CF Staff Memo No. 28-84

MEMORANDUM

October 10, 1984

TO : Attorneys
Assistant Directors
Branch Chiefs
Division of Corporation Finance

FROM : William E. Morley, Chief Counsel
Mauri L. Osheroff, Deputy Chief Counsel
Division of Corporation Finance

RE : Procedures for Responding to Requests for Interpretive and No-Action Letters

Introduction

In order to assist the many new attorneys who have joined the staff in recent months, and to provide a helpful reminder for all of the Division's attorneys, this memo outlines the specific procedures to be followed in processing interpretive and no-action letters and references certain materials setting forth the Division's procedures for dealing with these matters.

This memo deals only with interpretive and no-action letters, not responses to Congressional or Chairman's mail or shareholder complaint letters. 1/ In addition, it does not cover requests for waivers of form requirements - such matters are handled directly by the Deputy Chief Counsel, or, in the case of financial statement waivers, by the Office of the Chief Accountant - CF.

Initially, everyone should be familiar with the two Commission releases that describe the Division's procedures: Securities Act of 1933 Releases No. 6253 (October 28, 1980) and 6269 (December 5, 1980). 2/ These releases explain the difference between no-action and interpretive letters, the amount of reliance which may be placed on the letters, the endorsement procedure for responding to them, and specific requirements for incoming letters.

1/ See Paragraphs 600-605 of the Disclosure Operations-Operating Procedures Reference Book for a discussion of those types of correspondence.

2/ There are also numerous releases dealing with substantive interpretive matters. Although it is beyond the scope of this memo to enumerate all of these, attorneys should be aware of them and use them when doing research. Among the more recent comprehensive interpretive releases are Securities Act of 1933 Releases No. 6188 and 6281 (employee benefit plans), 6099 (Rule 144 and other resales) and 6455 (Regulation D), and Securities Exchange Act of 1934 Release No. 18114 (Section 16).

Release 6253 also contains a list of the types of questions on which the Division will not normally express an opinion: hypothetical questions, integration, affiliate or control status, removal of restrictive legends, time-sharing and other novel real estate offerings, esoteric commodity offerings, the availability of the Section 3(a)(4) exemption where the issuer has not received a favorable tax ruling, and the availability of the Sections 3(a)(11), 4(1) and 4(2) exemptions. 3/ Although the release does not explicitly say so, it is generally understood that we will not give a no-action or interpretive letter concerning transactions which have already taken place.

In addition, the July 31, 1980 memo from Peter Romeo to the Division's attorneys should be very helpful to you. Parts of the memo are out of date, 4/ but on the whole, it is still pertinent. Branch attorneys should continue to follow the procedures for responding to letters described in the memo, and should use the recommended format and language, appropriately adapted to the specific request.

Summary of Procedures

A branch attorney to whom a no-action or interpretive letter has been assigned should do the appropriate research, not only with respect to the legal question involved, but also about the company. The attorney should know whether there is any Enforcement interest in the company, and whether there is any other significant information about the company which could affect the response - for instance, the 132-3 (public correspondence) file may contain previous no-action or interpretive letters on the same point, or shareholder complaint letters indicating the existence of a particular problem. Consideration should also be given to whether there is any Enforcement or other information about other entities or individuals who would be involved in the transaction, such as a would-be selling shareholder. In addition to a search for Enforcement interest and an examination of the 132-3 file, an examination of other files may be needed, depending on the nature of the request. Some of the staff manuals may be helpful in researching the legal position, but remember that these should not be cited to members of the public, even though most of them are largely publicly available.

If the incoming request is incomplete, either because additional facts are needed or because the letter does not meet the general standards described

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3/ The statement that we will not express a view on 4(2) in view of the safe harbor afforded by Rule 146 should of course now be read as referring to the safe harbor afforded pursuant to Regulation D.

4/ For example, the list of topics which will be handled directly by the Office of Chief Counsel is outmoded (letters regarding many of these topics are now assigned to branch attorneys and reviewed by the Office of Chief Counsel).

in the releases cited above (e.g., the requestor does not name the parties involved or fails to indicate his/her own opinion on the matter), the branch attorney should call and ask for a supplemental request supplying the additional information.

Other Offices and Divisions should be consulted as appropriate. For example, many requests involve not only our Division but also the Divisions of Market Regulation and/or Investment Management - sometimes a joint response is sent, and sometimes separate but coordinated responses are employed. Letters involving bankruptcy should be checked with those persons in the Office of the General Counsel handling bankruptcy matters. Letters involving foreign issuers or transactions may require contacting the Office of International Corporate Finance. If there is Enforcement interest in a party involved with the proposed transaction, we should find out what that Division's views are - would our granting the request have an adverse effect on the investigation or legal proceeding? As soon as a letter is assigned, the branch attorney should consider what coordination is necessary and begin the process; the other Division or Office should be contacted promptly, so its input will be available by the time the response is due.

After the research has been done, the branch attorney should consult with an OCC attorney if there are questions regarding the type of coordination with other Divisions needed, the need to ask for additional information from the requestor, or the legal issues involved.

When the proposed response is complete, the branch attorney should give the OCC a package consisting of:

1. A short cover memo setting forth the research done, the precedents (if any), and the basis for the conclusion, particularly if there are no recent precedents on point. If the incoming letter has cited precedents, the memo should indicate whether they are on point. If there are some factors not covered by precedent or factors that would militate against the conclusion drawn by the branch attorney, these should be flagged.

2. A Research Summary form.

3. A double-spaced draft response in the form of an endorsement. The "Re" line should give the name of the company, and below that should be a line giving the dates of the incoming letter and any supplemental letters.

4. Copies of the incoming letter, as well as any supplemental letters. If additional information was requested by telephone, there should be a telephone memo.

5. Research materials, such as cases or previous no-action letters (including Lexis printouts), used as a basis for the response.

Every effort should be made to submit the proposed response to the OCC by the due date. Letters to be reviewed are normally assigned to OCC attorneys by rotation, but if the branch attorney has had detailed discussions with an OCC attorney prior to submitting the proposed response, it may be helpful to attach a note to that effect so that the same OCC attorney will review the letter.

One final note on language. As you know, most of our responses end with a paragraph as follows:

> Because this position is based upon the representations made to the Division in your letter, it should be noted that any different facts or conditions might require a different conclusion. Further, this response only represents the Division's position on enforcement action and does not purport to express any legal conclusion on the question(s) presented.

A no-action letter should end with the entire paragraph, but an interpretive letter needs only the first sentence.

Confidential Treatment of No-Action and Interpretive Letters

If questions arise concerning a confidential treatment request for a no-action or interpretive letter, please see Securities Act of 1933 Release No. 5098 (October 29, 1970). This release describes the adoption of Rule 81 relating to the public availability of these letters and the period of time for which confidential treatment may be granted. The rule has not been changed since that time. Rules 83, 406, and 24b-2 are inapplicable to such confidential treatment requests.

Conclusion

The above information and the attached materials should provide assistance for the Division's attorneys in handling this important aspect of the Division's duties. If you have any questions, please discuss them with a member of the OCC's staff.

Attachments

1. Release 33-5098
2. Release 33-6253
3. Release 33-6269
4. Memo from Peter Romeo dated July 31, 1980 (CF Staff Memo No. 26-80)