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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

SEP 20 1982

1933 Act / Regulation D

James F. Basque, Esq.  
Foley & Lardner  
Post Office Box 1497  
First Wisconsin Plaza  
1 South Pinckney Street  
Madison, Wisconsin 53701

Dear Mr. Basque:

This is in response to your letter of August 18, 1982 to this Division's Office of Small Business Policy in which you request interpretive advice as to the provision in Regulation D that bars investment companies from using Rules 504 and 505 under the 1933 Act. You have also requested advice as to the appropriate form of disclosure for a Small Business Investment Company relying on an exemption from registration under Regulation D.

You represent a newly formed corporation applying for a license as a Small Business Investment Company and preparing to undertake a stock offering of around \$500,000. You intend to structure the offering so that the issuer will fall within the exception to the definition of "investment company" contained in section 3(c)(1) of the Investment Company Act of 1940 (the "1940 Act").

The exemptions from 1933 Act registration in Rules 504 and 505 are not available to investment companies. This Division is of the view that this limitation should be construed to apply to investment companies as defined under the 1940 Act.

The term "investment company" is defined in Section 3 of the 1940 Act. Section 3 also includes certain exceptions to the definition. One exception, that contained in section 3(c)(1), removes from the investment company definition any issuer whose securities are held by not more than 100 persons, if the issuer "is not making and does not presently propose to make a public offering of its securities."

The Division of Investment Management had advised this Division that it regards an offering under Rule 505 to be non-public for purposes of section 3(c)(1) of the 1940 Act. This Division is of the view, therefore, that an issuer excepted from the investment company

definition under section 3(c)(1) of the 1940 Act does not fall within the scope of the provision in Rule 505 that restricts investment companies from using the rule.

The Division of Investment Management also has advised this Division that, depending on the facts of the particular case, it might regard an offering under Rule 504 to be public for purposes of section 3(c)(1) of the 1940 Act. Thus, an issuer engaged in the activities described in section 3(a) of the 1940 Act and making or proposing to make an offering under Rule 504 might fall within the definition of investment company under the 1940 Act. Given this interpretation, this Division is of the view that the availability of Rule 504 to such an issuer will depend on whether the offering under Rule 504 is deemed public or non-public for purposes of section 3(c)(1) of the 1940 Act.

Your letter also raises a question concerning the disclosure obligations under Regulation D for a Small Business Investment Company. Rule 502(b)(2)(i)(A) directs the non-reporting issuer to Form S-18 as a guide for the preparation of its Regulation D disclosure document. The rule further provides that if Form S-18 is not available to the issuer, it should turn to that form of registration that the issuer would be entitled to use. This Division is of the view that a Small Business Investment Company may refer to Form N-5 in complying with the provisions of Rule 502(b)(2)(i)(A).

Sincerely,

*David B. H. Martin, Jr.*

David B.H. Martin, Jr.  
Special Counsel

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