

State of Texas
State Securities Board
Austin, Texas

September 23, 1981

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

Re: File No. S7-891

Dear Mr. Fitzsimmons:

Please accept these comments regarding proposed Regulation D.

Section 230.501(a)(6) -- I seriously question whether a net worth of \$750,000 is sufficient to depict an "accredited investor". The net worth requirement should be at least \$1 Million. Further, that Million Dollar net worth should be exclusive of home, home furnishings and personal automobiles. "With the enormous inflation of real estate values in recent years, a home can represent a substantial portion of a person's net worth. A person could have a net worth of \$750,000, much of which was tied up in home, home furnishings and automobiles so that the person had little discretionary income to make any type of investment. Unless the net worth requirement is raised to at least \$1 Million, I would urge that paragraph 6 be deleted from the Rule. The inclusion of a net worth concept in the limited offering exemption is new. The Rule would work equally well without the inclusion of a net worth basis for qualifying as an accredited investor. However, I am not opposed to the inclusion of a net worth requirement if the requirement is high enough to be a realistic measuring device.

Section 230.501(a)(7) -- The \$100,000 adjusted gross income test is deficient as a measuring standard of wealth or sophistication because it must be met for only one year. A prospective investor may have had an average adjusted gross income of \$20,000 a year over the preceding three years, and some windfall give him an income of \$100,000 in a single year. I strongly urge that the Rule require that the person have an income in excess of \$100,000 for each of the three preceding years. Unless such a requirement exists, I think that paragraph (7) should be deleted from the Rule. The inclusion of a gross income test for qualifying as an accredited investor is new and does not exist in the Rules which are being replaced by Regulation D.

Section 230.501 (d) - In calculating the number of purchasers, would it not be proper to also exclude under subparagraph (1)(i), any dependent of the purchaser, whether or not the dependent has the same home as the purchaser? In today's society it is common for a "purchaser" to have minor children who live with an ex-spouse in another home, and on whose behalf a "purchaser" will frequently want to purchase securities.

Section 230.502(b)(2)(i)(A) and (B) -- Why is the reference to "independent public accountant or certified public accountant"? As drafted, "independent" modifies only "public accountant". It seems unreasonable to me that the public accountant, whether certified or not, should be independent. Otherwise, a great deal of protection to investors will be lost. I can see no reason for this distinction and presume that it may be a drafting error.

Section 230.502(c) -- The advertising concept as embodied in the Rule is far too narrow, and is perhaps the biggest single flaw in the proposed Rule. Subparagraphs 1 and 2 do not come close to depicting the various circumstances in which advertising and general solicitation occur. I fear that subparagraphs 1 and 2 are so narrow that they, by implication, approve other forms of advertising and general solicitation. For example, the proposed language would not prohibit mass mailings, "cold calls" by telephone boiler rooms, or door-to-door solicitation. Unless subparagraphs 1 and 2 are completely redrafted so as to encompass the universe of advertising and general solicitation, I would suggest that the subparagraphs be stricken entirely. Since there are many differences between advertising and solicitation, perhaps the two subjects should be treated separately.

Section 230.503(c) -- The requirement to furnish information to state administrators should be expanded to include those sales made to accredited purchases identified in Sections 230.501(a)(5), (6) and (7). There is insufficient distinction between non-accredited investors and the above identified accredited investors to place them in a different category insofar as supplying information to a state administrator is concerned.

Section 230.505(a)(2) and (3) - I seriously question whether the five-year limit is long enough to provide proper investor protection. I would urge that the period of time be doubled to ten years. Also, the time period in subparagraph (2)(iii) should run from the date of release from incarceration or probation of the convicted criminal and not from the date of the conviction. Otherwise, a con man may use the exemption while still incarcerated or on probation for serious violations of law.

Section 230.506 -- I question the wisdom of eliminating the sophistication test for sales to investors who meet the definition of accredited investor under Section 230.501(a)(5), (6) and (7).

The following are technical comments.

Throughout the proposed Rule, references are made to sales made pursuant to, for example, "§230.504 to 230.506". To be more precise, should not the reference be "through" rather than "to"? On several occasions, I have seen "to" construed so as to not include the last number mentioned, i.e., office hours from 8:00 to 5:00 do not mean from 8:00 to 5:59.

Section 230.502(b)(1)(ii) -- The reference to "(a)(i)(ii) and (iii)" should be "(a)(1)(2) and (3)". Also, the reference to "(b)(2)" in the last sentence must not be correct, or the last "and" in the sentence should be "in lieu of", or the sentence should end before the "and"; otherwise, the sentence makes no sense.

Section 230.505(a)(1) -- Should the phrase not be, "for not more than thirty-six months"? Otherwise, the statement regarding thirty-six months states that the issuer cannot have been a reporting company within the preceding thirty-six months, which I do not believe is the intent.

Very truly yours,

Richard D. Latham
Securities Commissioner

cc: Edward F. Greene
Lee B. Spencer, Jr.
Mary E. T. Beach
Paul Belvin
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Members of Subcommittee on Small Business Financing -- NASAA