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Edward F. Greene, Esquire
Securities and Exchange Commission
500 North Capitol Street
Washington, DC 20549

RE: Proposed Regulation D, Release No. 33-6339
File No. S7-891

Dear Mr. Greene:

This letter will confirm our conversation concerning proposed Regulation D, relating to private offerings. It also expresses certain preliminary personal comments with to the proposal.

The Release indicates several statutory bases for the proposed actions, including specifically the exemptions contemplated by Sections 3(b), 4(2) and 19(c)(3)(C) of the Securities Act of 1933. While Release 33-6339 mentions that issuers may continue to rely on exemptions created under the statute, it does not emphasize that the Regulation is a safe harbor and that issuers may continue to rely on the exemption contained in Section 4(2), which is self-implementing.

You have made clear that the proposed Rules are not intended to be in derogation of, or a limitation on, the exemption now available under Section 4(2). To the extent that Regulation D or any Rules therein are promulgated under Section 4(2), they may be viewed as a non-exclusive safe harbor. The ABA subcommittee reviewing the Regulation D proposal, which I chair, is therefore assuming that the new Rules will in no way limit the availability of the Section 4(2) exemption as it exists apart from any rules which may be adopted.

<u>The Need for a Section 4(2) Interpretation</u>

I offer the following personal comment on what I consider to be the appropriate approach to a safe harbor rule relating to one of the statutory exemptions and the need for an interpretation of the statutory law of Section 4(2). A safe harbor rule should follow in general terms the requirements of the underlying statutory provision. It may be justifiable for the terms of a safe harbor rule to be slightly more demanding than the underlying statutory provision, but the additional

burdens should not be unrelated to those imposed by the statute itself. The additional burdens represent the trade-off for the certainty afforded by the safe harbor. Ideally, the safe harbor rule should be so structured that a party in substantial but not absolutely perfect compliance with the rule would be able to establish the exemption directly under the statute in most if not all cases.

It is difficult to comment meaningfully on Regulation D without having some understanding of the statutory law of Section 4(2) apart from the Regulation. Unfortunately, there is a considerable amount of confusion and conflict among the cases concerning the requirements of the statutory law exemption. By way of illustration, many decisions, including a number decided as recently as the last year or two, continue to cite the factors enunciated in Release No. 33-285 of 1935. However, many of these factors would appear to be totally irrelevant from the point of view of the underlying statutory purposes. For your further information, I enclose a galley proof of an article which will appear shortly in the Review of Securities Regulation, detailing this as well as many other areas of conflict and confusion in the cases dealing with Section 4(2).

I believe it would be most opportune for the Commission to comment on the statutory requirements under Section 4(2) in connection with its further actions on Regulation D. Such commentary might be embodied either in the adopting release, or in a companion interpretive release.

While the Commission is reviewing the entire subject of the private offering exemption, it should not miss the opportunity to clear up some of the confusion relating to the underlying statutory law. Stating the matter somewhat differently, the benefits of the Commission's most welcome initiative. In proposing safe harbor rules for private placements would be only partially realized if the Commission failed to comment at least in general broad brush terms on some of the troublesome issues underlying the statutory law.

I believe the Commissions interpretation is particularly needed with respect to the significance of the number of offerees under statutory law. Under Rules 146 and 242 as well as proposed Rules 505 and 506, the manner of the offering is appropriately regulated, but there is no limit on the number of offerees. With respect to the number of purchasers, the cited Rules establish an objective test -- 35 purchasers (subject to the aggregation of closely related persons), plus an unlimited number of "big ticket" buyers. I believe that this aspect of the Rules represents a very salutary improvement over the statutory law as it had been widely perceived previously. The general approach of the Rules (if not the specific numbers) should be embodied in a Commission interpretation of statutory law.

Although Ralston Purina and every case following has made clear that the number of offerees and purchasers was not determinative with respect to the availability of the exemption, experienced counsel now feel nonetheless that certain practical, although ill-defined, rules of thumb should limit the number of offerees and purchasers. Assuming that the Rules represent a proper interpretation of the statute, there is no reason why the statute itself cannot be reinterpreted by the Commission to adopt an approach similar to that in the Rules.

It is clear that an issuer need not make an election as a matter of law to reply exclusively either on the safe harbor Rules or on section 4(2). However, as a practical matter, parties now often feel compelled to make such an election, and they may well feel the same compulsion under Regulation D. At the counseling stage in planning a transaction, few lawyers would advise their clients that they can plan a transaction in reliance on statutory law, but using the Rule 146 approach to the number of offerees and the manner of the offering. That is, if the issuer plans to rely on statutory law and forego the benefits of Rule 146 safe harbor, counsel will normally advise that the number of offerees must be suitably limited. The same advice is likely to be given under Regulation D, absent the type of comment from the Commission which I have suggested. This consequence results from the long standing traditional approach to the statutory exemption reflected in much of the literature. However, it is a somewhat anomalous result, since virtually every court addressing the issue has held that the number of offerees is not determinative of the availability of the exemption. They have held that there is no maximum number which can never be exceeded, nor is there a minimum below which the exemption automatically applies.

There is ample precedent for the Commissions' publication of a statutory interpretation. It would be completely consistent for the Commission to promulgate Regulation D as a specific and detailed safe harbor under Section 4(2) (and possibly other sections as well), and at the same time publish a broad brush interpretation which clarified some of the confusion regarding the self-implementing statutory provision. While the Commission's analysis of the statute would not necessarily bind courts, no doubt courts would find it highly welcome and very persuasive. Given the high degree of confusion and inconsistency now prevailing regarding statutory law, I believe the Commission would be missing a unique opportunity to assist the public and the courts if it acted solely on the safe harbor rules, without expressing its views on the statutory exemption.

On the crucial issue regarding the permissible number of offerees, a Commission interpretation indicating that the Rule 146/242 and 505/506 approach is proper would be of very great practical benefit. It would permit counsel at the planning stage to advise their clients that statutory law permits and unlimited number of offerees, so long as the manner of offering and number of purchasers are both

properly limited; and it would also justify counsel in rendering favorable opinions on transactions so structured. The Commission's interpretation would almost certainly be followed by the courts since, as noted above, the courts have consistently rejected the notion that there is a fixed maximum limit on the number of offerees.

Preliminary Comment on Rule 506

As published in the Release, Rule 506 does not conform to the description in the Release. Subparagraph (a) does not affirmatively create any exemption, in a manner parallel to Rule 504(a) or 505(a), and does not in fact contain "conditions to be met" as suggested by the caption. The safe harbor language which now appears in 506(a) would be appropriate to include in the preliminary notes, relating to Regulation ID in its entirety, since no part of Regulation D for transactions of any size is intended to preempt reliance on section 4(2).

As published, Rule 506(b) does not provide for an unlimited number of accredited purchasers in addition to 35 non-accredited purchasers.

Apparently the foregoing matters with respect to Rule 506 represent inadvertent drafting problems. I suggest that the Commission publish a clarification of these points promptly, so that others can respond in a meaningful manner in commenting on Rule 506.

As indicated, I will be chairing the ABA Committee which has been formed to comment on the Regulation D proposal, although the views expressed in this letter are preliminary ones on my own behalf and not on behalf of the Committee. Our Committee members would be pleased to consult with you or members of your Staff regarding the suggestions contained herein, if you believe that such consultation would be of assistance.

On a personal note, I congratulate the Commission upon its willingness to undertake the comprehensive review of existing rules and forms which have resulted in proposed Regulation D as well as the recently published integrated disclosure proposals. These proposals evidence an overall sensitivity to the public's needs and reflect a balance to implement the statutory purposes of investor protection while appropriately considering the burdens of compliance with the law.

Very truly yours,

Carl W. Schneider

cc: George A. Fitzsimmons, Secretary, SEC

Lee B. Spencer, Jr., Esquire
Paul A. Belvin, Esquire
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