

Rule
252
File

MEMORANDUM

April 30, 1985

TO : John J. Huber, Director
Division of Corporation Finance

FROM : Mary E. T. Beach *me*
Mary M. Jackley *MMJ*

RE : Proposed Amendments to Rule 252

Rule 252 of Regulation A and Rule 505(b)(2)(iii) of Regulation D respectively provide that a Regulation A exemption and a Rule 505 exemption under Regulation D shall not be available if the issuer or any person in a specified relationship with the issuer is subject to one of the disqualifications described in Rule 252. The proposed amendments which make certain changes to the list of disqualifications are intended to reduce the necessity of requesting relief from the "bad boy" provisions under Rule 252(g) by revising and/or deleting certain of the disqualifying provisions. We will, of course, have to discuss any changes with NASAA.

The term "officers" in Rule 252(d) should be revised to read "executive officers." This change is suggested to prevent disqualification of an issuer by a person with the title of "officer" but without the necessary policy and decision-making functions normally associated with such title. Executive officers performing policy and decision-making functions who are subject to any of the Rule 252(d) disqualifiers would still cause the entire entity to be disqualified pursuant to Rule 252(d). The change is also proposed in order that the officers disqualified will parallel those for whom disclosure is required in Item 401 of Regulation S-K, namely "executive officers."

In view of the Bankers Trust case we might also want to clarify the term "underwriter" in Rule 252(d).

As you know, in interpreting the present requirement we have said that persons who are subject to an administrative order with undertakings are disqualified under Rule 252 for the duration of the undertakings or until a waiver is granted. We suggest that Rule 252(d)(3) be revised to state that being subject to undertakings in an administrative order will not constitute a disqualification. The Division of Enforcement has had trouble in negotiating settlements with undertakings because of the disqualification. Since undertakings seem to be a good thing for investor protection, our disqualification rules probably should not be a disincentive for giving the undertakings.

We should also reconsider Rule 252(e) which provides that:

"no exemption ... shall be available for the securities of any issuer if any underwriter of such securities was ... an underwriter of any securities:

(1) Covered by any registration statement which is the subject of any ... stop order entered within five years ..."

Although the court in the Olsen */ case did not accept the argument that this provision represented a denial of due process since the underwriter was not named in the stop order, some people in General Counsel's Office (Linda Feinberg particularly) still feel that there could be a successful challenge on the due process question. We are not suggesting that the rule be changed only that we discuss it among ourselves and possibly with General Counsel's Office.

*/ Olsen & Company v. SEC, No. 82-0228W (D. Utah Aug. 19, 1982).