The Creation of American Securities Law:

The Intersection of Statutes, Case Law and Administrative Law

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Lisbon, Portugal

March 6, 2012

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Prohibitions Relating to Interstate Commerce and the Mails

Sec. 5. (a) *Sale or Delivery After Sale of Unregistered Securities.* Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) *Necessity of Prospectus Meeting Requirements of Section 10 of This Title.* It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) *Necessity of Filing Registration Statement.* It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

(d) Notwithstanding the provisions of section 3 or 4, unless a registration statement meeting the requirements of section 10(a) is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)).

Exempted Transactions

Sec. 4. The provisions of section 5 shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

(2) transactions by an issuer not involving any public offering.

Securities and Exchange Commission v. Ralston Purina Co.

Supreme Court of the United States, 1953.
346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494.

■ MR. JUSTICE CLARK delivered the opinion of the Court.

Section 4(1)[9] of the Securities Act of 1933 exempts "transactions by an issuer not involving any public offering" from the registration requirements of § 5. We must decide whether Ralston Purina's offerings of treasury stock to its "key employees" are within this exemption. On a complaint brought by the Commission under § 20(b) of the Act seeking to enjoin respondent's unregistered offerings, the District Court held the exemption applicable and dismissed the suit. The Court of Appeals affirmed. The question has arisen many times since the Act was passed; an apparent need to define the scope of the private offering exemption prompted certiorari.

* * *

Ralston Purina manufactures and distributes various feed and cereal products. Its processing and distribution facilities are scattered throughout the United States and Canada, staffed by some 7,000 employees. At least since 1911 the company has had a policy of encouraging stock ownership among its employees; more particularly, since 1942 it has made authorized but unissued common shares available to some of them. Between 1947 and 1951 * * * Ralston Purina sold nearly $2,000,000 of stock to employees without registration and in so doing made use of the mails.

In each of these years, a corporate resolution authorized the sale of common stock "to employees * * * who shall, without any solicitation by the Company or its officers or employees, inquire of any of them as to how to purchase common stock of Ralston Purina Company." A memorandum sent to branch and store managers after the resolution was adopted, advised that "The only employees to whom this stock will be available will be those who take the initiative and are interested in buying stock at present market prices." Among those responding to these offers were employees with the duties of artist, bakeshop foreman, chow loading foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer, and veterinarian. The buyers lived in over fifty widely separated communities scattered from Garland, Texas to Nashua, New Hampshire and Visalia, California. The lowest salary bracket of those purchasing was $2,700 in 1949, $2,435 in 1950 and $3,107 in 1951. The record shows that in 1947, 243 employees bought stock, 20 in 1948, 414 in 1949, 411 in 1950, and the 1951 offer, interrupted by this litigation, produced 165 applications to purchase. No records were kept of those to whom the offers were made; the estimated number in 1951 was 500.

in some special way, an individual, of course, who carries some special responsibility, who is sympathetic to management and who is ambitious and who the management feels is likely to be promoted to a greater responsibility." That an offering to all of its employees would be public is conceded.

The Securities Act nowhere defines the scope of § 4(1)'s private offering exemption. Nor is the legislative history of much help in staking out its boundaries. The problem was first dealt with in § 4(1) of the House Bill, H.R. 5480, 73d Cong., 1st Sess., which exempted "transactions by an issuer not with or through an underwriter; * * *." The bill, as reported by the House Committee, added "and not involving any public offering." H.R.Rep. No. 85, 73d Cong., 1st Sess. 1. This was thought to be one of those transactions "where there is no practical need for * * * [the bill's] application or where the public benefits are too remote." Id., at 5. The exemption as thus delimited became law. It assumed its present shape with the deletion of "not with or through an underwriter" by § 203(a) of the Securities Exchange Act of 1934, * * * a change regarded as the elimination of superfluous language. H.R.Rep. No. 1838, 73d Cong., 2d Sess. 41.

Decisions under comparable exemptions in the English Companies Acts and state "blue sky" laws, the statutory antecedents of federal securities legislation have made one thing clear—to be public, an offer need not be open to the whole world. In Securities and Exchange Comm. v. Sunbeam Gold Mines Co., 9 Cir. 1938, 95 F.2d 699, 701, this point was made in dealing with an offering to the stockholders of two corporations about to be merged. Judge Denman observed that:

> In its broadest meaning the term "public" distinguishes the populace at large from groups of individual members of the public segregated because of some common interest or characteristic. Yet such a distinction is inadequate for practical purposes; manifestly, an offering of securities to all red-headed men, to all residents of Chicago or San Francisco, to all existing stockholders of the General Motors Corporation or the American Telephone & Telegraph Company, is no less "public" in every realistic sense of the word, than an unrestricted offering to the world at large. Such an offering, though not open to everyone who may choose to apply, is none the less "public" in character, for the means used to select the particular individuals to whom the offering is to be made bear no sensible relation to the purposes for which the selection is made. * * * To determine the distinction between "public" and "private" in any particular context, it is essential to examine the circumstances under which the distinction is sought to be established and to consider the purposes sought to be achieved by such distinction.
>
> The courts below purported to apply this test. * * *

The Commission would have us go one step further and hold that "an offering to a substantial number of the public" is not exempt under § 4 (2). We are advised that "whatever the special circumstances, the Commission has consistently interpreted the exemption as being inapplicable when a large number of offerees is involved." But the statute would seem to apply to a "public offering" whether to few or many. It may well be that offerings to a substantial number of persons would rarely be exempt. Indeed nothing prevents the Commission, in enforcing the statute, from using some kind of numerical test in deciding when to investigate particular exemption claims. But there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation.

The exemption, as we construe it, does not deprive corporate employees, as a class, of the safeguards of the Act. We agree that some employee offerings may come within § 4 (2), e.g., one made to executive personnel who because of their position have access to the same kind of information that the act would make available in the form of a registration statement. Absent such a showing of special circumstances, employees are just as much members of the investing "public" as any of their neighbors in the community. Although we do not rely on it, the rejection in 1934 of an amendment which would have specifically exempted employee stock offerings supports this conclusion. The House Managers, commenting on the Conference Report said that "the participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public." H.R.Rep. No. 1838, 73d Cong., 2d Sess. 41.

Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable. * * * Agreeing, the court below thought the burden met primarily because of the respondent's purpose in singling out its key employees for stock offerings. But once it is seen that the exemption question turns on the knowledge of the offerees, the issuer's motives, laudable though they may be, fade into irrelevance. The focus of inquiry should be on the need of the offerees for the protections afforded by registration. The employees here were not shown to have access to the kind of information which registration would disclose. The obvious opportunities for pressure and imposition make it advisable that they be entitled to compliance with § 5.

Reversed.

■ The CHIEF JUSTICE and MR. JUSTICE BURTON dissent.

REGULATION D—RULES GOVERNING THE LIMITED OFFER AND SALE OF SECURITIES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

PRELIMINARY NOTES

1. The following rules relate to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the "Act"). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading.

2. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities. Regulation D is intended to be a basic element in a uniform system of federal-state limited offering exemptions consistent with the provisions of sections 18 and 19(c) of the Act. In those states that have adopted Regulation D, or any version of Regulation D, special attention should be directed to the applicable state laws and regulations, including those relating to registration of persons who receive remuneration in connection with the offer and sale of securities, to disqualification of issuers and other persons associated with offerings based on state administrative orders or judgments, and to requirements for filings of notices of sales.

3. Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of Rule 506 shall not raise any presumption that the exemption provided by section 4(2) of the Act is not available.

4. These rules are available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. The rules provide an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

5. These rules may be used for business combinations that involve sales by virtue of Rule 145(a) or otherwise.

6. In view of the objectives of these rules and the policies underlying the Act, Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

7. Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States.

Rule 501. Definitions and Terms Used in Regulation D

As used in Regulation D (Rules 501–508), the following terms shall have the meaning indicated:

(a) *Accredited Investor. Accredited investor* shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

(1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in Rule 506(b)(2)(ii); and

(8) Any entity in which all of the equity owners are accredited investors.

(b) *Affiliate.* An *affiliate* of, or person *affiliated* with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

(c) *Aggregate Offering Price. Aggregate offering price* shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.

(d) *Business Combination. Business combination* shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

(e) *Calculation of Number of Purchasers.* For purposes of calculating the number of purchasers under Rules 505(b) and 506(b) only, the following shall apply:

(1) The following purchasers shall be excluded:

(i) Any relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser;

(ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(iii) of this Rule 501 collectively have more than 50 percent of the beneficial interest (excluding contingent interests);

(iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(ii) of this Rule 501 collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and

(iv) Any accredited investor.

(2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this Rule 501, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (Rules 501–508), except to the extent provided in paragraph (e)(1) of this Rule.

(3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

(f) *Executive Officer. Executive officer* shall mean the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.

(g) *Issuer.* The definition of the term *issuer* in section 2(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 *et seq.*), the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.

(h) *Purchaser Representative. Purchaser representative* shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:

(1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:

(i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;

(ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this Rule 501 collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or

(iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this Rule 501 collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;

(2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;

(3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and

(4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

NOTE 1: A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 (*Exchange Act*) (15 U.S.C. 78a *et seq.*, as amended) and relating to investment advisers under the Investment Advisers Act of 1940.

NOTE 2: The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this Rule 501 must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for *all securities transactions* or *all private placements*, is not sufficient.

NOTE 3: Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

Rule 502. General Conditions to Be Met

The following conditions shall be applicable to offers and sales made under Regulation D (Rules 501–508):

(a) *Integration.* All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in Rule 405 under the Act (17 CFR 230.405).

NOTE: The term *offering* is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this Rule 502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (*i.e.* are considered *integrated*) depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S. See Release No. 33–6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

(a) Whether the sales are part of a single plan of financing;

(b) Whether the sales involve issuance of the same class of securities;

(c) Whether the sales have been made at or about the same time;

(d) Whether the same type of consideration is being received; and

(e) Whether the sales are made for the same general purpose.

See Release No. 33-4552 (November 6, 1962).

(b) *Information Requirements.* (1) *When Information Must Be Furnished.* If the issuer sells securities under Rules 505 or 506 to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (b)(2) of this Rule 502 to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under Rule 504, or to any accredited investor.

NOTE: When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) *Type of Information to Be Furnished.* (i) If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business, and the securities being offered:

(A) *Non-financial Statement Information.* If the issuer is eligible to use Regulation A (Rules 251–263), the same kind of information as would be required in Part II of Form 1–A (17 CFR 239.90). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.

(B) *Financial Statement Information.* (*1*) *Offerings Up to $2,000,000.* The information required in Article 8 of Regulation S–X, except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.

(*2*) *Offerings Up to $7,500,000.* The financial statement information required in Form S–1 (17 CFR 239.10) for smaller reporting companies. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(*3*) *Offerings Over $7,500,000.* The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(C) If the issuer is a foreign private issuer eligible to use Form 20–F, the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i)(B)(1), (2) or (3) of this rule, as appropriate.

(ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(ii)(A) or (B) of this rule, and in either event the information specified in paragraph (b)(2)(ii)(C) of this Rule 502:

(A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of Rules 14a–3 or 14c–3 under the Exchange Act, the definitive proxy statement filed in connection with that annual report, and if requested by the purchaser in writing, a copy

of the issuer's most recent Form 10–K (17 CFR 249.310) under the Exchange Act.

(B) The information contained in an annual report on Form 10–K (17 CFR 249.310) under the Exchange Act or in a registration statement on Form S–1 (17 CFR 239.11) or S–11 (17 CFR 239.18) under the Act or on Form 10 (17 CFR 249.210) under the Exchange Act, whichever filing is the most recent required to be filed.

(C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraph (b)(2)(ii)(A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.

(D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraphs (b)(2)(ii)(A) or (B) of this rule, the information contained in its most recent filing on Form 20–F or Form F–1 (17 CFR 239.31).

(iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10–K report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his or her written request, a reasonable time prior to his or her purchase.

(iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under Rule 505 or 506, the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.

(v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under Rule 505 or 506 the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2)(i) or (ii) of this Rule 502.

(vi) For business combinations or exchange offers, in addition to information required by Form S–4 (17 CFR 239.25) the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S–4 by compliance with paragraph (b)(2)(i) of this Rule 502.

(vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under Rules 505 or 506, the issuer shall advise the purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of this Rule. Such disclosure may be contained in other materials required to be provided by this paragraph.

(c) *Limitation on Manner of Offering.* Except as provided in Rule 504(b)(1), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; *Provided, however,* that publication by an issuer of a notice in accordance with Rule 135c or filing with the Commission by an issuer of a notice of sales on Form D (17 CFR 239.500) in which the issuer has made a good faith and reasonable attempt to comply with the requirements of such form, shall not be deemed to constitute general solicitation or general advertising for purposes of this rule; *Provided further,*

that, if the requirements of Rule 135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this rule.

(d) *Limitations on Resale.* Except as provided in Rule 504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under Section 4(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(11) of the Act, which reasonable care may be demonstrated by the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;

(2) Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and

(3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, Rule 502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

Rule 506. Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering

(a) *Exemption.* Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) of this Rule 506 shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.

(b) *Conditions to Be Met.* (1) *General Conditions.* To qualify for an exemption under this Rule 506, offers and sales must satisfy all the terms and conditions of Rules 501 and 502.

(2) *Specific Conditions.* (i) *Limitation on Number of Purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this Rule 506.

NOTE: See Rule 501(e) for the calculation of the number of purchasers and Rule 502(a) for what may or may not constitute an offering under this Rule 506.

(ii) *Nature of Purchasers.* Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

• *Interpretative Releases*

[¶ 2380] Interpretive Release on Regulation D

Release No. 33-6455, March 3, 1983, 48 F. R. 10045.

17 CFR 231.6455. ACTION: Publication of Staff Interpretations.

SUMMARY: The Commission has authorized the issuance of this release setting forth the views of its Division of Corporation Finance on various interpretive questions regarding the rules contained in Regulation D under the Securities Act of 1933. These views are being published to answer frequently raised questions with respect to the regulation.

FOR FURTHER INFORMATION, CONTACT: David B. H. Martin, Jr., Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, Washington, D.C. 20549, (202) 272-2573.

SUPPLEMENTARY INFORMATION: In Release No. 33-6389 (March 8, 1982) (47 FR 11251), the Commission adopted Regulation D (17 CFR 230.501-.506) which provides three exemptions from the registration requirements of the Securities Act of 1933 (the "Securities Act" or the "Act") (15 U.S.C. 77a-77bbbb (1976) & Supp. IV 1980), as amended by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261 § 19(d), 96 Stat. 1121 (1982)).[1] Regulation D became effective on April 15, 1982.

In the course of administering the regulation, the staff of the Division of Corporation Finance has answered numerous oral and written requests for interpretation of the new provisions. This release is intended to assist those persons who wish to make offerings in reliance on the exemptions in Regulation D by presenting the staff's views on frequently raised questions. As indicated in Preliminary Note 3 to the regulation, Regulation D is intended to be a basic element in a uniform system of federal-state exemptions. As such, aspects of Regulation D have been incorporated in many state statutes and regulations. The interpretations set forth in this release relate only to the federal provisions.

Regulation D is composed of six rules, Rules 501-506. The first three rules set forth general terms and conditions that apply in whole or in part to the exemptions. The questions arising under Rules 501-503 fall into four general categories: definitions, disclosure requirements, operational conditions, and notice of sale requirements. The exemptions of Regulation D

[1] Prior releases leading to the adoption of Regulation D included Release No. 33-6274 (December 23, 1980) (46 FR 2631) in which the Commission considered and requested comments on various exemptions under the Securities Act and Release No. 33-6339 (August 7, 1981) (46 FR 41791) in which the Commission published proposed Regulation D for comment.

are set forth in Rules 504-506. Questions concerning those rules usually raise issues pertaining to more than one exemption. This release, an outline of which follows, is organized so as to reflect this pattern of inquiries.

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(72) *Question:* May an issuer of securities with a projected aggregate offering price of $3,000,000 rely on Rule 506?

Answer: Yes. The availability of Rule 506 is not dependent on the dollar size of an offering.

(73) *Question:* Rule 506 requires that the issuer shall reasonably believe that each purchaser who is not an accredited investor either alone or with a purchaser representative has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment. Former Rule 146 required the issuer to make a similar determination with respect to each offeree. Rule 506 is not an exclusive basis for satisfying the requirements of the private offering exemption in section 4(2). *See* Preliminary Note 3 to Regulation D. What is the Commission's view of the relevance of the nature of the offerees in an offering that relies exclusively on section 4(2) as its basis for exemption from registration?

Answer: Clearly, in an offering relying exclusively on section 4(2) for an exemption from registration, all offerees who purchase must possess the requisite level of sophistication. The sophistication of each of those to whom the securities are offered who do not purchase is not a fact that in and of itself should determine mechanically the availability of the exemption; the number and the nature of the offerees, however, are relevant in determining whether an issuer has engaged in a general solicitation or general advertising that would preclude reliance on the exemption in section 4(2).

E. Questions Relating to Rules 504–506

(74) *Question:* If an issuer relies on one exemption, but later realizes that exemption may not have been made available, may it rely on another exemption after the fact?

Answer: Yes, assuming the offering met the conditions of the new exemption. No one exemption is exclusive of another.

(75) *Question:* May foreign issuers use Regulation D?

Answer: Yes. Recent amendments to Regulation D have clarified the disclosure requirements for foreign issuers.[49]

(76) *Question:* Is Regulation D available to an underwriter for the sale of securities acquired in a firm commitment offering?

Answer: No. As Preliminary Note 4 indicates, Regulation D is available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. *See also* Rule 502(d) which limits the resale of Regulation D securities.

(77) *Question:* Regulation T (12 CFR 220.1-.8) of the Federal Reserve Board imposes certain restrictions on brokers and dealers for the use of credit in the purchase of securities. Regulation T provides an exemption from those provisions for the arrangement of credit in a sale of securities that is exempt from the registration requirements of the Securities Act under section 4(2). *See* 12 CFR 220.7(g). What is the applicability of this

provision to offerings conducted under Regulation D?

Answer: Regulation T is interpreted by the Federal Reserve Board which has expressed the view that the exemption from Regulation T in 12 CFR 220.7(a) is available for offerings conducted in reliance on Rules 505 and 506,[50] but not for those under 504.[51]

(78) *Question:* A corporation proposes to implement an employee stock option plan for key employees. Can the issuer rely on Regulation D for an exemption from registration for the issuance of securities under the plan?

Answer: The corporation may use Regulation D for the sale of its securities under the plan to the extent that such offering complies with Regulation D. In a typical plan, the grant of the options will not be deemed a sale of a security for purposes of the Securities Act. The issuer, therefore, will be seeking an exemption for the issuance of the stock underlying the options. The offering of this stock generally will commence when the options become exercisable and will continue until the options are exercised or otherwise terminated. Where the key employees involved are directors or executive officers, such individuals will be accredited investors under Rule 501(a)(4) if they purchase securities through the exercise of their options. Other key employees may be accredited as a result of net worth or income under Rules 501(a)(6) or (a)(7).

(79) *Question:* In an "all or none" or minimum-maximum Regulation D offering of interests in a limited partnership, the general partner proposes, if necessary, to purchase enough interests for the issuer to sell a specified level of interests by the specified expiration date of the offering. What disclosure and other considerations are relevant?

Answer: The staff is of the view that pursuant to Rule 10b-9 under the Exchange Act, the issuer must disclose the possibility that the general partner may make purchases of the limited partnership interests in order to meet the specified minimum. In addition, the issuer should disclose the maximum amount of the possible purchases. Finally, these purchases must be for investment and not resale. Questions regarding these views should be directed to the Division of Market Regulation, Office of Trading Practices, (202) 272-2874.

(80) *Question:* An issuer will conduct a Regulation D offering on an "all or none" basis within a specified time. What considerations are there for the issuer if it wishes to extend the offering beyond the specified time in order to sell the specified amount of securities?

Answer: The staff is of the view that an offering may be extended beyond the specified time without resulting in a violation of Rule 10b-9 under the Exchange Act or, in the case of an offering in which a broker-dealer is a participant, Rule 15c2-4 under the Exchange Act, under the following conditions:

a. Prior to the specified expiration date, a reconfirmation offer must be made to all subscribers that discloses the extension of the offering and any other material information necessary to update previously provided disclosure.

b. The reconfirmation offer must be structured so that the subscriber affirmatively elects to continue his investment and so that those subscribers who take no affirmative action will have their funds returned to them.

c. The reconfirmation offer must be made far enough in advance of the specified expiration date so that any subscriber who does not elect to continue his investment will have his funds returned to him promptly after the specified expiration date.

Questions regarding these views should be directed to the Division of Market Regulation, Office of Trading Practices, (202) 272-2874.

Fed. Sec. L. Rep. P 77,237, 1982 WL 29391 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1 Walnut**
Valley Special Cable TV FUND

Publicly Available June 14, 1982

SEC LETTER

1933 Act / Rule 502

May 13, 1982
Publicly Available June 14, 1982

Douglas S. Knox, Esq.
Jones Intercable, Inc.
5275 DTC Parkway
Englewood, Colorado 80111Re: Walnut Valley Special Cable TV Fund (the 'Fund')

Dear Mr. Knox:

This is in response to your letter of April 22,[FN*] 1982 to Mr. Howard P. Hodges, Jr., Chief Accountant for the Division of Corporation Finance, in which you seek confirmation by the staff that the Fund may omit certain financial statements of a predecessor business from the Confidential Offering Memorandum to be used by the Fund in connection with the sale of its limited partnership interests in an offering under Rule 506 of Regulation D.

FN* Letter not made publicly available by the SEC.

Rule 502(b)(2)(i)(B) of Regulation D states that if an issuer sells securities to any non-accredited investor in an offering over $5,000,000, the issuer must deliver to all purchasers 'the same kind of information as would be required in Part I of a registration statement filed under the [1933] Act on the form that the issuer would be entitled to use.'As you correctly indicate, this requires compliance with Regulation S–X for the form and content of financial statement disclosure. Under Regulation S–X, an issuer may be required in certain circumstances to include audited financial statements for any business to which it has succeeded during the period for which the issuer's income statements are required. You are of the opinion that this provision is applicable to the Fund and, based on the costs associated with obtaining the audited financial statements of a business to which the Fund has succeeded, you request a waiver of the requirement.

Regulation D does not provide for a review by the staff of disclosure documents to be used in connection with a Regulation D offering or for consideration by the staff of requests for waiver of disclosure requirements. For these reasons, the staff is not in a position to address the issue whether the Fund may omit the financial state-

ments of the business to which it has succeeded.

In connection with the foregoing, you may wish to consider the possible applicability of Rule 502(b)(2)(i)(B) to your situation. That provision states that '[i]f an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.'The staff takes the position that this provision may be interpreted also to apply to predecessor businesses. Thus, if the predecessor business is other than a limited partnership, and if the issuer cannot obtain audited financial statements of that predecessor business without unreasonable effort or expense, then the issuer may provide the relevant financial statements for that predecessor business on an unaudited basis so long as it also provides an audited balance sheet for the precedessor business dated within 120 days of the start of the offering or, if appropriate, as of the date of the acquisition of the predecessor business.

*2 I hope this is of some assistance. Please call should you have additional questions.

Sincerely,

David B.H. Martin, Jr.
Special Counsel

LETTER TO SEC
TEXT OR GRAPHIC MATERIAL AT THIS POINT IS NOT LEGIBLE

Fed. Sec. L. Rep. P 77,237, 1982 WL 29391 (S.E.C. No - Action Letter)

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