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October 5, 1981

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

RE: File No. S7-891

Dear Mr. Fitzsimmons:

The following comments are in response to SEC Release #33-6339, issued August 7, 1981, by the Commission. These comments specifically respond to proposed Regulation D, governing limited offerings of securities without registration. They follow our prior comments of February 18, 1981, in response to Commission Release #33-6274 regarding incorporation of the accredited investor concept of Rule 242 into Rule 146.

The Commission, by proposing elimination of present Rules 240, 242, and 146, is trying to facilitate limited offerings so as to meet the capital formation needs of smaller businesses. This represents a further development of recent Congressional and SEC actions to more specifically define the parameters of offerings not subject to registration.

Present Rule 146 exempts issuers from the registration requirements of the Securities Act of 1933. The offering of such securities is limited to 35 persons, but individuals who are able to pay for a securities issue with a minimum of $150,000 or more in cash or in installments are excluded from the 35.

Currently, under Rule 146, the issuer must make determinations that the up to 35 offerees are capable of evaluating the risk of investment or are able to bear the risk of an investment. Such offerees could have widely varying incomes and degrees of financial acumen.

New Rule 506, replacing Rule 146, would relieve the offerer of the burden of subjectively determining the financial sophistication of investors and their ability

to bear loss, by excluding "accredited investors" from the 35 person limitation. The criteria for defining an accredited investor are found in proposed Rule 501.

It is our opinion that while it is commendable to provide objective standards as to who can evaluate the risk of an investment, or who can bear financial loss, some of the definitions of an accredited investor are unnecessarily restrictive and inconsistent with the Commission's goal of broadening public participation in the market without undue regulatory burden. The following illustrations will clarify our position:

1. Accredited investors are defined in proposed Rule 501 as certain institutions like banks, investment companies, business development companies, and others; directors or officers of the issuer of the securities; any person who purchases $100,000 or more of securities for either cash or an obligation to pay the obligation within 60 days of first issuance of the securities; any person whose individual net worth is in excess of $750,000 and any individual who has an adjusted gross income of $100,000. The $150,000 installment investor of Rule 146 is eliminated in the proposed Rule.

2. The requirement for full cash payment where $100,000 of securities is bought is restrictive when compared to the current installment payment provision of Rule 146, because it excludes credit-worthy investors from investment opportunities. Whether an individual can obtain credit in excess of $100,000 is a judgment made by lenders in the private sector who perform an evaluation of an individual's financial capability. In effect, lenders perform the same function as issuers of securities currently perform for the 35 investors under current Rule 146, who are not subject to any specific standard of wealth. If the Commission is concerned about the bargaining power of an investor who borrows to purchase securities, a limitation period on installment payments could be imposed (e.g., a 10-year payout). But a cash requirement unduly substitutes the SEC's judgment for the marketplace's judgment on individual credit-worthiness.

Another safeguard which the marketplace imposes on the use of installment payments is the current high interest rate situation. The current interest rate situation could well discourage extensive installment payment plans. In the case where installments are used, it is more likely that an individual able to borrow at high interest rates over a period of time is one whose financial worthiness has been carefully evaluated by lenders.

3. The net worth requirement of $750,000 is an alternative standard to qualify as an accredited investor. This figure seems arbitrary: since the net worth requirement stands independent from the other standards, such as the minimum $100,000 purchase, it cannot be predicted with any certainty that someone with a net worth of $500,000 or even $300,000 is going to over-extend themselves in

terms of their assets. Again, referring back to our comment on installments, the checks and balances of the availability of credit will no doubt encourage individuals to commit only that portion of their resources which they can in fact afford to put at risk.

Since the Congressional background of the proposed Rule is the Small Business Investment Act of 1980, the Commission should be encouraging and not discouraging investment in smaller businesses. Congress stated in the legislative history to Public Law 96-477 that the Act seeks to reduce the cost of government regulation to the extent it can be done without sacrificing necessary investor protection. The requirements in proposed Rule 506 that would give non-accredited investors the same access to information that they have now under Rule 242 should meet the Congressional concern of full disclosure.

4. Finally, the qualification, for accredited investors, of $100,000 adjusted gross income, should apply to joint tax returns as well as to single tax returns. Adjusted gross income is a figure which is calculated after above-the-line deductions for business expenses. An individual or couple's gross income could be far higher than $100,000. This could be a reflection of financial sophistication, not of financial naiveté. Indeed, consideration could be given to defining an accredited investor as someone whose gross income prior to adjustment is more than $100,000. The adjusted gross income standard (for tax purposes) should not be incorporated into the accredited investor concept because of its variable nature.

Over-all, the proposed rules for limited offerings simplify the requirements for obtaining an exemption from registration of securities. We believe that with the suggestions made above, issuers and investors will benefit by providing capital for growing industries and new technology.

Certainly, whatever the Commission decides to do, should be in harmony with the over-all thrust of current public policy to encourage capital formation, as exemplified by the Economic Recovery Act of 1981. Individuals should be encouraged to invest their tax savings in healthy, growing ventures, and issuers should have the confidence that an expanded market now exists in which those securities can be sold. The means to finance capital formation should be as varied as the financial community itself in order to stimulate, and not stifle, economic growth.

Sincerely,

Stephen M. Feldman
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