OPENING STATEMENT OF WALTER HELLERSTEIN  
TO THE SALES TAX EXEMPTION STUDY COMMISSION

On October 1, 1986, the Legal Consultants\(^1\) and the State\(^2\) entered into an Agreement for Expert Legal Services (the "Agreement").\(^3\) Under the Agreement, the Legal Consultants undertook to prepare a Legal Study in the form of a written report addressed to the legal issues raised by the enactment of Chapter 86-166 of the Laws of Florida. The Agreement further provided that the written report would include, among other things, an overview of the legal problems raised by Chapter 86-166, a model annotated revision of Chapter 212 refining Chapter 86-166, and an appendix considering alternatives to Chapter 86-166. I am pleased to be here today to report on our progress to date and to attempt to respond to any questions you may have about the report we are in the process of preparing. I should emphasize at the outset that our report is not yet completed: substantial portions are in draft form and are subject to further revision; other portions

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1. The Legal Consultants are Walter Hellerstein, Professor of Law, University of Georgia School of Law, Athens, Georgia and Of Counsel, Morrison & Foerster, Washington, D.C.; Prentiss Wilson, Jr., Partner, Morrison & Foerster, San Francisco, California; and Morrison & Foerster, a California partnership, with its principal office in San Francisco, California.

2. The State is the Department of Revenue of the State of Florida, with its principal office in Tallahassee, Florida, on behalf of the the State of Florida.

3. The Agreement was appended as Exhibit 4 to the Information Package assembled by the Department of Revenue for the Commission in preparation for this meeting.
have yet to be written. Hence some of my responses today may reflect tentative judgments that will be modified in the final report. We are, however, committed to delivering the final report by December 31, 1986, and we expect to meet that deadline.

Let me briefly summarize our progress to date, and then I will be happy to answer your questions. We have been preparing the Overview with two general purposes in mind. The first is to identify and analyze the legal issues raised by the enactment of Chapter 86-166. This task includes consideration of the relationship between Chapter 86-166 and the preexisting sales tax in Florida; the problems of implementing Chapter 86-166 in its present form; the policy concerns generated by extension of the sales tax to services; and the constitutional objections that are likely to be encountered in the application of the sales tax to a broad range of services.

The second general purpose of the Overview is to explain the thinking that underlies the Model Annotated Revision of Chapter 212. The second purpose is intimately related to the first because the conceptual framework that shapes the proposed statutory revision was developed in light of the legal and policy concerns raised by Chapter 86-166. Perhaps the most important aspect of this second task—is to make explicit to the legislature what assumptions underlie the proposed statutory revision; why particular policy choices were made; and why specific statutory language was chosen. This will allow the legislature to focus on the determinations that it must make should it decide to revise Chapter 86-166 and will facilitate
its mark-up of the Model Annotated Revision.

In the Overview, we first consider the questions raised by Chapter 86-166 on the assumption that it is permitted to go into effect without legislative modification. The questions involve the meaning of Chapter 86-166, particularly with regard to its relationship to preexisting Chapter 212. They also involve the administrative problems and related legal challenges that may be encountered in implementing the statute in its present form.

Without even attempting to set forth the analysis of these issues, let me simply state our tentative conclusions with respect to a few of the principal questions raised. Chapter 86-166 does in fact impose a tax on services. The tax may reasonably be construed as not reaching the services that employees provide for employers, although this is a debatable issue. With a few exceptions, the preexisting statutory language of Chapter 212 does not by its terms apply to sales of services, and efforts to integrate the tax on services imposed by Chapter 86-166 with the preexisting provisions of Chapter 212 would be difficult at best in the absence of further legislation.

Chapter 86-166 raises two substantial constitutional questions under state law, namely, whether the tax on services constitutes an income tax on natural persons in violation of Article VII, Section 5(a) of the Florida Constitution, and whether Chapter 86-166 is vulnerable to attack under the delegation doctrine because the legislature has allegedly failed to provide intelligible principles to the guide the executive in implementing the statute. Our tentative answers to both questions
is that there is a discrete—though unquantifiable—risk that Chapter 86-166 would be held invalid on either of these grounds if permitted to go into effect in its present form.

Turning to the Model Annotated Revision of Chapter 212, we have been guided by the Agreement, as amended, to draft a statute that embraced essentially three objectives: first, to refine Chapter 86-166 so as to integrate the tax on services in a workable fashion into the preexisting structure of Chapter 212 without, however, making any substantive changes in the preexisting provisions of Chapter 212; second, to incorporate the substantive changes explicitly called for by the Agreement, as amended, such as the sale for resale exemption and the casual sale exemption; and, third, to reorganize to a limited extent and without substantive change the preexisting provisions of Chapter 212 by grouping exemptions and impositions and by alphabetizing multiple provisions where feasible.

In drafting the Revision, we view ourselves largely as technicians. We are not charged with creating a utopian sales tax structure for Florida, nor are we charged with evaluating on the merits any exemptions that have been repealed, sunsetted, or subjected to further study by this Commission. Rather our task in preparing the Revision is the narrow one of drafting provisions that could be added to Chapter 212 to provide for a clear and workable interface between the preexisting provisions of Chapter 212 and the tax on services imposed by Chapter 86-166. In pursuing that task, we necessarily had to make choices in language that affect the scope of Chapter 212. And insofar as we have done so, we have tried to indicate at every point—both in the Over-
view and in the annotations—the thinking that underlies those choices. Although I cannot in this brief opening statement address each of those choices specifically, let me say that our guiding principle was to write a statute consistent with the perceived objectives of Chapter 86-166 that would stand the greatest chance of surviving legal challenges.

Finally, we are preparing an Appendix, which considers several alternative approaches to Chapter 86-166 available to the legislature. We consider a value added tax, which would levy a tax at each stage of the economic process measured by the value that the taxpayer adds to goods or services it produces. We also consider a payroll tax or tax on employees, which could face constitutional challenges similar to those raised with regard to Chapter 86-166's tax on services. Finally, we consider gross receipts taxes, which are generally broad-based excise taxes upon the privilege of engaging in business in the state measured by the gross revenue of the business.

Thank you for your attention. I will now be happy to answer your questions.