



## **Recommendation 70-2**

### **SEC No-Action Letters Under Section 4 of the Securities Act of 1933**

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(Adopted June 2-3, 1970)

The following recommendations concern the process by which the Division of Corporation Finance of the Securities and Exchange Commission (the "Division") advises stockholders whether proposed sales of unregistered stock might involve a violation of the Securities Act of 1933 for which the Division would recommend Commission enforcement action. This no-action process is an outstanding example of administrative accessibility and pragmatism, enabling stockholders readily to determine whether a contemplated sales transaction may be consummated without registration. The recommendations are intended to enable the public and individual stockholders to be more fully advised of the interpretations, policies and precedents which guide the conclusions of the Commission and the staff, and to encourage the Commission to relieve its staff of the burden of routine no-action requests.

#### **Recommendation**

1. *Rulemaking.* The Commission acting under 5 U.S.C. § 553 should to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards guiding discretion which it and the Division staff apply in determining registration obligations in the no-action process. Where generalized rules are not feasible, the Commission should consider making rules limited to illustrative cases (involving either real or hypothetical facts) with an explanation of the reasons for their disposition. Existing summaries of past no-action letters, minutes of the Commission's disposition of those no-action requests which are brought before it, and related memoranda, insofar as they reflect current interpretative positions, should afford a strong and readily available foundation for such rulemaking.

2. *Interpretative Releases.* Where the formal rulemaking recommended above may not be feasible, the Commission should to the maximum extent feasible make publicly available by the means of public releases its legal interpretations and policies, and standards guiding discretionary determinations.



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3. *Past Interpretations.* On questions of law or policy which are not answered in formal rules or releases, a selected group of the more important past no-action letters which may have continuing significance should be summarized and made publicly available.

4. *Routine Inquiries.* As the Commission's rules, releases and particular interpretations become publicly available, the Commission should consider instructing its staff to discontinue giving no-action letters on routine questions adequately answered by publicly available materials.

5. *Future No-Action Letters.* The Commission and its staff should continue to issue no-action letters not excluded as routine under the limitation suggested in No. 4. Each non-routine letter should, in detail or in summary form as deemed appropriate, state the facts and the reasons for the conclusion. Each letter should be made publicly available, subject to safeguards deemed appropriate under No. 6.

6. *Confidentiality and Time of Publication.* The Commission in making no-action letters publicly available should protect confidential information by the most effective and feasible means, including deletion, preparation of a "public" version of the letter, or reasonable delay in making the letter public. However, those letters which reflect significant developments in legal interpretation, policy or standards guiding discretion should be published promptly, subject to the necessary protection of confidentiality.

7. *Procedural Regulations.* The present procedural regulations do not fully describe the no-action process and should be expanded to cover each step of the process.

### **Citations:**

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1 ACUS 34

**Note:** This recommendation was not published previously in the Federal Register.



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### **Separate Statement of Malcolm S. Mason**

Government needs the art of making practical compromises between conflicting goals. There is a regrettable tendency to hold up administrative agencies to Olympian standards based on a theoretical pure strategy when a mixed strategy is called for. This operates to defeat the purpose of administrative procedure and the values to the public of administrative action. The Conference is hurrying too fast the process towards formalism which destroys both effectiveness and fairness. Every generation needs not only a measure of rational consistency but also the principle of Equity that stare decisis kills.

The Securities and Exchange Commission no-action letter is an outstanding creation in the field of administrative procedure by an agency that has been outstanding in its efforts to communicate its views to the public affected. The Conference believes that the Commission can do better and I agree it can, but the Conference has proposed a solution which in my view makes sure that it will do worse.

The recommendation of the Conference if carried out will destroy the no-action letter for the valuable purpose for which it was created: quick, helpful, trustworthy guidance. If advice on particular matters must be accompanied by a public statement containing facts and reasons (as required by the Conference recommendation, paragraph 5) and will be used as precedent, cautious statement and careful qualification is needed. The result will be that the staff will no longer dare to give the quick and informal advice and assurance that they are now authorized to give. The people who need the assistance will no longer get it. A new piece of bureaucratic red tape will be created. An existing effective and valuable informal procedure will be hurt. None of those who supported the recommendation intended this, but it will be the result. The Conference recommendation does not reflect realistic consideration of how the no-action letter has operated in the past and how it will be likely to operate in the future.