

## HENRY S. MILLER COMPANIES OF DALLAS

Winstead, McGuire, Sechrest & Trimble

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### SEC LETTER

#### Advisers Act Sec. 202(a)(11)

Your letter has been referred to this Division for a response to your third question as to the applicability of the registration provision of the Investment Advisers Act of 1940 (the 'Act') to the proposed activities of your firm as an 'offeree representative' pursuant to Rule 146 under the Securities Act of 1933. It is our understanding that the Divisions of Corporation Finance and Market Regulation will respond separately to your other questions.

In our view, inclusion of your law firm in a list of 'offeree representatives' for use by potential investors in evaluating purchases of securities pursuant to Rule 146 might well require the registration of your firm as an investment adviser. Section 202(a)(11) of the Act defines an investment adviser as:

'any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . .'

Since the function of an offeree representative is to assist potential purchasers of securities in evaluating the merits and risks of prospective investments, it would appear that performing the duties of an offeree representative would necessarily involve advising others as to the advisability of investing in or purchasing securities. At the very least, an offeree representative would be involved in the issuance of an analysis or report concerning the securities. Moreover, if your firm were included in a list of offeree representatives (as opposed to serving as an offeree representative in an isolated instance) it would be engaging in the business of rendering investment advice. Accordingly, if your firm were included in a list of offeree representatives, and if it received any form of compensation for its services as an offeree representative, it would come within the definition of an investment adviser.

However, Section 202(a)(11)(B) excludes from the definition of investment adviser any lawyer whose performance of investment advisory services is solely incidental to the practice of his profession. Based on the limited information you have presented, it would not appear that, if your firm was included in a list of offeree representatives which was made available to potential investors, its activities as an offeree representative could be considered solely incidental to its practice of the legal profession.

In view of the foregoing, we are enclosing appropriate explanatory and investment adviser registration materials for your use should you determine to proceed in the manner you have described. You should also note, in partial response to your second question, that any person defined as an investment adviser is subject to the antifraud provisions of Section 206 of the Advisers Act. We interpret such provisions to impose upon an adviser the fiduciary duty of loyalty to his clients and the duty to act solely in the best interests of his clients and to deal fairly and honestly with them.

## **INCOMING LETTER**

**November 25, 1974**

**John J. Heneghan, Esquire  
Chief Counsel  
Securities and Exchange Commission  
Washington, D. C. 20549**

**Re: Interpretation of Rule 146  
Re: 'Offeree Representative'**

Dear Mr. Heneghan:

This law firm, a professional corporation, has been asked whether or not it would be able to act as an 'offeree representative' as defined in subparagraph (a)(1) of Rule 146. Securities Act Rel. 5487. The question has come from Henry S. Miller Companies of Dallas, Texas. We have been specifically asked whether or not the name of this firm might be included in a list of offeree representatives that could be used by potential investors for evaluating the risks and merits of certain investments.

Assuming that the definition of offeree representative can be met, we request your advice as to (1) whether a law firm or a lawyer could act as an offeree representative under Rule 146, (2) the duty to the offeree if the firm or lawyer does act in such a capacity, and (3) the registration requirements, if any, for acting in such capacity.

NOTE 3 to Rule 146 provides that the offeree representative is obligated to act in the interest of the offeree and the definition of offeree representative states that the offeree representative together with other offeree representatives or the offeree must be capable of evaluating the merits and risks of the prospective investment. There is no requirement in the rule that the offeree representative make an investment recommendation to the offeree or that he take any positive action with respect to the offeree. We would specifically like to know whether in the Commission's view, a law firm could evaluate the risks and merits of a prospective investment in its traditional professional role without making any recommendations as to the purchase or sale of an investment and still satisfy the requirements of Rule 146.

In view of NOTE 1 to Rule 146, we also request your advice as to the registration requirements for a law firm or lawyer acting as an offeree representative. It does not appear that acting in such a capacity would cause the law firm or lawyer to be deemed a 'broker' or 'dealer' or require registration as a broker or dealer under the Securities Exchange Act of 1934. Further, it does not appear that the law firm or lawyer would be deemed an 'investment advisor' or require registration under the Investment Advisor's Act of 1940 since 'investment advisor' is defined as any person who, for compensation, engages in the business of advising others as to the value of securities or the advisability of their purchase or sale, but does not include . . . (b) any lawyer . . . whose performance of such service is solely incidental to the practice of his profession; . . .

It is our view that Rule 146 allows a law firm or a lawyer to evaluate the risks and merits of a prospective investment without recommending that investment or advising as to whether or not the investment should be purchased or sold. By acting in such a capacity, the apparent requirements of Rule 146 could be met, and the 'investment advisor' definition of the Investment Advisor's Act of 1940 would be avoided. We would appreciate your advice in this regard, and any further interpretations or recommendations that you deem appropriate.

Thank you for providing us with the above requested information. If you desire further clarification from us, please contact the undersigned or William B. Sechrest of this office by collect telephone call.

Very truly yours,

William A. French