

12-47-30 SBO4

ACTION MEMORANDUM

February 16, 1982

TO: The Commission

FROM: Division of Corporation Finance

SUBJECT: 1. Adoption of Regulation D, a series of new rules intended in part to be a uniform federal-state exemptive scheme, that provides three exemptions from registration under the Securities Act of 1933 (the "Securities Act") for transactions involving limited offers and sales;

2. Adoption of Form D, a uniform notice of sales form for Regulation D and Section 4(6) of the Securities Act;

3. Adoption of Rule 215 which establishes additional classes of "accredited investor" for purposes of Section 2(15)(ii) of the Securities Act;

4. Adoption of conforming amendments to Rules 144 and 148 under the Securities Act; and

5. Rescission of Rules 146, 240 and 242 under the Securities Act and Forms 146, 240, 242, and 4(6), which have been replaced by Regulation D and Form D.

RECOMMENDATION: That the Commission authorize publication of a release announcing the adoption of Regulation D, Form D, Rule 215, and conforming amendments to Rules 144 and 148, the rescission of Rules 146, 240 and 242 and Forms 146, 240, 242, and 4(6), and the approval of the public release of the Final Regulatory Flexibility Analysis regarding Regulation D, Form D, and Rule 215. (Attachment A)

ACTION REQUESTED BY: Week of March 1, 1982

TENTATIVE SUNSHINE ACT STATUS: Open Meeting

**REGULATORY FLEXIBILITY ACT STATUS:** An Initial Regulatory Flexibility Analysis was prepared for proposed Regulation D, Form D and Rule 215 and a summary of that analysis was published in the Federal Register with the proposing release. A Final Regulatory Flexibility Analysis for Regulation D, Form D, and Rule 215, which need not be published in the Federal Register but must be made available to the public on request, is provided as Attachment E. DEPA (H. Haworth) concurs in this analysis.

**PAPERWORK REDUCTION ACT STATUS:** Form D is subject to the Paperwork Reduction Act. The Office of Management and Budget ("OMB") has approved Form D and assigned it OMB Control No. 3235-0076 which expires on June 30, 1982. A submission to OMB, reviewed by the Office of Executive Director, will be made to request extension of the expiration date for three additional years.

**NOVEL, IMPORTANT OR COMPLEX ISSUES:** The applicability of Regulation D as the principle element in a uniform federal-state system of exemptions.

**VIEWS OF OTHER OFFICES OR DIVISIONS CONSULTED:** The Office of the Chief Accountant (Sampson), DEPA (Davis), the Office of General Counsel (Greene) and the Division of Enforcement (Fedders) concur in the recommendation. The Division of Market Regulation raises no objection to the recommendations. The Division of Investment Management (Brown) and Corporate Regulation (Herman) have provided technical assistance and raise no objections to the recommendation.

As indicated in the memorandum, the Division has coordinated the development of Regulation D with the North American Securities Administrators Association ("NASAA") Subcommittee on Small Business Financing. In October 1981, NASAA formally endorsed a variation of Rule 505 of Regulation D as a uniform federal-state exemption.

**PRIOR COMMISSION ACTION:** The Commission solicited comments on the efficacy of certain exemptions from registration under the Securities Act as they relate to the capital needs of small businesses in Release No. 33-6274 (December 23, 1980). The Commission published proposed Regulation D and Rule 215 for comment in Release No. 33-6339 (August 7, 1981) (Attachment B).

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### I. Introduction and Summary

As the Commission is aware, Regulation D was proposed for comment in August 1981. [Footnote: A summary of the comment letters was prepared by the Division's Office of Small Business Policy and is attached (Attachment C).] The proposals represented a major step in the Commission's efforts to simplify and clarify its limited offering exemptions and to expand the availability of existing exemptions to comport with statutory authorizations and current practice. [Footnote: These rules are the culmination of the Commission's reevaluation of limited offering exemptions under the Securities Act which began over a year ago. See Release No. 33-6274 (December 23, 1980), in which the Commission issued an advance notice of rulemaking release soliciting views on limited offering exemptions under the Securities Act.] Moreover, the proposals represented the first major step in establishing uniform federal and state exemptions in order to facilitate capital formation consistent with investor protection.

As proposed, Regulation D consisted of a series of six rules, Rules 501-506, which govern the offers and sales of certain securities without registration under the Securities Act. The regulation consolidates and replaces limited offering exemptions currently in Rules 240 and 242 as well as the private offering exemption under Rule 146. Form D is a notice of sales form for offerings under Regulation D, as well as under Section 4(6) of the Securities Act. It replaces current notice of sales Forms 146, 240, 242 and 4(6). Rule 215 provides a definition of "accredited investor" for purposes of Section 2(15)(ii) of the Securities Act, thereby augmenting the statutory core of that definition in Section 2(15)(i). The combined elements of the "accredited investor" definitions are repeated in Regulation D.

The Commission received 88 comment letters which generally supported the proposals. [Footnote: A summary of the comment letters was prepared by the Division's Office of Small Business Policy and is attached (Attachment C).] While certain changes were made to the proposals in response to commentators and

the views of NASAA, the revisions are substantially similar to the proposals. Rather than reiterate all the changes reflected in the attached draft release, this memorandum focuses on the cooperative efforts between the Division and NASAA. The recommended revisions represent the culmination of this joint effort, one which is intended to establish for the first time a uniform system of federal-state limited offering exemptions.

## II. Regulation D and Federal-State Uniformity

As a result of coordination between the Commission and NASAA, Regulation D is the principle element in an evolving system of uniform federal-state exemptions. Appreciation of the applicability of Regulation D to the uniform system is enhanced by a review of that coordination.

Subsequent to the adoption of Rule 242 [Footnote: See Release No. 33-6180 (January 17, 1980).], NASAA's Subcommittee on Small Business Financing was given the charge of developing a uniform exemption designed to facilitate small business capital formation at the state level. In view of the enactment of Section 19(c) [Footnote: Section 19(c) was enacted in October 1980 as part of the Small Business Investment Incentive Act of 1980, 94 Stat. 2275 (codified in scattered sections of 15 U.S.C.)]. It mandates that the Commission work with state securities associations in effectuating greater uniformity in federal-state securities matters. It is designed to encourage collaborative work on such projects as standardization and elimination of forms, the reduction of duplicative clearance procedures and the development of a uniform small business exemption.] and the publication of the Commission's advance notice release, the Division recommended to NASAA that it defer further action on its proposals until the Division's Office of Small Business Policy could consider the comments received and develop recommendations for revisions to the existing exemptive scheme.

The Division worked closely with the NASAA Subcommittee during the development of the proposed regulation last summer. Drafts were exchanged and a number of substantive changes resulted. At the time the Commission released proposed Regulation D for comment, the NASAA Board of Directors approved the concept of a uniform federal-state exemptive system with Regulation D as the principle element and solicited comments on proposed Regulation D from its membership.

In October 1981, NASAA formally adopted, upon the recommendation of the NASAA Subcommittee, a uniform limited offering exemption as an official policy guideline. [Footnote: A copy of the adoption accompanies this memorandum as Attachment D.] That exemption, which had two alternatives, was based on proposed Rule 505 of Regulation D but differed from that provision in certain

respects. Subsequent to the endorsement of the uniform exemption, the NASAA Subcommittee and the Division have coordinated to minimize differences in the NASAA policy guideline and Regulation D. The Division believes that these efforts have been successful and understands that the NASAA Subcommittee will recommend for adoption by NASAA at a meeting this spring a new uniform exemptive system as an official policy guideline. This system, which will revolve around Regulation D, will endorse Rule 505, with certain additional terms, and Rule 506.

The framework of uniform exemptions which Regulation D will support is expected to operate as follows. Under Rule 504, registration would not be required at the federal level for offerings below \$500,000 by non-reporting companies. Moreover, if such offerings are registered in states requiring the delivery of a disclosure document, the offerings would not be subject to manner of sale restrictions and the securities would not be deemed to be restricted. This reflects the belief that greater reliance on state securities laws is appropriate given the size of these offerings and their expected geographic limits. Rules 505 and 506, and applicable definitions, terms and conditions in Rules 501-503, are intended to be uniform federal-state exemptions.

The additional terms that NASAA is expected to consider involve the following: (1) restriction on transaction related remuneration to other than state registered broker-dealers; (2) disqualification of issuers and other persons associated with offerings on the basis of state administrative orders or judgments; (3) qualification of investors based on the suitability of the investment; and (4) requirements for filing of the notices of sales.

The Division does not believe that these additional terms detract from the goal of increased federal-state uniformity. Because of differences between federal and state securities regulation, complete uniformity may not be an attainable objective. Certain additional terms, for instance, relate to valid state interests of jurisdiction which are not appropriately addressed in federal regulation. Other additional terms relate to the mechanics of regulating limited offering exemptions at the state level and are not necessary in a federal rule. These terms notwithstanding, the Division believes that Regulation D, as recommended herein, represents a significant step in the development of a uniform federal-state exemptive system.

### III. Conclusion

For the reasons discussed above, as more fully described in the attached release, the Division recommends that the Commission approve the recommendations set forth in the forepart of this memorandum.

## Attachments

A - Draft Release on Regulation D, Form D and Rule 215

B - Release No. 33-6339 (August 7, 1981)-Proposed Regulation D

C - Summary of Comments on Proposed Regulation D

D - NASAA Official Policy Guideline on Uniform Limited Offering Exemption

E - Final Regulatory Flexibility Analysis on Regulation D, Form D and Rule 215.