

sec docket

VOLUME 21, NO. 5

NOVEMBER 11, 1980

SECURITIES ACT OF 1933
Release No. 6253/October 28, 1980

PROCEDURES UTILIZED BY THE DIVISION OF
CORPORATION FINANCE FOR RENDERING
INFORMAL ADVICE

ACTION: Interpretive Release.

SUMMARY: The Commission has authorized the issuance of a release describing certain procedures recently adopted by the Division of Corporation Finance (the "Division") for responding to all requests for no-action and interpretive letters except those involving shareholder proposals. In addition, the release discusses some of the alternative methods utilized by the Division in providing informal interpretive advice to the public. Also, it enumerates those matters which the staff of the Division, for policy or other reasons, will not express any view on when raised in a request for no-action or interpretive advice. Finally, it sets forth a discussion of letters regarding shareholder proposals.

FOR FURTHER INFORMATION CONTACT: William E. Morley or Peter J. Romeo, Division of Corporation Finance, Securities and Exchange Commission, Washington, D.C. 20549, (202) 272-2573.

SUPPLEMENTARY INFORMATION: One of the more important functions of the Commission's Division of Corporate Finance is to respond to requests for informal advice concerning the application of the federal securities laws administered by it.¹ As explained in more detail later in this release, the Division provides such advice in a variety of ways, such as by issuing no-action and interpretive letters,² preparing interpretive releases, and answering telephone inquiries. Some other units of

¹The Division administers the Securities Act of 1933 ("1933 Act") [15 U.S.C. 77a, et seq.], the Trust Indenture Act of 1939 ("1939 Act") [15 U.S.C. 80a, et seq.], and portions of the Securities Exchange Act of 1934 ("1934 Act") [15 U.S.C. 78a, et seq.].

²A no-action letter is one in which an authorized staff official indicates that the staff will not recommend any enforcement action to the Commission if the proposed transaction described in the incoming correspondence is consummated. In some instances, the staff will state in response to a no-action request that it is unable to assure the writer

the Commission, such as the Divisions of Investment Management and Market Regulation, similarly provide informal advice in this manner.

NO-ACTION AND INTERPRETIVE LETTERS

The practice of issuing no action and interpretive letters in response to written requests has been singled out in the past as an "excellent practice in administrative procedure,"³ and many members of the public have come to rely on the informal advice provided in this manner.⁴ Such letters provide a current statement of the staff's views concerning the application of the securities laws to particular transactions and are monitored closely by many issuers, members of the bar, and the public. As an aid to these persons, the Division publishes monthly in the SEC News Digest a list of those letters issued during the preceding month that it considers significant.

Until recently, all no-action and interpretive letters issued by the Division have followed the format of reciting the essential facts and then setting forth the position of the Division regarding the issues raised. While such detailed responses have been helpful to the public in the sense that they have included in a single document all of the pertinent information relating to the matter under discussion, they have required significant expenditures of staff manpower both in preparation and typing.⁵ Due to an increase in the number of disclosure documents which are subject to review by the Division, as well as a decrease in the number of Division attorneys, it no longer is practical for the Division to continue providing such lengthy responses. Accordingly, in order to make more efficient use of its resources, while at the same time continuing its longstanding practice of providing no-action and interpretive letter advice upon request, the Division has instituted a new abbreviated procedure for providing such advice.

The new procedure involves the use of an endorsement to the incoming letter as a method of response. Under this procedure, which is being utilized for all no-action and interpretive requests except those involving shareholder proposals,⁶ the Division simply sets forth its position on the issues raised either on the last page of the incoming letter or, more commonly, on a separate page attached at the end of that letter. Both the incoming letter and the Division's endorsement response are then set to the requestor, along with a brief note explaining the

procedure.

The principal difference between the endorsement procedure and the procedure formerly utilized by the Division is that the Division no longer recites the facts in its response. The absence of such a recitation is not harmful, since all of the pertinent facts are set forth in the incoming correspondence. The experience of the Commission's Division of Investment Management, which has been utilizing a similar type of endorsement procedure for many years without any apparent adverse results, indicates that while a resettlement of the facts is useful, it is not essential and can therefore be dispensed with.

OTHER METHODS FOR PROVIDING INFORMAL ADVICE

In addition to no-action and interpretive letters, the Division, as previously mentioned, also provides informal advice in other ways as well. For example, it responds to many thousands of telephone inquiries annually concerning the statutes, rules and regulations administered by it. While the statements made by the staff on the telephone are intended to

Footnote 2 continued

that it will not recommend enforcement action to the Commission if the transaction occurs in the manner proposed by the writer. An interpretive letter is one in which the staff provides an interpretation of a specific statute, rule or regulation in the context of an actual fact situation.

³See the "Task Force Report on Legal Services and Procedures" prepared in 1955 by the Commission on Organization of the Executive Branch of the Government, p. 189.

⁴Members of the public are entitled to rely on no-action and interpretive letters as representing the views of the Division. Such letters, however, set forth staff positions only and do not constitute an official expression of the Commission's views. See 17 CFR 202.1(d).

⁵The extent of these expenditures is evident in the fact that the Division annually issues more than one thousand such letters, and the letters commonly are four or more pages in length.

⁶Letters involving shareholder proposals will be discussed later in this release.

be helpful to the persons making the inquiries, they are not binding due to their highly informal nature.

The Division also provides informal advice through the periodic issuance of interpretive releases on matters of general interest to the public. In the past, these releases generally have been limited to a discussion of a single issue and have been relatively short.⁷ During the past year or so, the Division determined to expand its activities in this regard by issuing interpretive releases on selected subjects or areas of the law that are much more comprehensive than those issued in the past. These comprehensive interpretive releases are intended both to inform the public of the staff's current views on matters of wide interest and to reduce the need for the public to submit no-action or interpretive requests.

The two major interpretive releases issued to date under this policy dealt, respectively, with resales of restricted securities⁸ and the application of the 1933 Act to employee benefit plans.⁹ Both releases appear to have been quite helpful to the interested public and, as a consequence, the Division intends to continue to issue such releases whenever a need for them is perceived.

Currently, the staff of the Division is engaged in preliminary work for the preparation of an extensive interpretive release on the Commission's rules underlying the insider reporting and liability provisions of Sections 16(a) and (b) of the 1934 Act. It also is preparing another comprehensive release on employee benefit plans which is intended to supplement the earlier release on that subject by discussing some issues not previously addressed. The Division would welcome any comments or suggestions from the public regarding other specific topics or areas of the law that are believed to be appropriate subjects for such a release.¹⁰

AREAS OF NO-COMMENT

In connection with its functions of providing informal no-action and interpretive advice, the Division occasionally finds that it is inappropriate for policy or other reasons to express any position or to comment upon the transaction which is the subject of a particular inquiry. In such situations, the Division will decline to express any view on the application of the securities laws to the proposed transaction.

There are several reasons why the Division may feel it is inappropriate in a particular instance to express

an opinion. For example, (1) the Division may be in no position to verify the facts and circumstances which are the basis of the letter; (2) the Division may be concerned that its position may be misconstrued in somewhat different factual situations; and (3) in some areas policy concerns dictate that the Division not express a view.

All of the situations in which the staff will decline to state a position have previously been publicized either in Commission releases or in staff letters which are publicly available. The Division believes, however, that it would be helpful to provide a comprehensive list of those situations. The list, which relates generally to matters arising under the 1933 Act, is as follows:

(1) *Hypothetical questions.* Responses to such inquiries could be misconstrued when applied to actual fact situations.¹¹

(2) *Integration.* Questions of this nature involve factual issues which the staff is not in a position to resolve.¹²

(3) *Affiliate or control status.* This too is an area involving factual questions which the staff is not in a

⁷See, e.g., Release Nos. 33-4790 (July 13, 1965) [30 FR 9059] (employee stock purchase plans), 33-4982 (July 2, 1969) [34 FR 11581] (spin-off transactions), 33-5347 (January 18, 1973) [34 FR 1735] (sale of condominiums), 33-5515 (August 8, 1974) [39 FR 28520] (dividend reinvestment plans), and 33-5927 (April 24, 1978) [18163] (registration of certain tender offers.)

⁸Release No. 33-6099 (August 2, 1979) [44 FR 46752].

⁹Release No. 33-6188 (February 1, 1980) [45 FR 8962].

¹⁰Any such suggestions or comments should be forwarded to William E. Morley, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549.

¹¹See Release No. 33-5127 (January 25, 1971) [36 FR 2600].

¹²See, e.g., letter re *Security Bancorp Inc.* dated January 21, 1980.

position to resolve.¹³

(4) *Removal of restrictive legends.* Since such legends are applied by the issuer voluntarily, their removal is subject solely to the issuer's discretion.¹⁴

(5) *Availability of the Section 4(2) exemption.* The Commission has adopted a safe harbor in the form of Rule 146 [17 CFR 230.146] for this exemption.¹⁵ Accordingly, only in the most compelling circumstances will the Division express a view on its availability.

(6) *Availability of the Section 3(a)(11) exemption.* Again, the Commission has adopted a safe harbor, Rule 147 [17 CFR 230.147], for this exemption and will therefore express a view concerning its availability only in the most compelling circumstances.¹⁶

(7) *Availability of the Section 4(1) exemption.* Rule 144 [17 CFR 230.144] has provided a safe harbor for this exemption since April 15, 1972. As a consequence, the Division will not express any view concerning the availability of the exemption unless the securities involved were acquired on or before April 15, 1972.¹⁷

(8) *Availability of the Section 3(a)(4) exemption where the issuer has not received a favorable tax ruling.* The exemption provided by Section 3(a)(4) of the 1933 Act depends in part on whether the issuer possess certain characteristics that are common to specific types of tax-exempt organizations. Under the circumstances, unless the issuer can demonstrate that it has received a ruling from the Internal Revenue Service that it qualifies as such an organization, the Division will not express any view on the availability of the exemption.¹⁸

(9) *Time-Sharing and other novel real estate offerings.* Pursuant to a directive from the Commission, the Division will not take a position on whether individual offerings of this nature involve securities within the meaning of Section 2(1) of the 1933 Act.¹⁹ The concern underlying the Commission's directive is that incorrect inferences could be drawn from any expression of staff views in this evolving area.

(10) *Esoteric commodity offerings (e.g., gems, rare books, gold, silver, and master recordings).* The Division has declined to express any view as to whether such offerings involve securities because of

the unique and unusual circumstances involved and the possibility that no-action letters for such offerings could be misunderstood or misapplied.²⁰ The applicability of Section 2(1) of the 1933 Act to these offerings is highly dependent on the particular facts and circumstances involved, and the Division is in no position to verify such facts and circumstances.

SHAREHOLDER PROPOSAL LETTERS

As previously noted, the new endorsement procedure outlined earlier in this release will not be used in responding to letters under Rule 14a-8 [17 CFR 240.14a-8] of the Commission's proxy rules relating to the omission of shareholder proposals from an issuer's proxy materials. Letters received from issuers pursuant to Rule 14a-8 generally raise a variety of complex and difficult issues which cannot be easily dealt with through the abbreviated endorsement format. The Division, however, is concerned with the amount of staff time being devoted to shareholder proposal matters and therefore is exploring ways for reducing the length and complexity of its responses in this area.

¹³See, e.g., letter re *Book Mobile, Inc.* dated November 17, 1979.

¹⁴See, e.g., letter re *RLT, Inc.* dated December 12, 1979.

¹⁵Release No. 33-5487 (April 23, 1974 [39 FR 15266]).

¹⁶Release No. 33-5450 (January 7, 1974) [39 FR 2353].

¹⁷Release No. 33-5223 (January 11, 1972) [37 FR 591].

¹⁸See, e.g., letter re *Shannondale Club, Ltd.* dated January 12, 1979.

¹⁹See, e.g., letters re *Tropics International* and *Spirit of Hawaii* dated April 5, 1974.

²⁰See, e.g., letters re *Publishers Distributors Inc.* dated August 23, 1979 (book sales); *Wes Sanborn* dated November 9, 1979 (master recording leases); and *Diamond Network Associates Inc.* dated July 9, 1979 (gems).

Some of the alternatives presently under consideration for achieving the above objective are the elimination from the Division's response of a verbatim restatement of the proposal under discussion and the use of standardized statement of the Division's function regarding such proposals that can be attached to each response rather than retyped in each letter as a separate final paragraph. While none of these alternatives have yet been adopted, it is anticipated that some methods of this nature will be utilized within the next few months to limit the amount of time which must be spent on shareholder proposal matters. Any comments or suggestions from members of the public regarding this subject would be welcomed.²¹

The recently issued Staff Report on Corporate Accountability indicated a desire by the Division and the Commission to reconsider some of the views previously expressed with respect to certain types of shareholder proposals.²² The Report indicates that the Commission will issue concept releases relating to various shareholder proposal matters in the future.²³ It is anticipated that these releases will reduce the number of requests for no-action letters under Rule 14a-8 because they will set forth the staff's position with respect to the applicability of the rule's provisions to certain relatively common types of proposals. If such a reduction does indeed occur, it will alleviate somewhat the Division's resource problem in this area.

In connection with the foregoing, the Division urges issuers to avoid the practice followed by some in the

²¹Any such comments or suggestions should be directed to William E. Morley at the address listed in footnote 10.

²²See Chapter Two of the "Staff Report on Corporate Accountability" prepared by the Division. The Staff Report is dated September 4, 1980 and is set forth in a Committee Print for the Senate Committee for Banking, Housing and Urban Affairs, 96th Cong., 2nd Sess. GPO Document No. 052-070-05418-2.

²³Some areas which are to be the subject of such releases are Rule 14a-8(c)(7) dealing with proposals relating to an issuer's ordinary business, and the Commission's view of the applicability to shareholder proposals of the Supreme Court's decision in *First National Bank v. Bellotti*, 435 U.S. 765 (1978).

past of citing frivolous grounds for omitting proposals. Such a practice causes the Division's staff to spend valuable time in responding to such grounds that could be better utilized in other areas. Accordingly, while the Division continues to believe that issuers should feel free to raise all legitimate bases for the omission of a proposal, they and their counsel should review past statements issued by the Division in connection with the same or similar proposals submitted to other issuers to make certain that the grounds for omission have not been previously addressed,²⁴ thereby reducing the need for the Division to discuss previously settled issues.

Accordingly, 17 CFR Part 231 is amended by adding this release thereto.

By the Commission.

George A. Fitzsimmons
Secretary
