

**Securities Industry Association**

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April 2, 1997

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

**Re: Definition of "Prepared by or on Behalf of the Issuer" for Purposes of Determining
if an Offering Document is Subject to State Regulation (File No. S7-6-97)**

Dear Mr. Katz:

The Capital Markets Committee of the Securities Industry Association ("SIA")¹ is pleased to respond to the request of the Securities and Exchange Commission (the "SEC") for comments on the above-captioned release (the "Release").

The National Securities Markets Improvements Act of 1996 ("NSMIA") mandates that the SEC adopt a definition of the phrase "prepared by or on behalf of the issuer," because the phrase is used, without being defined, in the newly revised Section 18 of the Securities Act of 1933. The SEC proposes such a definition in the Release. For the reasons set forth in this letter, we believe the SEC's proposed definition is appropriate and we suggest only one minor change.

A. OVERVIEW

As the SEC states in the Release, one of the primary goals of NSMIA was to reduce duplicative and unnecessary regulatory requirements stemming from the dual system of federal and state securities regulation. Congress sought to remove many of the inefficiencies from securities regulation by reallocating regulatory responsibilities for securities offerings between federal and state regulators, based on the nature of the security or offering. One of NSMIA's most significant changes was to preempt state authority over most offerings of securities. Under amended Section 18 of the Securities Act, no state may prohibit an offering or sale in the state, impose additional disclosure requirements or merit standards, require the registration or qualification of a security or transaction, or prohibit or limit the use of any offering document *prepared by or on behalf of an issuer* in connection with an offering if the security offered is a "listed" security or other "covered security."²

Although NSMIA results in near total preemption of state authority over offerings of securities, it permits states to continue to impose filing requirements for documents filed with the SEC and for certain annual and periodic reports. It also permits states to require filings of consents to service of process and filing fees (except for "listed" or to be listed securities and securities

senior to such securities) in the amount authorized by state law on the day prior to NSMIA's effective date. Furthermore, NSMIA preserves states' authority to investigate and bring enforcement actions for fraud and deceit for unlawful conduct by a broker or dealer.

B. SEC's PROPOSED DEFINITION

We believe that the definition proposed in the Release by the SEC for the phrase "prepared by or on behalf of an issuer" generally is appropriate. We suggest, however, that the SEC broaden the concept of authorization in the proposed definition.

1. Scope of Persons Acting for Issuer

The SEC's proposed definition specifies that the document must be prepared by a director, officer, general partner, employee, affiliate, underwriter, attorney, accountant or agent of the issuer, or the representatives or agents of these persons. This list is appropriate and does not need to be broadened or narrowed. We believe the list, with specific examples of persons, is preferable to stating simply that the person must be an agent or representative of the issuer because the examples provide better guidance. The risk that listing specific persons could be interpreted as a limitation on the types of persons who could act on behalf of the issuer is mitigated by the last category, which includes any agent of the issuer.

2. Authorization

The one part of the proposed definition that we suggest changing relates to authorization. The concept of "authorizing" the preparation of a document is too limited because it implies that the issuer must give its approval in advance of the preparation. As a matter of practice, documents are prepared on behalf of an issuer in a number of different ways. The SEC should permit the definition to cover not only situations in which the issuer authorizes the document, but also where the issuer consents to, ratifies, accepts or adopts the document. It should not matter whether the act occurs before or after the preparation of the document in question as long as the issuer acknowledges responsibility for the document in a clear and unambiguous manner.

C. CONCLUSION

We support the efforts of both Congress and the SEC to reduce duplicative regulation. We believe that NSMIA's rationalization of federal and state regulation of securities offerings represents significant progress. The SEC's proposed definition of the phrase "by or on behalf of the issuer" generally is appropriate and provides helpful guidance on the meaning of the statutory term. The only change we recommend is to permit the issuer to ratify, accept, consent or adopt the document either before or after its preparation. By clarifying the application of the statute, the SEC's definition should remove uncertainty and enhance the capital-raising process.

If you would like to discuss these views in more detail or if we can be of any further assistance, please feel free to contact the undersigned at 212-761-6686 or Mark A. Egert, SIA Staff Adviser to the Capital Markets Committee, at 212-618-0508.

Sincerely,

Ralph L. Pellecchio

Chairman
Capital Markets Committee

cc: James R. Budge, SEC Division of Corporation Finance

Footnotes

1 The Securities Industry Association is the trade association representing more than 750 securities firms headquartered throughout North America. Its members include securities organizations of all types--investment banks, brokers, dealers, specialists, and mutual fund companies. SIA members are active in all markets, and in all phases of corporate and public finance. Collectively, they provide investors with a full spectrum of investment services and account for approximately 90% of the securities industry's revenue in the United States.

2 NSMIA defines a "covered security" as: (a) a security listed, or authorized for listing, on the New York Stock Exchange, the American Stock Exchange, the Nasdaq National Market System, or listed or authorized for listing on a national securities exchange that the SEC determines has listing standards substantially similar to these named markets ("listed" securities); (b) a security that is equal in seniority or senior to a security described in the preceding clause; (c) a security issued by an investment company registered under the Investment Company Act; (d) a security offered or sold to a "qualified purchaser" as defined by the SEC; (e) a security offered or sold pursuant to most of the exemptions contained in Sections 3(a) and 4 of the Securities Act (in the case of Sections 4(1) and 4(3), the issuer must be a reporting company under the Exchange Act), the principal exceptions being the intrastate exemption in Section 3(a)(11) and the exemption in Section 3(a)(4) for a security issued by non-profit religious and eleemosynary institutions; and (f) a security that will, upon completion of the transaction, become a covered security under any of the foregoing definitions of covered security.