

13-49-32 C31

ACTION MEMORANDUM

February 16, 1983

TO: The Commission

FROM: Division of Corporation Finance

SUBJECT: Issuance of a release setting forth the views of the Division of Corporation Finance on various interpretive questions regarding the rules contained in Regulation D under the Securities Act of 1933.

RECOMMENDATION: That the Commission authorize the issuance of the subject release. (Attachment A)

ACTION REQUESTED BY: Week of February 28, 1983

TENTATIVE SUNSHINE ACT STATUS: Open Meeting

REGULATORY FLEXIBILITY ACT STATUS: The subject release is an interpretive release and does not contain any proposed rules. Accordingly, the Regulatory Flexibility Act is not applicable. The Division has consulted with the Office of General Counsel.

PAPERWORK REDUCTION ACT STATUS: The subject release is an interpretive release and does not contain any proposed rules. Accordingly, the Paperwork Reduction Act is not applicable. The Division has consulted with the Office of General Counsel.

NOVEL, IMPORTANT OR COMPLEX ISSUES: None

VIEWS OF OTHER OFFICES OR DIVISIONS CONSULTED: The Divisions of Investment Management (Grant) and Market Regulation (Chamberlain/ Manning) and the Offices of the Chief Accountant (Kirby) and General Counsel (Stevenson) concur in the recommendation. The Division has also consulted with the Division of Enforcement, the Office of the Chief Economist, DEPA, and all Regional Offices. Additionally, the Division has circulated the proposed release to the Small Business Finance Committee of the North American Securities Administrators Association. See Advice Memorandum dated January 5, 1983 (Attachment B).

PRIOR COMMISSION ACTION: The Commission adopted Regulation D in Release No. 33-6389 (March 8, 1982). The Commission made certain minor amendments to Regulation D with the adoption of the foreign issuer integrated disclosure system in Release No. 33-6437 (November 19, 1982).

PERSONS TO CONTACT: Lee B. Spencer, Jr. (X22800); Mary E.T. Beach (X22585); Linda C. Quinn (X22579); David B.H. Martin, Jr. (X22573)

DISCUSSION:

The proposed release (Attachment A) is a compendium of questions and answers reflecting interpretations of Regulation D by the Division of Corporation Finance. These interpretations address questions that have been raised during the past year by persons complying with the regulation. The Division believes that the publication of this release will give broader exposure to established interpretations and will assist those who use the rules.

The Division also has included an interpretation clarifying the Commission's construction of section 4(2) of the 1933 Act as reflected in Regulation D. See Question 73. Question 73 makes clear that the Commission does not believe an issuer is precluded from relying on the exemption provided by section 4(2) solely because an offeree does not possess the requisite level of sophistication. The availability of the statutory exemption rather depends on the manner of the offering and the nature of the purchasers of the securities.

The Division received input on the proposed release from the Small Business Finance Committee of the North American Securities Administrators Association. (See Attachment C.) In response to certain comments from this committee the Division has added a cautionary statement to the effect that the interpretations in this release are limited to federal provisions. (See page two of the proposed release.) The committee also noted disagreement with the interpretations in Questions 18 and 19. Because these positions have been published previously in interpretive letters, and because the Division continues to believe they reflect correct interpretations of the federal provisions, the Division elected not to modify the interpretations set forth in this release.

CONCLUSION

For the reasons discussed, the Division recommends that the Commission authorize the publication of the proposed interpretative release.

ATTACHMENT B

ADVICE MEMORANDUM

January 5, 1983

TO : The Commission

FROM : Division of Corporation Finance

SUBJECT : Furnishing to the North American Securities Administrators Association Subcommittee on Small Business Financing (the NASAA Subcommittee) a draft copy of a proposed interpretive release on Regulation D.

TRIGGER DATE : January 12, 1982

As you know, this Division in developing Regulation D coordinated with the NASAA Subcommittee so that Regulation D could serve as the basic framework for a state uniform limited offering exemption. Shortly after Regulation D was adopted by the Commission last spring, NASAA did endorse a Uniform Limited Offering Exemption (ULOE) which was substantially the same as Rule 505 of Regulation D with, however, some significant differences.

While it was generally recognized that sane differences would inevitably exist between Regulation D and ULOE because of legitimate state concerns which might not be Federal concerns, both the Commission staff and members of the American Bar Association (ABA) strongly objected to some of the ULOE provisions which differed from Regulation D. In addition, both the staff and the ABA believed that Rule 506 of Regulation D as well as Rule 505 should be included in ULOE.

On December 15, 1982 staff members of the Division of Corporation Finance, Commissioner John Evans, members of the NASAA Subcommittee and members of the ABA State Regulation of Securities Committee met to discuss the differences between ULOE and Regulation D. At that meeting, the NASAA Subcommittee indicated a desire to work with the Division staff and the ABA to resolve the controversial differences so that all those organizations (the Commission, the ABA and NASAA) could present a unified position in supporting the adoption of ULOE by the states. It is anticipated that additional meetings may be held over the next few months to achieve this goal.

At the December meeting, the NASAA Subcommittee members indicated that they would like to have some input on Commission releases dealing with

interpretive questions under Regulation D. They recognized that the ultimate decision on any interpretive questions would be made by the Commission and the staff. Nevertheless, they believed that it would be helpful if they could at least have the opportunity to see and comment on any release prior to publication.

The staff of the Division has no objection to furnishing to the NASAA Subcommittee copies of draft interpretive releases. During the development of Regulation D drafts of the proposed regulation and accompanying release were circulated to the Subcommittee members and resulted in the staff receiving helpful comments and suggestions. The NASAA representatives understand that such drafts are not public and should not be circulated.

The Division is currently working on an interpretive release which will set forth the Division's views with respect to questions that frequently arise under Regulation D. The views expressed in the release for the most part have already been expressed either in interpretive letters or in response to telephone inquiries. If the Commission does not object, the Division intends to furnish copies of the draft release to members of the NASAA Subcommittee on January 14, 1982.

ATTACHMENT C

STATE OF MICHIGAN
DEPARTMENT OF COMMERCE
CORPORATION & SECURITIES BUREAU

MEMORANDUM:

TO: Lee Spencer, Director
Division of Corporation Finance, SEC

FROM: E. C./ Mackey, Chairman
NASAA Small Business Finance Committee

SUBJECT: SEC 1-18-83 Proposed Interpretive Release on Regulation D

The following comments are submitted on behalf of the subject committee. Clearly, these comments cannot be considered as reflecting any official position of NASAA.

In general, we were very impressed with the release. It is scholarly and generally responsive to the investor protection concerns or objectives underlying

Regulation D. Although time constraints did not allow for the type of in-depth analysis and review of the proposed release we would prefer, we appreciate the opportunity to input to the drafting process and hope these brief comments will be helpful.

Supplemental Information

Some type of state cautionary statement needs to be presented either under this heading or incorporated within the appropriate questions. This statement should indicate that Reg D has been the subject of a considerable state coordination effort; it serves as the core of many state exemptions; consistent with state needs and the historical pattern of securities regulation in this country, supplemental conditions have been added to those found in Regulation D and finally the interpretations presented in this release must be considered within this context. This point is best illustrated in question (39). While the answer to the question is correct within the context of Reg D, such a payment (fees of a purchaser representative) may be considered as a commission or similar remuneration by a state and cause significant regulatory implications. Another example is question (41). In a rescission offer situation most states have very specific standards and procedures which must be followed.

In this same area we would suggest another cautionary comment which would in effect clarify that any additional facts or change in facts could result in a different result. There were numerous instances where the answer would be reversed based upon an additional fact or facts.

Question (13). Even with the general cautionary statement suggested above, we believe the facts in question (13) need to be clarified.

It is important to know when the actual 5-year installment term commences for the individual investor -- at the time of sale or when a minimum sales level has been achieved. If it is the latter and it is impossible to determine when the minimum level will be achieved, then we believe the answer presented in the release is correct. If the installment "clock" starts upon sale to an individual investor, then we believe the 5-year time period should also start from that date.

Question (18). We believe the answer to this question should be in the negative. Since each partner is individually liable to the full extent of his/her assets and since the purpose of the 20% of net worth limitation in rule 501(a)(5) was to insure that the individual investor would not be at risk for more than the 20% of net worth each partner's net worth should be considered in order to satisfy the test. In addition, the opposite result would create an incentive for people to create "investment partnerships" just to avoid the limitations of the rule.

Question (19). Based upon the limited facts presented, we do not agree with the answer. If the assets of the parent are as available to the subsidiary as they should be in order to answer this question in the affirmative, then serious separate entity questions are raised and violation of state corporate law.

Question (30). In a narrow legal sense, we understand the proposed answer to this question, but in the context of the broad investor protection purposes of Rule 501(a)(8) we would see no reason to deny, even a conventional trust, accredited investor status if all the beneficiaries are individually qualified as accredited investors.

C. Manner of Offering -- Rule 502(c). Although we have no specific comments to make on this part of the release, we would like to point out that this is the area where states have experienced the greatest amount of Reg D abuse. Perhaps some reference to this development along with a caution that the limitations will be narrowly construed, would be helpful.

IV. Exemptions -- A. Rule 504. Obviously, the state cautionary statement suggested above is particularly applicable at this point.

cc: Mary Beach
Paul Belvin

SUMMARY MEMORANDUM

February 9, 1983

TO: Office of the General Counsel

FROM: Division of Corporation Finance

SUBJECT: Interpretive Release on Regulation D

ACTION REQUESTED DURING WEEK OF: February 28, 1983

SUMMARY OF RECOMMENDATIONS: That the Commission authorize the publication of a release that sets forth the views of its Division of Corporation Finance on various interpretive questions regarding the rules contained in Regulation D under the Securities Act of 1933.

OTHER DIVISIONS OR OFFICES CONSULTED: Division of Enforcement
Division of Investment Management

Division of Market Regulation
Office of the Chief Accountant
Office of the General Counsel
All Regional Offices

DATE MEMORANDUM CIRCULATED: Not circulated as of this date.

SUNSHINE ACT STATUS RECOMMENDATION: Open Meeting

STAFF RESPONSIBLE FOR MEMORANDUM: Lee B. Spencer, Jr. (x22800)
Mary E.T. Beach (x22585)
Linda C. Quinn (x22579)
David B.H. Martin, Jr. (x22573)

ESTIMATED TIME FOR COMMISSION CONSIDERATION: One half hour.