1933/Regulation D

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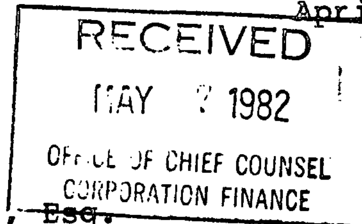
April 23, 1982



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APR 23 1982
OFFICE OF THE DIRECTOR
CORPORATION FINANCE

HAND DELIVERED

Lee B. Spencer, Jr., ~~Esq.~~
Director
Division of Corporation Finance
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Re: Winthrop Financial Co., Inc.: Request for
<u>Interpretation of Regulation D, Rule 501(a)(5)(iii)</u>

Dear Mr. Spencer:

I am writing on behalf of our client, Winthrop Financial Co., Inc. ("Winthrop Financial"), to request the views of the staff of the Securities and Exchange Commission (the "Commission") concerning a provision of Regulation D recently adopted by the Commission under the Securities Act of 1933, as amended. See 17 C.F.R. 230.501-506. Winthrop Financial is engaged in the organization and sponsorship of real estate limited partnerships, interests in most of which are sold to investors in private offerings exempt from registration under Section 4(2) of the Securities Act of 1933.

This letter requests your concurrence with our interpretation of the installment payment provisions of Rule 501(a)(5) in Regulation D. That section provides, in pertinent part, that any person who invests at least $150,000 is an accredited investor. Installments due within five years after the "sale of securities" may be aggregated to reach the $150,000 minimum, pursuant to Rule 501(a)(5)(iii).

Our request for interpretation concerns the date on which this five year installment payment period begins to run. That date is specified in the Rule only as the date of "sale,"

which could be either (1) the date a subscription is accepted from the accredited investor, individually, or (2) the date of the "closing," when the escrow is broken and the funds delivered to the issuer by the escrow agent. This occurs, typically, only when a specified minimum amount of funds has been raised and the requisite opinions of counsel have been furnished.

Winthrop Financial would prefer that Regulation D be interpreted to provide that the payment period begins to run from the date the escrow is broken, and we see no countervailing policy reasons to interpret Regulation D to require selection of a different date. Until the actual closing, it remains a possibility that the offering will not close, and the investor will receive a refund of his money. In effect, the sale is conditional until the occurrence of the closing. Delaying the commencement date of the installment payment period comports with that economic reality.

Commencing the five-year payment period on the closing date also has certain beneficial effects. It will establish a uniform payment schedule for all investors, in accord with prevailing practice under Securities Act Rule 146, with two resultant advantages. First, the issuer will be able to schedule the receipt of installment payments to coincide with its business plan and, in the case of programs providing "tax shelter," the realization of tax benefits by investors. Second, the time periods when the issuer is required to handle payments will be circumscribed and definite, reducing the associated administrative burdens.

We believe that the above interpretation is consistent with the Commission's intent to streamline exempt offerings and to facilitate capital formation by small businesses. Therefore, we request that you exercise your discretion to interpret Regulation D to mean that investors must pay $150,000 within five years from the date of the closing, when the escrow is broken and the issuer receives the proceeds of the offering.

We appreciate your time and attention to this matter.

Sincerely,

Carol Herndon Israel

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CHI/jbj

cc: David B. H. Martin, Esq.

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500 North Capitol Street
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Re: Winthrop Financial Co., Inc.: Request for Interpretation of Regulation D, Rule 502(b)(2)(A)

Dear Mr. Spencer:

I am writing on behalf of our client, Winthrop Financial Co., Inc. ("Winthrop Financial"), to request the views of the staff of the Securities and Exchange Commission (the "Commission") concerning a provision of Regulation D recently adopted by the Commission under the Securities Act of 1933, as amended. See 17 C.F.R. 230.501-506. Winthrop Financial is engaged in the organization and sponsorship of real estate limited partnerships, interests in most of which are sold to investors in private offerings exempt from registration under Section 4(2) of the Securities Act of 1933.

This letter seeks confirmation that the staff of the Commission agrees with our interpretation of the disclosure requirements of Regulation D, particularly Securities Act Rule 502(b)(2)(A), 17 C.F.R. §230.502(b)(2)(A), as applied to the facts described below.

The issuer will be a limited partnership (the "Partnership") formed for the purpose of acquiring an existing building. The proposed offering will cover approximately $4 million of limited partnership interests and will be structured to comply with the requirements of Rule 506 under Regulation D.

Rule 502(b)(2)(A), which applies offerings of under $5 million, requires the Partnership (which is not currently eligible to use Form S-18) to furnish prospective investors with the same kind of information as required by Form S-11, with certain reductions in the required financial information, that is, only two years of financial statements, the most recent of which must be certified. If financial statements cannot be obtained without "unreasonable effort or expense," the Partnership may furnish financial statements prepared for tax purposes and examined in accordance with generally accepted auditing standards ("GAAS") by an independent accountant. This much is clear from the text of the rule.

Our question arises in applying the rule to the requirement, imposed upon real estate programs by Regulation S-X, that issuers provide financial information regarding the operating history of properties to be acquired with the proceeds of the offering of securities by the program. See Regulation S-X §3-14, 17 C.F.R. §210.3-14 (1981). That provision of Regulation S-X requires three years of audited financial statements, which is more burdensome than the requirement applied to issuer financial statements under Regulation D.

Such a result does not seem to be consistent with the intent of Regulation D. Therefore, we interpret the Rule to mean that the financial information about properties with operating histories to be acquired by an issuer making an offering under Regulation D is also to be reduced to two years, only the most recent of which must be audited, and may in appropriate instances be prepared on a "tax basis" and be examined in accordance with GAAS.

We would appreciate your written concurrence with this interpretation.

Thank you very much.

Sincerely yours,

Carol Herndon Israel

Carol Herndon Israel

CHI/jbj