



BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

INTERSECURITIES, INC.
570 Carillon Parkway
St. Petersburg FL 33716-1202

GREGORY RUSSELL BROWN AND KAREN
BROWN, husband and wife
16417 South 15th Drive
Phoenix AZ 85045
CRD #2233684

Respondents.

DOCKET NO. S-03482A-03-0000

SECURITIES DIVISION'S
RESPONSE TO RESPONDENT
INTERSECURITIES, INC.'S
MOTION TO COMPEL

Arizona Corporation Commission

DOCKETED

AUG 04 2004

DOCKETED BY

The Securities Division of the Arizona Corporation Commission ("Division") hereby responds to Respondent's Motion to Compel ("Motion"). The Division is providing voluntarily copies of the materials requested in Requests Nos. 8 and 9, (which were previously produced in January 2004). For the reasons stated below, the Division objects to Request No. 12, the personnel file for Wendy Coy, and further objects to the production of investigative investor interview memos, requested pursuant to Request No. 1(b).

Background Information

In a spirit of cooperation, and with the purpose of facilitating settlement of this matter, the Division has already voluntarily permitted Respondent to review substantially its entire file, including confidential documents within the Division's authority to disclose under A.R.S. § 44-2042. Undersigned counsel personally informed Respondent's counsel at the time that he reviewed the Division's extensive file in early November 2003 that the investor interview memos were not available to him for review or for production. At that time, counsel for Respondent did not object;

1 Respondent requested copies of documents from the Division's file, and those documents were
2 provided, filling approximately nine banker's boxes.

3 Subsequently, the Division provided additional documents responsive to Request Nos. 8 and
4 9, which were not previously contained in the case file, produced in January 2004 with the Division's
5 Response to Respondent's First Request for Production of Documents (Bates Nos. ACC009920 to
6 9936, copies attached hereto).

7 The Division has refused to produce the personnel file for Wendy Coy (Request No. 12) or
8 investigative interview memos pursuant to Request No. 1(b), and continues to object to such
9 production, for reasons discussed fully below. Respondent has no right or need for these documents,
10 which are protected from disclosure by statutory confidentiality provisions and legal privileges. The
11 Division has already voluntarily provided substantially all other documents responsive to Request
12 No. 1(b), including all investor correspondence with the Division, questionnaires, and investor
13 documents in its possession. Respondents have all addresses and telephone numbers of investors in
14 the pay telephones sold by Gregory Brown, and can conduct their own interviews if they so choose.

15 Respondent cites only Rule 37 of the Arizona Rules of Civil Procedure (*see* Motion, page 1)
16 and Rule 26.1, Ariz. R. Civ. P. (*see* Motion, page 7) to support its Motion. These civil rules do not
17 govern this case. Respondent's discovery requests are not supported by the administrative rules and
18 procedures that govern this proceeding.

19 ***Discussion:***

20 A. **Respondent is not entitled to the personnel file for Wendy Coy or the**
21 **Division's investigative memos of investor interviews under the civil rules of**
22 **discovery or under the administrative rules for discovery.**

23 Discovery rules in administrative actions are not subject to the whims of individual
24 litigants. To the contrary, the rules and procedures for conducting discovery in administrative
25 proceedings are explicitly provided under Arizona statute and through local administrative agency
26 rules. Only by adhering to these provisions can parties to an administrative adjudication
participate in an acceptable, effective and cooperative disclosure process.

1 **1. Discovery is available for Administrative Proceedings within Arizona, but only**
2 **within the limits as defined by statute and agency rule**

3 Courts have often had occasion to consider the limits of discovery in administrative
4 proceedings. Through these deliberations, two salient points have become evident. The first of
5 these is the fact that, because they derive from an entirely distinct process, the rules of civil
6 procedure for discovery **do not** apply in administrative proceedings.¹ See, e.g., *Pacific Gas and*
7 *Electric Company v. Federal Energy Regulatory Commission*, 746 F.2d 1383, 1387 (9th Cir. 1984);
8 *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *National*
9 *Labor Relations Board v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961); *LTV Steel Co.*
10 *v. Industrial Commission*, 748 N.E.2d 1176, 1184 (Ohio App. 2000); *In re City of Anaheim, et al.*
11 1999 WL 955896, 70 S.E.C. Docket 1848 (the federal rules of civil procedure do not properly play
12 any role on the issue of discovery in an administrative proceeding).

13 The second of these points is that the authority to pursue discovery during the course of an
14 administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly
15 recognized that there simply is no basic constitutional right to pretrial discovery in administrative
16 proceedings. *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir.
17 1977); See also *Starr v. Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7th Cir. 1955), cert.
18 denied, 350 U.S. 993 (1956); *National Labor Relations Board v. Interboro Contractors, Inc.*, 432
19 F.2d 854, 857-858 (2nd Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507, 508 (N.Y. App. 1988); *Pet*
20 *v. Department of Health Services*, 542 A.2d 672, 678 (Conn. 1988). The federal Administrative
21 Procedures Act echoes this point by offering no provision for pretrial discovery during the
22 administrative process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588.

23 ¹ This principle is particularly important from a policy standpoint. Indeed, merging civil
24 discovery rules into the administrative arena would have many deleterious results, including: 1)
25 allowing respondents to access confidential investigative information far removed from the
26 witnesses and exhibits relevant to the active case against them; 2) allowing respondents to protract
the proceedings indefinitely; 3) allowing respondents to excessively consume scarce but vital
resources better expended on other matters necessary for the protection of the public; and 4)
allowing respondents to force the agency into the position of a civil litigant rather than into its
proper role as a governmental regulatory authority.

1 In accordance with these findings, discovery within the confines of an administrative
2 proceeding is only authorized to the extent that it is explicitly provided for in a separate statute or
3 rule. *See, e.g., 73A C.J.S. Public Administrative Law and Procedure, § 124 (1983)*(“Insofar as the
4 proceedings of a state administrative body are concerned, only the methods of discovery set forth
5 by the pertinent statute are available, and the methods not set forth therein are excluded”); *See*
6 *also 2 Am.Jur.2d. Administrative Law § 327 (2d. ed. 1994)*(In the context of administrative law,
7 any right to discovery is grounded in the procedural rules of the particular administrative agency).

8 Following these precepts, the state of Arizona has enacted both statutes and agency rules to
9 address the issue of discovery in the context of administrative proceedings. Indeed, both the
10 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Corporation
11 Commission (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery
12 procedures in contested administrative adjudications. Only by observing these controlling provisions
13 can a party effectively pursue discovery in an administrative matter before the Arizona Corporation
14 Commission.

15 The statute setting forth the parameters of discovery in administrative proceedings is, not
16 surprisingly, found in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under
17 Article 6 of this chapter, covering “Adjudicative Proceedings,” Arizona law provides as follows:

18
19 A.R.S. § 41-1062: *Hearings; evidence; official notice; power to require testimony*
and records; Rehearing

20 A. Unless otherwise provided by law, in contested cases the following shall apply:

21 ...

22 4. The officer presiding at the hearing may cause to be issued
23 subpoenas for the attendance of witnesses and for the production of
24 books, records, documents and other evidence and shall have the
25 power to administer oaths.... *Prehearing depositions and*
26 *subpoenas for the production of documents may be ordered by the*
officer presiding at the hearing, provided that the party seeking
such discovery demonstrates that the party has reasonable need of
the deposition testimony or materials being sought....

1 actions such as the administrative proceeding at issue. As the Supreme Court noted in *Willner v.*
2 *Committee on Character and Fitness*, 373 U.S. 96, 105 (1963), a respondent must be adequately
3 informed of the evidence against him and be afforded an adequate opportunity to rebut this
4 evidence.

5 Courts have since had occasion to consider what types of procedures do in fact comply
6 with due process in the context of administrative proceedings. It is now well-settled that
7 procedures designed to ensure “rudimentary requirements of fair play” are sufficient to meet the
8 due process requirements in administrative adjudications. *Mitchell v. Delaware Alcoholic*
9 *Beverage Control Commission*, 193 A.2d 294, 311-312 (Del.Super. 1963), *rev’d on other grounds*,
10 196 A.2d 410 (Del.Super. 1963); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting
11 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(“The fundamental requirement of due process is
12 the opportunity to be heard ‘at a meaningful time and in a meaningful manner’”); *Swift & Co. v.*
13 *U.S.*, 308 F.2d 849, 851 (7th Cir. 1962)(“Due process in an administrative proceeding, of course,
14 includes a fair trial, conducted in accordance with fundamental principles of fair play and
15 applicable procedural standards established by law.”); 73A C.J.S. *Public Administrative Law and*
16 *Procedure*, § 60 (1983); *see also Adamchek v. Board of Education of Town of Stamford*, 387 A.2d.
17 556, 559 (Conn. 1978)(the procedures required for the UAPA still exceed the minimal procedural
18 safeguards mandated by the due process clause).

19 Petitioners have often sought to challenge this due process standard for administrative
20 proceedings. For instance, in *Cimarusti v. Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d
21 336 (Cal. App. 2 Dist. 2000), a petitioner argued that his due process rights were compromised
22 through the lower court’s curtailment of his discovery requests. The court rejected this claim,
23 reasoning that the pre-hearing discovery and hearing procedures as provided under the state’s
24 Administrative Procedures Act fully satisfied the petitioner’s due process rights. Similarly, in
25 *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28 (7th Cir. 1997), a petitioner
26 argued that he was denied due process in connection with the prehearing production of documents

1 by the CTFC. In noting that the petitioner received copies of all proposed exhibits, a list of all
2 proposed witnesses, the identity of the government employees who had investigated the case, and
3 copies of memoranda reflecting petitioner's own statements to administrative representatives, the
4 court ruled that the proceedings did not involve a denial of due process. Responding to a similar
5 appeal, a Texas court found that due process in administrative proceedings mandates notice, a
6 hearing, and an impartial trier of facts, but not various methods of discovery. *Huntsville Mem.*
7 *Hospital v. Ernst*, 763 S.W.2d 856, 859 (Tex.App. 1988).

8 These cases demonstrate that, in order to comport with procedural due process in the
9 context of an administrative proceeding, an agency need only enforce the guidelines of applicable
10 administrative statutes and rules while using the discretion inherent in these guidelines to ensure a
11 level of fundamental fairness. See *Pacific Gas and Electric Company v. Federal Energy*
12 *Regulatory Commission*, 746 F.2d 1383 (9th Cir. 1984)(If an agency has adopted rules providing
13 for discovery in its proceedings, **the agency is bound by those rules** and must ensure that its
14 procedures meet due process requirements)(*emphasis added*). It follows that the Arizona statutes
15 and agency rules governing discovery procedure in administrative proceedings are more than
16 adequate in satisfying any due process concerns.

17 **3. *Attempts to invoke the Civil Discovery Rules in this administrative forum are***
18 ***misplaced and unsustainable.***

19 As previously discussed, the extent of discovery to which a party to an administrative
20 proceeding is entitled is primarily determined by the particular agency; the rules of civil procedure
21 are inapplicable. See, e.g., *Pacific Gas and Electric Company*, 746 F.2d at 1387 (9th Cir. 1984); see
22 also *LTV Steel Co. v. Industrial Commission*, 748 N.E.2d 1176 (Ohio 2000) (discovery as
23 generally provided by the rules of civil procedure in court proceedings is not available in
24 administrative proceedings). This point is particularly obvious in light of the fact that the Arizona
25 legislature and Corporation Commission have enacted and adopted specific statutes and rules,
26 respectively, to govern discovery procedure in this administrative forum. See A.R.S. § 41-1001 *et*

1 *seq.; Arizona Administrative Code, Title 14, Ch. 3, Article 1. Rules of Practice and Procedure*
2 *Before the Corporation Commission.*

3 A.A.C. R14-3-101(A) of the Rules of Practice and Procedure provides, in pertinent part:
4 “In all cases in which procedure is set forth *neither by law, nor by these rules, nor by regulations*
5 *or order of the Commission*, the Rules of Civil Procedure for the Superior Court of Arizona as
6 established by the Supreme Court of Arizona shall govern” (emphasis added). The obvious intent
7 of this provision is to provide a secondary procedural resource only *where there is nothing in the*
8 *law or rules governing a particular procedure*. There are layers of governing authority with
9 respect to the discovery procedures for administrative proceedings within Arizona. Indeed, both
10 laws and rules explicitly outline the proper discovery procedures for administrative proceedings in
11 this state. It follows that there is neither need nor justification to apply the civil rules of procedure
12 for guidance on discovery.

13 **B. The ALJ should not order the Division to produce the personnel file for Wendy**
14 **Coy or the investigative investor interview memos.**

15 Under A.R.S. § 41-1062, the ALJ can order disclosure only upon a showing of reasonable
16 need. Respondents do not need the personnel file of Wendy Coy because Ms. Coy’s personal
17 employment information is not relevant to this action and disclosure would violate Ms. Coy’s privacy
18 rights.

19 **1. *The personnel file for Wendy Coy is not relevant.***

20 Respondent, a full service brokerage firm that operates nationwide with more than 2,500
21 registered representatives and a fully staffed compliance department complete with legal counsel,
22 seeks to defend itself from liability for violations of the Securities Act in connection with the sale of
23 unregistered securities solely upon its independent contractor’s, i.e., registered rep’s purported
24 conversation with “a Wendy” at the Securities Division who allegedly told him that she had “no
25 problem” if he wanted to sell payphones as long as they were not limited partnerships. Based solely
26 upon this alleged statement, Respondent demands access to the personnel file of a certain attorney of

1 the Securities Division, Wendy Coy, claiming that it is “entitled to inspect Ms. Coy’s personnel file to
2 determine if she has ever been disciplined for misconduct with respect to her performance as
3 “Attorney” or “Officer” of the day. Respondent offers no explanation whatsoever why the material
4 sought is relevant or why such an invasion of a state employee’s privacy rights is needed. Even if
5 Respondent’s agent had spoken with Ms. Coy, and she had told him that he could sell pay telephones
6 to his heart’s delight and it was “no problem,” would this constitute a defense if the pay telephones
7 investments proved to be securities? No legal theory supports such a defense. Respondent’s claimed
8 reliance on such an alleged misstatement is not relevant as a matter of law. If Respondent’s claimed
9 defense is not supported by the law, then it cannot be supported by additional facts.

10 Mistake of law is not a defense. A misstatement by an employee of the Securities Division is
11 not binding on the state. Neither the agency nor an employee of the agency has authority to waive
12 statutory requirements or compliance therewith except as specifically provided by statute. Neither the
13 agency nor an employee can place the legal status of a statute “at issue.” Estoppel may succeed
14 against the state only when its application would promote rather than frustrate the basic intent of
15 the statute. *See, e.g., Hansson v. Ariz. Board of Dental Examiners*, 195 Ariz. 66, 985 P.2d 551
16 (App. 1999), *review denied*. Equitable estoppel generally may not be invoked against the
17 sovereign. *Freightways, Inc. v. Arizona Corp. Comm’n*, 129 Ariz. 245, 247, 630 P.2d 541, 543
18 (1981) (Commission estopped to deny validity of certificate of public convenience and necessity
19 where commission knew of defects in the filing application when certificate was issued fifty years
20 earlier).

21 The government may be estopped only when its “wrongful conduct threatens to work a
22 serious injustice and ... the public interest would not be unduly damaged....” *Id.* at 248, 630 P.2d
23 at 544. When the state is not able to enforce the law because of the purported statements of an
24 employee, the interests of the public are damaged. *Heckler v. Community Health Services*, 467
25 U.S. 51, 60 (1984). Estoppel will not be applied to the state when it will affect the exercise by the
26 state of its governmental powers and sovereignty, or bind it by unauthorized acts of its officers and

1 employees. *Freightways, Inc.*, 129 Ariz. at 248, 630 P.2d at 544. Unlike certain other agencies of
2 the state, Securities Division employees are not statutorily authorized to give legal advice to the
3 public;² a statement by an employee that contravenes statutory authority is not binding on the state.
4 Even when the alleged action is authorized, estoppel requires “that the state’s action bear some
5 considerable degree of formalism under the circumstances.” *Valencia Energy v. Arizona Dept. of*
6 *Rev.*, 191 Ariz. 565, 577, 959 P.2d 1256, 1268 (1998). “An off-the-cuff opinion, for example, will
7 not suffice if the question presented requires a measure of research or deliberation. It is rare that
8 satisfactory evidence of an absolute, unequivocal, and formal state action will be found unless it is
9 in writing.” *Id.* To permit a person to avoid liability under the Securities Act based upon a
10 purported statement of opinion by a staff attorney responding to a routine telephone inquiry would
11 effectively contravene the statutory authority of the sovereign. Such a liberal application of
12 estoppel would unduly damage the public interest contrary to established law.

13 The law does not support any claim of waiver or nullification of a statute by the acts of an
14 agent of the government. *See, e.g., Montilla v. U.S.*, 457 F.2d 978, 986-987 (Ct. Cl. 1972):

15
16 It is true that the government may be estopped by the acts and conduct
17 of its agents where they are duly authorized and are acting within the
18 scope of their authority and in accordance with the power vested in
19 them, as, for instance, in certain cases involving contractual dealings
20 with the government. But we know of no case where an officer or
agent of the government ... has estopped the government from
enforcing a law passed by Congress. Unless a law has been repealed
or declared unconstitutional by the courts, it is a part of the supreme
law of the land and no officer or agent can by his actions or conduct
waive its provisions or nullify its enforcement.

21 Estoppel, even if applicable, requires justified reliance. Respondent has no right to rely on anything
22 other than the law as it is written to govern their conduct. *See Federal Crop Insurance Corp. v.*
23 *Merrill*, 332 U.S. 380, 385 (1947) (“The oft-quoted observation ... that ‘Men must turn square
24 corners when they deal with the Government’ does not reflect a callous outlook.”).

25
26 ² Cf. A.R.S. § 42-104(A)(6)(Tax Revenue department “shall” “provide information and advice, within the scope of its duties...”). The Securities Act contains no such provision authorizing its staff to provide advice the public.

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2. *The personnel file for Wendy Coy is protected by privacy interests.*

By law, access to state employees' personnel files is very limited. A.A.C. R2-5-105(F) expressly limits the disclosure that may be made to others. A ruling by an administrative tribunal is not sufficient to give Respondent access. Even if a court ordered production of the personnel file, it must be reviewed *in camera* and only relevant items can be disclosed. See A.A.C. R2-5-105(E)(6); *Pima County v. Harte*, 131 Ariz. 68, 69, 638 P.2d 735, 736 (Ct. App. 1981). Access to the entire file is limited. Access may be provided only to an "official" acting in response to a court order or subpoena. A.A.C. R2-5-105(E)(4). An "official" is defined as "an individual who provides identification verifying that the individual is exercising powers and duties on behalf of the chief administrative head of a public body." A.A.C. R2-5-105(E). An administrative law judge is constrained by the administrative rules that limit discovery consistent with general administrative law.

The privacy rights of a state employee are protected by administrative rule. Protection of personnel files rises to a level that disclosure beyond the enumerated items should involve a court. Disclosure of a personnel file in an administrative action is not provided for in the rule. A.A.C. R2-5-105(F) mandates that the Director or designee shall ensure only the specified information is provided to "any person"—persons other than those listed in paragraph (E)—under public records law.

Privacy interests are also protected under public records laws. In *Pima County v. Harte*, 131 Ariz. 68, 638 P.2d 735 (Ct. App. 1981), the court addressed police personnel records in a discovery context. The court ordered *in camera* review and production of only those portions relevant to claims for relief. Even in circumstances where relevancy is not at issue, privacy rights receive strong protections. In *Bolm v. Custodian of Records of Tucson Police Dept.*, 193 Ariz. 35, 969 P.2d 200 (Ct. App. 1998), police personnel records were sought under public records requests where there was no relevancy requirement and no statute or rule mandating confidentiality. The court used a balancing test: the public right to know vs. privacy interests, to be applied on a case-by-case basis. The court stated: "Our supreme court repeatedly has stated that 'where the [trial] court's discretion has been

1 properly invoked,' the preferred practice is for that court 'to make [an] *in camera* inspection[] of the
2 relevant documents and balance the rights of the parties.'" *Id.* at 40, 969 P.2d at 205. Under A.A.C.
3 R2-5-105(F), the only information from a personnel file that may be disclosed under public records
4 law is (1) the name of the employee; (2) the date of employment; (3) the current and previous class
5 titles and dates received; (4) the name and location of current and previous agencies to which the
6 employee has been assigned; (5) current and previous salaries and dates of each change; and (6) the
7 name of employee's current or last known supervisor. In this case, where the information is not
8 relevant and Respondent has no need to know the information, Ms. Coy's privacy rights require
9 confidential treatment of her personnel file.

10 **3. *Respondent has no need for the personnel file for Wendy Coy or the investigative***
11 ***investor interview memos.***

12 In the context of an administrative discovery, even if confidentiality protections and privacy
13 interests are not at issue, disclosure should be restricted to matters that are relevant and to instances
14 where there is a requisite showing of "reasonable need." A.R.S. § 41-1062(A)(4). The investigative
15 interview memos are confidential under the law, and Respondent has demonstrated no reasonable
16 need for the memos.

17 Even if Respondent had articulated an arguable defense for estoppel, which it has not, the
18 information sought in the personnel file is not needed, and the privacy interest in protecting the file
19 from disclosure outweighs any value it might have to Respondent. Respondent argues that it seeks
20 the personnel file to observe whether Ms. Coy was disciplined for giving unauthorized legal
21 advice. Such evidence of lack of authority is not needed and in fact could only weaken a defense
22 based upon estoppel. Estoppel will not be applied to the state when it will bind the state by
23 unauthorized acts of its officers and employees. *Freightways, Inc., supra*, 129 Ariz. 245, 248, 630
24 P.2d 541, 544.

25 ...
26

1 **Conclusion**

2 The discovery rules for contested administrative proceedings in this state are expressly
3 provided by statute and agency rule, and the principles of due process are amply preserved within
4 these rules. As a consequence, discovery requests predicated on inapplicable rules of civil
5 procedure are misplaced in this administrative forum.

6 Notwithstanding these principals, however, the Division has already voluntarily produced
7 to Respondent over seven banker's boxes of materials, including all of the documents and records
8 provided to the Division by all investors and other parties in this action. The Division further has
9 provided and provides again herewith the policies and procedures and schedules requested by
10 Respondent.

11 The Division strongly objects to any additional disclosure of information or documents
12 confidential under A.R.S. § 44-2042, subject to other privileges and privacy rights, or not relevant
13 to this proceeding.

14 Moreover, Respondent has provided no compelling authority or rationale under which this
15 administrative tribunal should order the disclosure of the personnel file of Wendy Coy or the
16 confidential investigative interview memos of investors. Under the circumstances, Respondent's
17 Motion to Compel should be denied in full.
18

19 RESPECTFULLY SUBMITTED this 4th day of August, 2004.

20
21 By: 
22 Pamela T. Johnson
23 Attorney for the Securities Division of
24 the Arizona Corporation Commission
25
26

1 ORIGINAL and 13 copies of the foregoing
hand-delivered this 4th day of August, 2004 to:

2 Docket Control
3 Arizona Corporation Commission
1200 West Washington Street
4 Phoenix AZ 85007

5 COPY of the foregoing hand-delivered
this 4th day of August, 2004 to:

6
7 Marc Stern, Esq.
Administrative Law Judge
8 Arizona Corporation Commission
1200 West Washington Street
9 Phoenix AZ 85007

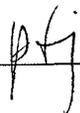
10 COPY of the foregoing mailed
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11
12 Alan S. Baskin, Esq.
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23 2375 E. Camelback Rd., Suite 700
Phoenix, AZ 85016-9000
24 Attorney for Respondents Gregory Russell Brown
and Karen Brown

25
26 

DUTY OFFICER PROGRAM—POLICIES AND PROCEDURES

SUMMARY

The Division typically receives in excess of 30 telephone inquiries a day regarding Division business, in addition to e-mail inquiries and in-office visitors. To meet the public demand for information, the Division has established a duty officer program. Two individuals each day handle telephone, e-mail, and walk-in inquiries.

Investigators and paralegals, as assigned by the chief of investigation, respond to inquiries regarding complaints, registered or licensed individuals and securities, and fees and forms. The duty officer assigned to respond to these inquiries is commonly referred to as the IOD.

Attorneys and accountants respond to inquiries regarding statutes, rules, and application filing procedures. The duty officer assigned to respond to these inquiries is commonly referred to as the AOD. Registration and general counsel attorneys currently share the AOD responsibility. When those individuals are not available, backups are chosen on a rotating basis from a backup list, located at n:\counsel\AOD\AOD-backup.

Duty officers are the Division's front-line contact with the public and provide prompt professional assistance to inquiring individuals. Their courteous treatment of the public is essential to the Division. Responding to inquiries from the public is not, however, the exclusive domain of the duty officers. Nor is it an optional Division service. The Division is a political body--serving the public and dependent upon the public's perceived need for those services. All staff members willingly assist the public for whom they are employed.

All duty officers are subject to basic principles and policies.

POLICIES

- A duty officer must be in the office at all times between the hours of 8:00 a.m. and 5:00 p.m. in order to timely take calls and meet with individuals who come into the office to obtain information. Therefore, the duty officers coordinate with one another regarding meetings, lunch hours, and other appointments or obligations.
- Duty officers and other employees are responsible for making sure telephone calls and e-mails received by them are answered.
- Duty officers and other employees do not forward calls to a director or other personnel, unless requested to do so by that individual.
- Any employee receiving an inquiry from the public identifies himself or herself to the caller and responds to that inquiry promptly, in a professional manner, and in accordance with the appropriate procedures.

- Before giving a response, duty officers and other employees advise inquirers that the responses are the employee's opinion only, are not offered as legal advice, and do not bind the Division. This disclaimer is included on all correspondence, including e-mail, in response to public inquiry.
- The Division does not provide legal counsel. Duty officers and other employees give information regarding the relevant statutes, rules, no-action letters, other sources of legal guidance, and previous Division interpretations of those sources. Employees may "brain storm" with the inquirer. Legal conclusions, however, regarding the application of the law to a particular set of facts are made by the inquirer.
- Duty officers are not expected to know all of the answers. If unsure of an answer, the duty officer says so, obtains assistance, and then calls the inquirer back.

STAFF CONTACTS

The following individuals may be contacted for assistance with inquiries received by the Division: (These individuals' names and numbers should not be given out to the general public unless you have first consulted with and have the permission of that individual.)

REGISTRATION

Matt Neubert 2-0605
Susan Baker 2-0628

ENFORCEMENT

LeRoy Johnson 2-0185
Wendy Coy 2-0633

GENERAL COUNSEL

Cheryl Farson 2-0193
Sharleen Day 2-0679

CORPORATIONS DIVISION

See X-B-2

INVESTIGATIONS

[REDACTED]

MIS

Alex Shivers 2-0703

EXAMINATIONS

Richard Unangst 2-0323
Matt Neubert 2-0605

To obtain assistance, employees call the staff contact and request assistance in responding to the call. The contact may assist in a conference call or provide relevant information. The employee does not refer the inquirer to a staff contact or forward the inquiry unless requested by the staff contact to do so.

SOURCES

Duty officers and other employees may obtain answers to public inquiries from a variety of sources. The Securities Division Manual provides basic information regarding the business of the Division, including a section on procedural information. See also sources of information and referrals in this section.

PROCEDURES

E-mails are received in the Division mailbox. The permanent duty officers review and respond to the e-mails, as appropriate.

Telephone calls are forwarded to the duty officers by the receptionist.

- **Complaints.** Complainants are provided with a form to complete that will be given to the appropriate investigator or enforcement attorney. The duty officer may take the information over the phone.
- **Inquiries regarding licensure or registration.** The duty officers may obtain from the SEC/Dealer data base, the CRD, and the enforcement data base information with which to respond to inquiries whether a person or security is licensed or registered. The duty officers may answer questions and forward application packets in response to inquiries on how to license or register. Inquirers may also be directed to the Division's web site to obtain information on how to license or register.
- **Inquiries regarding forms and fees.** The duty officers respond to inquiries regarding fees and complete a forms request, which they forward to the receptionist, in response to requests for forms. Inquirers may also be directed to the Division's web site to obtain forms.
- **Inquiries regarding securities law.** This type of inquiry is the most varied and difficult to answer. The inquirer is frequently seeking legal conclusions from the Division regarding the availability of exemptions from registration or legal advice regarding structuring a securities offering or transaction. The Division will take a binding position only through the no-action letter process. See no-action letter section.

Questions regarding the duty officer program should be directed to associate general counsel. Each AOD provides, within five business days following the 15th day and end of each month, to the associate general counsel a report of the total inquiries with which they dealt that period. Backup duty officers inform the associate general counsel of the number of inquiries at the end of the day or the day following their duty. Likewise, IODs provide statistical information to the chief of investigation.

Guideline No. 3 – Anonymous Calls

Attempt to obtain the identify of individuals who contact the Division, unless the individual gives a legitimate reason for wanting to remain anonymous.

Guideline No. 4 – Telephone Etiquette

Be courteous on the telephone and to members of the public. Avoid abruptness or rudeness, even if the caller displays such conduct.

Maintain a professional attitude at all times, even when you are unable to be of assistance or provide the caller with any information because of confidentiality limitations.

Guideline No. 6 –Calls Regarding Investment Decisions

Individuals check with the Securities Division in connection with making investment decisions. Apply the following guidelines in responding to these inquiries.

1. Supply all public information from our files and databases.
2. You are not authorized to provide investment advice. It is not appropriate for you to help a person decide between a preferred stock or corporate bond.
3. Avoid making inferences about the individual company that is the subject of the inquiry. If it appears an illegal stock scheme is involved, discreetly ask the member of the public if he or she would mind discussing the matter further. If they have no objections, pass the call on to the Enforcement Section.
4. Always be discrete because you are in a sensitive government office. If any questions arise, contact the Director or Assistant Director.

Guideline No. 8 – Conduct of Employees Where Violations of the Securities Act may Exist.

When dealing with members of the public, either investors or the focus of the investigation, avoid even the slightest threat of any enforcement action. The Director, in conjunction with members of the staff and the attorney general, makes decisions on such actions after reviewing all of the evidence in a case.

Never suggest that the Division's efforts are retaliatory or based upon any purpose other than serving the public interest.

Do not make judgments on the legality of any person's conduct in conversations with the public.

Guideline No. 10 – Request to Divulge Investigation Information

In the event that any person contacts you with the request that you divulge information that is not public, report such request immediately to the Director or the Assistant Director. Failure to report such a conversation is a serious matter.

Guideline No. 12 – Nondisclosure of Information Obtained in the Course of Examinations and Investigations

By statute, information or documents obtained by employees of the Securities Division in the course of any examination or investigation are confidential, unless made a matter of public record. Employees are prohibited from making such confidential information available to anyone other than a member or employee of the Commission, the attorney general, or law enforcement or regulatory officials, unless the Commission or the Director of Securities authorizes the disclosure of such information as not being contrary to the public interest.

By statute, the home addresses, home telephone numbers, and social security numbers of salesmen, investment adviser representatives, or individual investment advisers are confidential unless the Commission or Director authorizes the disclosure as not being contrary to the public interest.

Should other individuals or parties wish to have access to such information, the Director will need to sign an authorization for the release of the information. Such authorization is on the word processing machine. Private parties desiring such access should direct correspondence to the Director of Securities indicating the purpose for which the information is needed, the reason or reasons why it cannot be obtained from other sources, and reasons justifying its release as not being contrary to the public interest. Upon receipt, the Director will evaluate these requests and make a determination. Each of these requests will be evaluated on an independent basis by the Director.

Guideline No. 13 – Discussions with Reporters

All contacts with the press should be handled in accordance with the Division's Press Release Procedure and Media Inquiry Procedure.

Guideline No. 16 – Referrals and References Regarding the Private Bar

Refer all requests for the name of legal counsel to the Arizona State Bar Association or the Maricopa County Legal Referral Service. Do not comment to the public on the character or skill of any member of the private bar.

DISCLOSURE RESPONSIBILITIES

DIVISION PERSONNEL DISCLAIMER

Division personnel should disclose to an inquirer that the information they are providing does not bind the Division. To that end, the inquirer always be given the following disclaimer:

MY RESPONSES TO YOUR INQUIRIES ARE MY OPINION ONLY, ARE NOT OFFERED AS LEGAL ADVICE, AND DO NOT BIND THE DIVISION.

This disclaimer should be stated to all individuals seeking information from the Division and included on all correspondence (including E-mail) prepared in response to public inquiry.

COMPLAINANT DUTY

Under Arizona law, individuals filing complaints with the Division are required to disclose their names to the Division. Effective August 21, 1998, A.R.S. § 41-1010 states:

Notwithstanding any other law, a person shall disclose the person's name during the course of reporting an alleged violation of law or rule. During the course of an investigation or enforcement action, the name of the complainant shall be a public record unless the affected agency determines that the release or the complainant's name may result in substantial harm to any person or to the public health or safety.

This section requires that, notwithstanding any other law, complainants must disclose their names. The complainants' names are a matter of public record unless the agency determines release of a complainant's name may result in "substantial harm" to any person or to the public health or safety.

A.R.S. § 41-1010 does not bar the Division from accepting an anonymous complaint.

RESOURCES

Internal resources for information are many and include computer data bases, library materials, and paper files. See the Procedural Information—Location of Resources section of this manual. Additionally, see the Referrals section for various agencies and telephone numbers.

INTERNAL HUMAN RESOURCES

REGISTRATION

Matt Neubert 2-0605
Susan Baker 2-0628

ENFORCEMENT

LeRoy Johnson 2-0185
Wendy Coy 2-0633

GENERAL COUNSEL

Cheryl Farson 2-0193
Sharleen Day 2-0679

INVESTIGATIONS

Ron Clark 2-0152

MIS

Alex Shivers 2-0703

EXAMINATIONS

Richard Unangst 2-0323
Matt Neubert 2-0605

CORPORATIONS DIVISION

See page X-B-2

C O R P O R A T I O N S D I V I S I O N

The following is a current listing of the various Sections and phone numbers in the Corporations area of the Commission. Please distribute to personnel who transfer telephone calls within the Commission. **Note:** The Corporations Division must adhere to A.R.S. Title 10 regarding corporations and Title 29 regarding L.L.C.s. These statutes may be viewed on the ALIS web site: www.azleg.state.az.us.

602/542-3285 ANNUAL REPORTS, including Revocation/Administratively Dissolved Corporation and Bankruptcy Filings

All inquiries regarding annual reports filed by corporations; fees; penalties. Address changes; officer/director changes; statutory agent appointments/resignations; delinquent notices and reinstatements.

602/542-0775 Holly Halliburton-Wagner – Supervisor
602/542-0774 position open – Assistant Supervisor

602/542-3135 CORPORATE FILINGS

Instructions on "how" to incorporate or organize an L.L.C.; filing requirements; mergers; amendments; dissolutions; publication requirements. Information on creating or changing Non-Profit, Profit, Foreign Corporations and Limited Liability Companies. All forms and instructions are on the Commission web site: www.cc.state.az.us.

602/542-0018 Christine Rosales– Supervisor
602/364-0089 Lottie Hawkins – Assistant Supervisor

602/542-3026 CORPORATE RECORDS

Information and existence/non-existence of a corporation or L.L.C. Whether a company is incorporated/authorized/organized in Arizona; their status; address; statutory agent's name and address; officers and/or directors' and historic corporation records. The public may view Corporate and Foreign Corporation documents and copies can be obtained for \$.50 each.

602/542-4786 CERTIFICATIONS

Request for certified copies of documents on file; Certificates of compliance (good standing). Also, basic information about costs of certificates.

602/542-5085 Melissa Hawkins – Supervisor of Records, Certifications and Phone Bank
602/542-4608 Elsie Newhouse – Assistant Supervisor of Counter and Certifications

602/542-3230 NAME RESERVATIONS (located in the CORPORATE FILINGS section)
Inquiries and request for use of a corporate name. Hours: 8:00 am to 3:00 pm

***NOTE: To override the recording, press "4" on touch-tone phone.**

602/542-3521 Director – Joanne MacDonnell
602/542-0776 Deputy Director – Steve McCance
602/542-0671 MIS Supervisor – Clark Lathrum
602/542-0774 Management Analyst – Carmen Salas
602/542-0791 Administrative Assistant – Juanita May
602/542-0784 Administrative Assistant– Mary Sanchez

REFERRALS

American Bar Association	(312) 988-5000
Arizona Attorney General	
Banking Department	(602) 255-4421
Consumer Information and Complaints Unit	(602) 542-5763
ASU Law Library	(602) 965-6141
	www.asu.edu/lib
Better Business Bureau (Phoenix)	(602) 264-1721
Susan (602) 212-2219	
Better Business Bureau (Tucson)	(520) 888-5454
Bankruptcy Court	(602) 640-5800
CCH Business and Finance Customer Service Center	(800) 449-6435
	http://business.cch.com
Commodity Futures Trading Commission Public Affairs	(202) 418-5080
Corporation Commission	
Corporate status	(602) 542-3026
Department of Economic Security	(602) 542-4791
Department of Insurance	(602) 912-8400
Department of Liquor Licenses & Control	(602) 542-5141
Department of Mines & Mineral Resources	(602) 255-3795
Department of Real Estate	(602) 468-1414
Department of Revenue	(602) 542-3887
Examination preparation courses	See list contained in dealer registration section of manual
Federal Bureau of Investigation	(602) 279-5511
Federal Trade Commission	(202) 326-3650
FTC Consumer Fraud	(877) 382-4357
Institute of Financial Planners	(800) 282-7526
International Board of Standards & Practices for Certified Financial Planners	(303) 830-7543
Land Department	(602) 542-4621
Maricopa County Attorney	(602) 506-3411
Investigations	(602) 506-3844
Maricopa County Sheriff's Office	(602) 256-1000
Mine Inspector	(602) 542-5971
National Association of Securities Dealers	(202) 728-8000
National Fraud Information Center	(800) 876-7060
National Futures Association Disciplinary Information Access Line	(800) 676-4632
North American Securities Administrators Association, Inc.	(202) 737-0900
	www.nasaa.org
Racing Commission	(602) 542-5151
Registrar of Contractors	(602) 542-1525

Secretary of State (602) 542-4285
Limited partnerships (602) 542-6187
UCC filings and trade names (602) 542-6187
Securities & Exchange Commission (202) 942-8090
Stock certificates:

The Manual of Valuable and Worthless Securities
edited by Robert D. Fisher

The Manual of Extinct and Obsolete Companies
edited by Marvin Scudder

Stock Search International, Inc. (520) 579-5635
4761 West Waterbuck Drive (800) 537-4523
Tucson, AZ 85742 Fax: (520) 579-5639

R.M. Smythe & Company, Inc. (212) 943-1880
26 Broadway, Suite 271 Fax: (212) 908-4047
New York, NY 10004 www.rm-smythe.com

Prudential/American Securities, Inc. (626) 795-5831
Financial Information Center Fax: (626) 792-5407
921 East Green Street
Pasadena, CA 91106

Paper Chase (514) 482-3609
P.O. Box 22
Cote St. Luc Station
Montreal, Quebec
H4V 1H8

Tracers Co. Of America (212) 558-6550
P.O. Box 154
Holtsville, NY 11742

The Securities Division does not endorse the use of any of these sources but merely makes the information available. The cost of these services varies.

U.S. Customs (602) 379-3514
U.S. Postal Inspection Service (602) 223-3660

April 1999

ATTORNEY/ACCOUNTANT DUTY OFFICER CALENDAR

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SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
				1 Poole	2 Poole	3
4	5 Poole	6 Poole	7 Russell-Pisaruk	8 Poole	9 BACKUP	10
11	12 Poole	13 Poole	14 Russell-Pisaruk	15 Poole	16 Poole	17
18	19 Poole	20 Poole	21 Russell-Pisaruk	22 Poole	23 Armbruster	24
25	26 Poole	27 Poole	28 Russell-Pisaruk	29 Poole	30 Poole	