

JAN 3, 1958

Philip E. Kendrick, Esquire
Regional Administrator
Securities and Exchange Commission
2001 Post Office and Court House
Boston 9, Massachusetts

Dear Mr. Kendrick:

I have your letter in which you request "any citations" supporting the opinion, on page 11 of our Quarterly Interpretative Bulletin for the period July 1, 1957 to October 1, 1957, that the "applicability of Rule 10b-6 does not depend on control but on whether or not a distribution is in fact involved". You state you have recently tried a suspension case in the matter of Gob Shops, Inc. and you would like to be able to furnish to the hearing examiner "citations to the effect that there could be a distribution even though control stock was not involved".

I understand that Gob Shops, Inc. involves a Regulation A suspension, and I assume that your request to us relates only to the problem of whether Rule 10b-6 was violated, or manipulation was involved, and not to the problem arising under Section 5 of the Securities Act, since the question of "control" may be pertinent to the Section 5 Securities Act question.

We are unable to furnish any decisions or court opinions on the question in which you are interested. As you know, Rule 10b-6 has been in existence a comparatively short time and there have been no Commission decisions or court opinions under it. However, the anti-manipulative provisions of the Securities Exchange Act (including Sections 9(a), 10(b) and 15(c)(1)) were intended to rid the securities markets of manipulation, and manipulative devices and contrivances, and the question of whether or not activity involves manipulation under these sections is not conditioned upon whether or not the person engaging in such activity is in a control relationship to the issuer of the security. For example, Section 9(a) of the Act makes it unlawful for any person, directly or indirectly, by use of the mails or any means or instrumentality of interstate commerce or any facility of a national securities exchange, to engage in the activities prohibited. Sections 15(c)(1) and (2) are applicable to any broker or dealer who uses the mails or any instrumentality of interstate commerce to effect or induce a purchase or sale of a security otherwise than on a national securities exchange by means of a manipulative, deceptive or fraudulent device as defined by the Commission. (See, for example, Securities Exchange Act Release No. 3056.)

Rule 10b-6 was adopted under Section 10(b) of the Act which makes it unlawful for any person (by use of the mails, interstate commerce or exchange facilities) to use any manipulative or deceptive device or contrivance in contravention of Commission rules. The rule defines the term "underwriter" to mean a person who has agreed with an issuer or other person on whose behalf a distribution is to be made (A) to purchase securities for

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distribution, or (B) to distribute securities for or on behalf of such issuer or other person, or (C) to manage or supervise a distribution of securities for or on behalf of such issuer or other person. Thus a person would be an “underwriter” within the meaning of this rule if he is acting for any person on whose behalf a distribution is to be made; such person need not be in a control relationship to the issuer. This contrasts with the provision in Section 2(11) of the Securities Act under which a person would ordinarily become an “underwriter” only if he undertakes the specified activity on behalf of the “issuer” which, by reason of the last sentence in that section, is deemed to include “any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer”.

I regret that it is not possible to be more helpful on the basis of your general inquiry. We shall, however, be glad to review the draft of any brief you propose to submit and to make suggestions or to supplement such brief if you submit a copy to us in sufficient time.

Yours very truly,

Philip A. Loomis, Jr.
Director

cc: Mr. Loomis
Mr. Emerson
Mr. Lese
Mr. M. Cohen