National Association Of Securities Dealers, Inc.
Washington, D.C.

October 21, 1981

Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Attn: Mr. George A. Fitzsimmons, Secretary

Re: File No S7-391

Members of the Commission:

The National Association of Securities Dealers, Inc. ("Association") is pleased to have the opportunity to comment on a series of rule proposals published by the Securities and Exchange Commission ("Commission") in Securities Act Release No. 6339 (August 7, 1981) ("Release"). The views expressed herein are those of the Direct Participation Programs Committee and the Real Estate Committee' ("Committees") of the Association's Board of Governors and have not been reviewed by the entire Board. The Board is kept apprised of the Committees' actions on matters of this nature, however, and each member of the Board is being sent a copy of this letter.

In the Release, the Commission proposes a new series of rules, designated Regulation D, governing the offers and sales of securities without registration under the Securities Act of 1933 ("1933 Act"). The Committees wish to commend the Commission for its continuing efforts to alleviate regulatory burdens particularly on smaller businesses, through less restrictive exemptions from registration, coordination of exemption requirements and increases in the amount of capital which may be raised without the need for registration.

In addition, the Committees support the commitment of the Commission to increasing the uniformity of federal and state securities laws. We were in agreement with the concept embodied in Section 19(c)(3)(C) as added to the 1933 Act in 1980 and are pleased to see proposals to implement that provision We further believe that the joint effort of the Commission and the North American Securities Administrators Association ("NASAA") on Regulation D represents a significant milestone in the movement toward greater uniformity between state and federal securities regulation. We also recognize, however, that no substantive benefit will be realized from this joint effort unless all parties, including the Commission, NASAA, and each of the states, commit themselves to

a coordinated, uniform approach in adopting Regulation D and, perhaps even more important, in interpreting its provisions following adoption. The Committees strongly urge each of the parties involved to weigh carefully any possible departure from the uniform provisions of the Regulation.

Our comments on particular matters are discussed below in the order in which they appear in the Release.

Proposed Rule 501

The Committees support the Commission's proposal to adopt a uniform definition of "accredited investor" to be applicable to offerings pursuant to Rules 505 and 506. The Release indicates that the Commission is proposing to revise the definition of accredited investor as contained in Rule 242 in response to the concerns of many commentators who believe the Commission should develop an objective test for persons purchasing less than $100,000. As proposed, the definition would include as accredited investors any natural person who, at the time of the offering, has a net worth in excess of $750,000, and any natural person who had an adjusted gross income in excess of $100,000 as reported for federal income tax purposes on the most recent tax return. The Committees have consistently urged that the Commission utilize more objective standards in the criteria for qualifying investors to participate in private offerings and we are pleased with the movement in that direction.

While the Committees support more objective criteria we question certain aspects of the proposed definition of accredited investor. First, we are concerned with the requirement in Rule 501 (a) that the issuer and any person acting on the issuer's behalf believe that persons meet the rule's criteria "after reasonable inquiry". We were disappointed that the Commission has apparently rejected the concept of certification by purchasers of their compliance with various qualifying criteria, especially the criteria for net worth and income. The Committees believe that much confusion can arise as to what constitutes "reasonable inquiry", re-injecting a great deal of subjectivity and uncertainty into the process of raising capital through private offerings. We believe the concept of self-certification has merit and we urge the Commission to consider incorporating that concept into the definition of "accredited investor". Should the Commission choose not to adopt self-certification as the exclusive means to establish compliance with the Rule's criteria, we urge the Commission to provide that self-certification will presumptively satisfy the requirement for a reasonable inquiry.

We question the need for both the issuer and its representative to reach a finding of compliance with the Rule's criteria. Such a requirement appears to only duplicate obligations and resultant costs.

Secondly, the Committees believe the Commission should reconsider certain of the payment conditions and time periods to be imposed on persons purchasing $100,000 of securities pursuant to Rule 501(a)(5). In particular, we are disturbed by the proposal to require the $100,000 purchase price to be fully paid within two years even where payment is secured by an unconditional letter of credit issued by a bank. We believe that there should be a distinction between an obligation secured by an unconditional letter of credit and one which is secured by other collateral, in terms of the discharge date limitation. Where the obligation is secured by a letter of credit, the Committees believe that the two-year outside discharge date appears to be needlessly restrictive. We question the need for a restriction on the discharge date in view of the criteria which one usually must satisfy in obtaining an unconditional letter of credit and the commitment to pay made by the bank issuing the letter.

With respect to those obligations secured by some other form of collateral, the Committees believe that a two-year discharge date is unduly restrictive. We encourage the Commission to permit a discharge date at the end of five years, as comprehended by the Commission's "no-action" letter in connection with Continental-American Drilling Program 1981-I, Ltd. (August 24, 1981).

Thirdly, with respect to the provisions in Rule 501(a)(6) and (7), the Committees believe specific dollar amounts will facilitate use of the private offering exemption. We have certain questions concerning details of the proposal, however. The Committees question the need to restrict paragraphs (6) and (7) to natural persons. Entities other than natural persons, e.g. law firms organized as either partnerships or corporations, often invest in private offerings and we question the need to require such entities to purchase at least $100,000 to qualify as accredited investors. The Commission should consider extending these categories to "any person", e.g. trusts, corporations and partnerships, not formed for the purpose of making the particular investment.

Lastly, we believe the use of adjusted gross income as an indication of one's financial standing under Rule 501(a)(7) is a mistake. Because adjusted gross income reflects the result of various tax-oriented investments and transactions, the more sophisticated or better advised investor may have a lower adjusted gross income than another person with a similar amount of income. We would therefore suggest that the Commission utilize another figure, perhaps one based on a cash flow income concept. If such a concept is adopted, it would be reasonable to raise the dollar amount to perhaps $150,000.

Proposed Rule 502

The Committees are particularly pleased that the Commission proposes in Rule 502(e) to limit payment of commissions or other remuneration in connection with

sales under Regulation D to broker/dealers registered both under the Securities Exchange Act of 1934 ("1934 Act") and applicable state regulations in those states where the securities are to be sold. In 1980, the Association published the results of a study of members' participation over a 12-month period in the placement of some 1400 private offerings. That study indicated apparently widespread payments by issuers to various parties engaged in selling activities but not registered as broker/dealers or associated persons. The Committees view this practice as one of the most serious problems related to the sale of securities in today's market place. We believe that permitting remuneration only to registered persons should substantially reduce this problem and we encourage the Commission to adopt this concept.

The Committees believe the Commission should consider clarifying certain details of Rule 502(e), however. First, the proposed language appears to prohibit payments by purchasers to their advisers or purchaser representatives who may not be registered broker/dealers. This problem could be addressed by exempting transaction-related remuneration paid by the purchaser or by restricting the Rule's application to remuneration paid by the issuer.

The Commission may wish to clarify the reference in Rule 502(e) to "applicable regulations" in states where the securities are offered. We assume that this language is intended to refer to existing state broker/dealer registration requirements and is not intended to extend those requirements beyond their current application. Amended language to better reflect this intent would be beneficial, however.

In addition, the Committees believe that the state of the law in this area would be clarified if the Commission would either adopt proposed Rule 3a4-1 under the 1934 Act or rescind the proposal. The proposed Rule would clarify circumstances under which certain parties must register as broker/dealers and a clear statement of the Commission's policy in that respect would be very constructive.

Proposed Rule 505 (Current Rule 242)

The Committees commend the Commission for proposing to eliminate certain issuer qualifications which would expand the availability of Rule 242 (proposed Rule 505) to limited partnerships. The Association has long maintained that no logical basis exists for discrimination among issuers based on the form of organization. We believe that the Commission is taking a routine step in extending this new capital raising tool to limited partnerships.

We are concerned, however, that the Commission may be limiting the value of proposed Rule 505 to limited partnership offerings over $500,000 by the requirement of Form S-18 disclosure. As a practical matter, Form S-18 is not

designed for the kind of disclosure which is appropriate in connection with a limited partnership offering. While the Committees encourage the Commission to broaden the availability of Form S-18 to include limited partnerships, one must recognize that some technical revisions to Form S-18 will be necessary in that process. To facilitate use of Rule 505 by limited partnerships pending a revision of Form S-13, the Commission might consider issuing a release to clarify how the form's requirements can be satisfied by partnerships. In the alternative, the Commission might consider developing a separate registration form for offerings by limited partnerships.

Proposed Rule 506 (Current Rule 146)

The Committees are pleased that the Commission is proposing to adopt the concept of "accredited investor" for Rule 506, thereby providing a more objective standard by which the issuer may determine the sophistication of an accredited investor. In addition, the Committees approve of the Commission's efforts to ease the restrictions of Rule 146 by eliminating the economic risk test and shifting the focus of the sophistication requirement from offerees to purchasers. We believe these changes will help facilitate the use of the present Rule 146 type of offering mechanism. We also believe that investor protection remains assured, especially in view of the longstanding Association rule requiring member broker/dealers to determine the suitability of investments for their customers.

Lastly, the Committees believe that the Commission's manner of proposing Rules 505 and 506 may raise a question as to whether offerings using staged payments could be made under the proposed rules. Federal Reserve Board Regulation T exempts offerings made pursuant to Section 4(2) of the 1933 Act. Rule 146 is adopted under that section and offerings relying on Rule 146 have routinely been made with staged payments. In addition, while Rule 242 was adopted under Section 3(b), the apparent intention of the Commission to open up proposed Rule 505 to use by limited partnerships would seem to require a similar exemption as staged payments are prevalent in such offerings. The statutory authority section of the Release indicates that the rules are proposed pursuant to Sections 3(b) and 4(2), without a notation as to whether specific rules have been proposed pursuant to specific sections. It may be that the rules are proposed pursuant to both sections, in which case the exemption from Regulation T would still be available. If either Rules 505 or 506 are based solely on Section 3(b) , however, Regulation T would presumably apply, prohibiting staged or deferred payments. The Commission is requested to clarify this issue.

The Association appreciates the opportunity to present comments on these proposals. If we can provide any further assistance to the Commission or its staff in their further consideration of these proposals, do not hesitate to call on us.

Sincerely,

Frank J. Wilson
Executive Vice-President
General Counsel