



BERMAN DEVALERIO

September 15, 2010

Via Electronic Mail

Dennis D. MacKee
State Board of Administration
1801 Hermitage Blvd.
Tallahassee, Fl 32317

Dear Mr. MacKee:

You have asked me to address Ms. Freedberg's email of September 14. The response, which you may forward to Ms. Freedberg, is below.

In the fall of 2000, concerned about the scope of the transactional exemption for the sale of unregistered securities under Rule 144A, the SBA sought guidance from the law firm of Sutherland Asbill & Brennan as to which entities were qualified to purchase pursuant to Rule 144A and in what types of transactions. While it was clear that the Florida Retirement System was qualified to purchase securities in 144A transactions, other funds like the Local Government Investment Pool, ("LGIP"), while qualified to purchase unregistered securities under Section 4(2) of the Securities Act, did not meet the definition of a Qualified Institutional Buyer ("QIB") in Rule 144A. Adding to the uncertainty, certain similar pools in other states took the position that such pools did meet the QIB criteria.

The Sutherland firm provided the SBA with its opinion in November of 2000. That memo confirmed that while the SBA was able to purchase unregistered securities for the LGIP pursuant to Section 4(2) of the Securities Act, it could not purchase the same securities in a resale transaction under Rule 144A. That memo shaped the policy of the SBA for years to come, including the period of July 2007.

The SBA did not "ignore" its own lawyer's advice as suggested by Ms. Freedberg. To the contrary, traders at the SBA sought to follow the guidance in the Sutherland memo. Traders, when purchasing for the LGIP, would uniformly ask whether the securities offered were being sold in a primary transaction (the "day 1" referred to in the Sutherland memo). If the response was that it was either a primary or new issue transaction the traders would proceed to buy the securities under the guidance that such transaction was exempt from registration under Section 4(2) of the Securities Act. Indeed, had these securities been purchased directly from the issuers, there is no question that the transactions would have been exempt under Section 4(2) of the Securities Act, as outlined in the Sutherland memo.



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Unfortunately, the sales staff at the various brokerage firms were not correct in their characterizations of these transactions. The securities in question had actually been acquired by the brokerage firms and were being resold in a "secondary" market transaction. Section 4(2) does not apply to secondary market transactions, and the only exemption available for a resale is Rule 144A. Obviously, had that fact been fully disclosed to the SBA traders, they would have understood they were buying on "day 2" and would not have proceeded with the purchase. The only liability for selling these securities to the SBA without an exemption rests with the seller.

As for the request for an SEC no action letter, this SEC procedure is a commonly used to request guidance from the SEC when one is in doubt as to the application of the law to certain facts. Indeed, this idea was referenced in the Sutherland memo as one available option to the SBA.

Ms Freedberg asks if the SBA guidelines were "relaxed" to justify prior conduct or in response to an SEC inquiry (which has now been closed). The answer to both questions is no.

Finally, Ms. Freedberg has also asked about litigation against the Brokerage firms. The SBA has obtained agreements tolling the applicable statutes of limitations with the firms in question and is in ongoing discussions with those firms. The Office of Financial Regulation and the Florida Attorney General's Office have been assisting with these discussions. Accordingly, any further comment on that subject would be inappropriate.

Very truly yours,

Michael J. Pucillo

MJP/ia