Sullivan and Cromwell
New York, NY

September 30, 1981

George A. Fitzsimmons, Secretary
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Re: Proposed Regulation D
File No. S7-891

Dear Mr. Fitzsimmons:

We submit the following comments in response to Release No. 33-6339 (August 7, 1981).

Preliminary Notes

The final sentence of Note 4 is duplicative of the first sentence of Rule 502(d) and could be deleted. We note that adoption of Regulation D would require consequential alterations in the definition of "restricted securities" appearing in Rule 144(a)(3).

We suggest that the potential application of Note 3 is practically impossible if not impossible to discern and that the Note is unnecessary and should be deleted.

Rule 501(a) -- "Accredited Investor"

We think the "accredited investor" concept used in Regulation D is very helpful and appropriate.

We note that the proposed definition of the term omits several important categories of sophisticated investors -- e.g., large corporations; financial institutions other than banks and insurance companies, such as General Electric Credit Corporation and other credit companies; foundations, such as the Ford and Mellon foundations; and broker/dealers and investment advisers, purchasing for their own accounts or for accounts over which they have investment discretion. However, we believe that the qualification as an "accredited investor" of any person who purchases $100,000 or mare of an issue (clause (5) of the

definition) should make these omissions of less significance because many investments made by these kinds of investors will be in this or larger size.

We strongly urge, however, that clause (5) be drafted in a manner more nearly comparable to present Rule 146(g)(2)(d); that is, to include any person who purchases or agrees in writing to purchase $100,000 or more of securities of an issue in a single payment or installments for cash or the cancellation of indebtedness. We think the proposed limitations on installments are too restrictive. In many investment situations the total amount of the arranged financing is not needed immediately and it is desirable that funds be advanced only as needed. The period during which such advances may be required frequently will extend beyond 60 days. Often the commitment of the investors, particularly if they are institutional investors, to make the advances will not be secured by a bank letter of credit or any other third party security. Further, the obligation to make advances may not be totally unconditional because investors may not be obligated to provide further funds if negotiated conditions, such as the receipt of legal opinions or the absence of agreed events of default, are not met. The presence of such arrangements in particular investment situations seems irrelevant to the question of the size of an investor's commitment and should not be a factor in determining whether the $100,000 threshold is met. According to the Release, the proposed approach to installments in clause (5) is intended to be responsive to a Commission concern that in some instances installment obligations are being spread over such periods of time that the present value of the purchase commitment is substantially less than the nominal amount. To meet this concern, we suggest that, in lieu of the clause (5) approach, the Rule provide that where installments are involved the commitment by the investor must have a present value of at least $100,000 as determined by some accepted standard (see, e.g., the reference in Rule 501(e) to "some accepted standard" for a valuation matter).

We think that the last two categories of the definition of "accredited investor", relating to the net worth or adjusted gross income of natural persons, are useful and appropriate. The specific dollar amounts, particularly the one for net worth, strike us as a bit high, but not unreasonable. In the case of the adjusted gross income test, we suggest, however, that, from both a practical and substantive viewpoint, it would be desirable to permit the use of either individual or joint income as reported in the tax return mentioned.

Rule 502(b) -- Information Requirements

We applaud the proposal that there be no specific information delivery requirements in the case of accredited investors, and we think that the "60% provision" is an excellent one. The latter will neatly accommodate the situation where a non-accredited investor plans to make his investment decision based

upon what the institutional investors do and does not require the kind of information otherwise specified by the Rule. This will make it practical for issuers to include such investors as purchasers, and it will avoid the substantial unnecessary expense which would result if materials had to be prepared for an investor who has no intention of consulting them. Yet, under the proposal the investor is protected because if he does not wish to invest without receiving the information required by paragraph (b)(2) of the rule he need not do so.

Rule 503 -- Form D

The proposed Form D does not appear in the Release, but we understand it is to be similar to present Form 242, amended as described in the Release. As such, it will require a good deal of information which has only the most remote, if any, relevance to Section 5 considerations. To illustrate, the form will require elaborate information about the issue including the states in which the offering is made, the number of and amount purchased by accredited and non-accredited investors and the extent to which sales to accredited investors were made to accredited institutions.

Further, information will be required as to the address and telephone number of the principal business operations (in addition to the principal executive offices) of the issuer; the name and address of each promoter, the chief executive officer and each affiliate of the issuer; a brief description of the issuer's business; its Standard Industrial Classification, the CUSIP number for its securities; the market in which its securities are traded; data as to its revenues, assets, net income, shareholders' equity, number of shareholders, percentage of shares held by non-affiliates, number of shares outstanding and number of employees; an itemized statement of expenses of the offering; and an itemized statement of the proposed use of proceeds. We believe this will impose a substantial paperwork burden on all issuers wishing to rely on Regulation D exemptions which will be disproportionate to any benefit that will be derived from collecting and filing the data. This is particularly true in the case of issuers wishing to utilize Rule 506, and will continue to discourage reliance on the Rule for many non-public offerings.

We also think it entirely inappropriate to require the filing of Form D as a condition to the availability of the Regulation D exemptions. Obviously such a report is not substantively relevant to the protection of investors in the transaction being reported, and the consequences of a failure to file should not be escalated into a Section 5 violation. There is no apparent reason why incentives to require filings of Form D reports need be more draconian than those, for example, relied upon to ensure the filing of 1934 Act reports.

Accordingly, if a report is to be required we suggest that it be a brief one limited to data pertinent to the transaction being reported, and that the filing of the report not be a condition to the availability of Regulation D exemptions. If the Commission then wishes to obtain further empirical data for use in its regulatory activities it may send appropriate questionnaires to such of those persons who have filed reports as it may wish. This would encourage the use of the Rules by reducing the associated paperwork burden. It would permit selectivity in collecting information and it would allow for the use of sampling techniques, all at considerably less cost to both the Commission and issuers than the filing requirements proposed in the Release.

Rule 506

We agree completely with the Commission's decision to eliminate the qualification requirements with respect to offerees in present Rule 146. We also agree wholeheartedly with the deletion of the economic risk test. We have explained our reasons for these positions in comment letters, beginning in 1973, previously furnished in relation to Rule 146.

In response to a specific request in the Release for comments, we reiterate here our view that the accredited investor concept is appropriate in the circumstances to which Rule 506 relates. Also, we believe that purchasers who meet the $100,000 or the net worth or adjusted gross income tests can sufficiently fend for themselves in participating in the kind of limited offers and sales of securities contemplated by Rule 506.

We wish to make two points regarding Rule 506(b).

First, as a drafting matter, we think the language is not as clear as it might be as to whether the 35 purchaser limit applies in both conventional issues and in business combinations and as to whether the reasonable grounds and inquiry standard applies to all of the determinations referred to in paragraph (b).

Second, we think that in a business combination otherwise in compliance with the Rule it is reasonable and appropriate to provide that the management of the acquired company, if it is not an affiliate of the issuer, can take the place of, or arrange for, the purchasers' representative. It would be a rare instance in which that management was not qualified to advise the shareholders in this regard, and it would be normal and natural that they should do so. Moreover, if this were done the possibility that a shareholder of the acquired company could hold up the other interested persons by failing to designate a purchaser's representative would be eliminated.

The following suggested redraft of clause (b) of Rule 506 is presented to illustrate these two points.

"The issuer shall have reasonable grounds to believe and, after making reasonable inquiry shall believe, immediately prior to making any sale, or in the case of a business combination, at the time that the plan for business combination is submitted to security holders for approval or in the case of an exchange immediately prior to the sale,

(1) that there are no more than 35 purchasers of each issue of the securities of the issuer pursuant to this rule, and

(2) that each purchaser who is not an accredited investor, either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is or they are capable of evaluating the merits and risks of the prospective investment.

If in the case of a business combination the company to be acquired is not an affiliate of the issuer, the management of the company to be acquired, or a person selected by that management who has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, shall be deemed to be a purchaser's representative of each security holder of the company to be acquired, without additional qualification or selection or acknowledgment by such security holder."

If any elaboration of the foregoing comments would be helpful please contact John Merow of our office.

Very truly yours,

Sullivan and Cromwell