



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
MARKET REGULATION

October 17, 1995

John A. Granda, Esq.  
Stinson, Mag & Fizzell, P.C.  
1201 Walnut Street  
Kansas City, Missouri 64106-2150

Act	IAA
Section	202(a)(11)
File	
Public	
Availability	10-17-95

Re: Missouri Innovation Center

Dear Mr. Granda:

In your letter of October 9, 1995 on behalf of Missouri Innovation Center, Inc. ("MICI"), as supplemented by telephone conversations with the staff, you request assurance that the staff will not recommend enforcement action to the Commission under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(a) of the Investment Advisers Act of 1940 ("Advisers Act") if MICI engages in the activities described below without registering with the Commission as a broker-dealer or investment adviser.

We understand the facts to be as follows:

MICI is a not-for-profit Missouri corporation that was organized in 1984. Since that time, it has engaged in two activities, which it performs pursuant to state statute, and under contracts with the Missouri Department of Economic Development ("Department"). Its principal activity has been to operate an "innovation center," which provides assistance to individuals and business organizations during the early stages of developing new technology-based business ventures. Such assistance generally includes providing equipment, administrative and managerial support, planning assistance, and occasionally facilities. In addition, MICI is a "Qualified Economic Development Organization" that approves the issuance of Missouri tax credits to certain investors in developing companies. Pursuant to state law, when MICI approves the issuance of tax credits, it receives a percentage of certain distributions from qualifying investments.

MICI proposes to engage in three additional activities to help Missouri entrepreneurs in raising capital.<sup>1/</sup> These activities include (1) assisting entrepreneurs in connection with the use of Missouri's simplified securities registration procedures ("MoReg"), (2) assisting entrepreneurs in obtaining Missouri tax credits for their investors, and (3) distributing a newsletter that will include general information as well as summaries of MoReg offerings.

1. MoReg Assistance. MICI will familiarize issuers with the regulatory framework and MoReg process and provide issuers with sample forms and comments

<sup>1/</sup> While MICI authorizes tax credits for investors providing "seed capital" and "start-up capital" (as defined by state law) for developing businesses, in connection with its new activities it proposes to assist businesses in raising seed, start-up, and "follow-up" capital.

from the Missouri Division of Securities with respect to other offerings. It will not assist in drafting documents, and will strongly encourage issuers to employ lawyers and accountants. It will end its involvement in the process either at the conclusion of a "test the waters"<sup>2/</sup> period, or upon the effectiveness of the registration of an offering.

MICI also may assist issuers in preparing MoReg "test the waters" presentations by observing practice sessions and comparing them to other presentations. For observational purposes only, MICI staff members may attend actual presentations. MICI staff members attending actual presentations will not engage, directly or indirectly, in solicitation or promotional efforts.

MICI will not receive compensation for this assistance, other than a minimal flat fee to cover administrative expenses such as the cost of copies and supplies used for the presentation. MICI also may offer these services to issuers that do not qualify for MoReg as long as their offerings will be subject to review by the Missouri Division of Securities.

2. Assistance in Obtaining Tax Credits. MICI will assist issuers in understanding the requirements for obtaining Missouri tax credits for investors contributing seed capital, and will approve the issuance of these tax credits for the issuers' investors if the statutory requirements are met. As noted above, pursuant to state law, MICI receives a percentage of certain distributions from qualifying investments.

In addition, MICI will provide forms and general guidance for issuers to obtain tax credits for their investors pursuant to another section of the Missouri statutes. It will not receive compensation for this assistance.

3. Newsletter Publication. At least quarterly, MICI will publish a newsletter that will be distributed primarily to Missouri residents. Most newsletters will be distributed as supplements to local business periodicals. These periodicals are expected to charge MICI a fee, which MICI will pay from its own funds. Newsletters also will be available upon request to persons in exchange for a small fee intended to defray MICI's mailing, reproduction, and handling expenses. This fee will be unrelated to the completion of transactions in securities listed in the newsletter. The newsletter will consist of at least two parts: a general education section and a MoReg summaries section. Issuers will not be charged a fee for including their MoReg summaries in the newsletter.

a. The General Education Section. The general education section will provide potential investors with information on the nature of small business capital investments, and with general guidance on how to approach and analyze such investments. It might summarize relevant law or self-regulatory organization rules, or

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<sup>2/</sup> Under Missouri law, an issuer may solicit up to \$100,000 during a test the waters period without a formal offering document if it has a business plan including certain disclosures. Proceeds must be placed in escrow until the offering is formally registered. At that time, investors have the option of maintaining or withdrawing their investments.

provide basic guidance on analyzing financial statements or business plans. This section also may include theoretical examples of investment opportunities to illustrate some of the more important factors to consider in making a decision to invest in a small business.

In addition, the general education section will include excerpts from interviews with securities regulators, attorneys and accountants with experience in financing transactions and securities law, venture capitalists, bankers, and entrepreneurs who have been involved in operating or raising capital for businesses in various stages of growth. Entrepreneurs, who may have had successful or unsuccessful ventures, will explain how they discern the merits and risks of businesses and their prospects and how to spot danger signs. The interview portion will contain a disclaimer in bold type stating that the views expressed (a) are solely those of the interviewee, (b) do not necessarily represent the views of MICI, (c) are not intended to constitute investment advice or recommendations to purchase securities of any company, and (d) are based on particular experiences which may not be replicated in the future.

MICI will not conduct interviews with entrepreneurs whose companies (a) were included, or will be included, in the MoReg summaries section of the newsletter within 6 months, (b) received an equity investment or a loan from MICI, (c) received assistance from MICI in preparing its disclosure documents or its test the waters presentation, or (d) are involved, or are expected to be involved, in receiving MICI's authorization for Missouri tax credits for their investors.

b. MoReg Summaries Section. In a separate and distinct section, the newsletter will list and briefly describe in narrative fashion Missouri issuers and their proposed offerings that have been filed recently with the Missouri Division of Securities under MoReg. MICI will prepare the summaries from information contained in the issuers' filing materials, and will limit the contents of each summary to the information permitted in a tombstone ad under Missouri law.<sup>3/</sup>

The MoReg summaries section will include a disclaimer in bold type that (a) in preparing the summaries, MICI relied on the issuers' offering materials and did not investigate or verify their truth or accuracy, (b) the summaries were prepared by MICI without the involvement, investigation, or verification of the Missouri Division of Securities, (c) investors should read carefully the actual disclosure documents and should not rely on MICI, the Missouri Division of Securities, or the summaries, (d) neither MICI or the Missouri Division of Securities is recommending, advising, or otherwise endorsing an investment, and (e) the summaries do not constitute an offer to sell, or the solicitation of an offer to purchase securities, and that an offer may only be made through a MoReg prospectus.

Officers, directors, and employees of MICI will be prohibited from investing in any small business that seeks a newsletter listing, or from placing, offering, or listing any ventures in the newsletter. Moreover, MICI will exclude from the newsletter any

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<sup>3/</sup> Although not required to by statute, MICI will submit the summaries to the Missouri Division of Securities seven days before publication.

summaries of offerings by issuers that have received an investment from MICI's seed capital fund if MICI was involved in preparing its disclosure documents or test the waters presentation. As explained in your letter, an exception to these representations will be made with respect to two issuers with which MICI established a relationship prior to developing the newsletter concept.

The newsletter also will exclude summaries of offerings by issuers when MICI is involved, or expected to be involved, in authorizing Missouri tax credits. Conversely, MICI will not approve tax credits for an issuer that was listed in the newsletter. As explained in your letter, an exception to this will be made for one issuer with which MICI established a relationship prior to developing the newsletter concept.

All the information included in the summaries will be public information that is available in more detail from the issuers or from the Missouri Division of Securities. MICI will not be involved with any communications, discussions, or negotiations between an issuer and potential investors regarding possible investments. MICI will not match borrowers and lenders, or buyers and sellers, and will not act as agent for any party. Issuers and potential investors will conduct their discussions and negotiations independently. MICI will not have access to or possession of funds, securities, or properties of any person receiving the newsletter or any other third parties.

Response:

On the basis of your representations and the facts presented, and strict adherence thereto by MICI, the staff of the Division of Market Regulation will not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if MICI engages in the activities described above without registering with the Commission as a broker-dealer.

The Division of Investment Management has asked us to inform you of its position as follows: On the basis of the facts and representations in your letter and the telephone conversation noted below, the staff would not recommend enforcement action to the Commission if MICI engages in the activities described in your letter without registering under the Advisers Act.

With respect to the listing of securities offerings in MICI's Newsletter, the staff has taken the position that information relating to securities does not constitute an analysis or report within the meaning of section 202(a)(11) of the Advisers Act if (i) the information is readily available in its raw state; (ii) the categories of information presented are not highly selective; and (iii) the information is not organized or presented in a manner that suggests the purchase, holding, or sale of any security or securities.<sup>4/</sup> In this regard, we note your representations that: (i) Missouri Innovation will prepare the summaries to be included in the Newsletter by extracting information from issuers' offering materials; (ii) the Newsletter and summaries will not offer any endorsement,

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<sup>4/</sup> Media General Financial Services, Inc. (pub. avail. July 20, 1992); Charles Street Securities, Inc. (pub. avail. Feb. 27, 1987); Butcher & Singer, Inc. (pub. avail. Jan. 2, 1987).

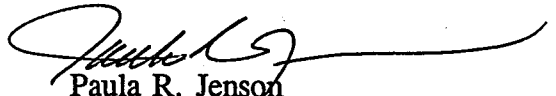
John A. Granda, Esq.  
October 17, 1995  
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analysis or recommendation as to the securities listed therein; (iii) with certain limited exceptions, all issuers with a Form U-7 on file with the Missouri Division of Securities will be included in the Newsletter summaries;<sup>5/</sup> and (iv) the listings will be organized alphabetically by issuer.

The Division of Investment Management, on a number of occasions, has expressed its views regarding the circumstances in which the presentation of securities information constitutes an analysis or report concerning securities for purposes of section 202(a)(11) of the Advisers Act.<sup>6/</sup> Having stated our views, we will no longer respond to requests for interpretive or no-action letters in this area unless they present novel or unusual issues.

The positions of the Divisions concern enforcement action only and do not represent legal conclusions regarding the applicability of statutory or regulatory provisions of the federal securities laws. Moreover, the positions of the Divisions are based solely on the facts and representations in your letter and in telephone conversations with the staff. Any different facts or conditions might require a different response.

Sincerely,



Paula R. Jenson  
Senior Counsel  
Office of Chief Counsel

PJ/dn

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<sup>5/</sup> Telephone conversation with John Granda, Stinson, Mag & Fizzell on September 12, 1995. Issuers will be excluded from the Newsletter summaries if: (i) Missouri Innovation has made an investment from its seed capital fund, or (ii) if Missouri Innovation is involved, or is expected to be involved, in authorizing tax credits under Mo. Rev. Stat. § 340.300 *et. seq.* You have noted three historic exceptions to this general exclusion.

<sup>6/</sup> Media General, *supra* note 1; Investex Investment Exchange Inc. (pub. avail. Apr. 9, 1990).

# STINSON, MAG & FIZZELL

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Investment Advisers Act: § 202(a)(11), 203(a)  
Securities Exchange Act: § 3(a)(4) and (5)  
§ 15(a), (b)

October 9, 1995

Via Federal Express

Division of Investment Management  
Office of Chief Counsel  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Via Federal Express

Division of Market Regulation  
Office of Chief Counsel  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Missouri Innovation Center, Inc.

Ladies and Gentlemen:

On behalf of the Missouri Innovation Center, Inc. (the "Company"), we hereby request confirmation (i) from the Division of Investment Management ("Investment Management") that it would not recommend enforcement action against the Company if it does not register as an "investment adviser" under Section 203(a) of the Investment Advisers Act of 1940, as amended (the "Advisers Act") and (ii) from the Division of Market Regulation ("Market Regulation") that it would not recommend enforcement action against the Company under Section 15(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") if it does not register as a "broker" or "dealer" under Section 15(b) of the Exchange Act. Three copies of this letter are being sent to each of Investment Management and Market Regulation.

## BACKGROUND

The Company was organized under the laws of the State of Missouri as a not-for-profit corporation on June 15, 1984. The principal executive offices of the Company are located at 5650 A South Sinclair Road, Columbia, Missouri 65203.

The Company's principal activity is to operate an "innovation center" pursuant to Mo. Rev. Stat. § 348.271. As such, the Company operates pursuant to a contract with the Missouri Department of Economic Development (the "Department") to provide assistance to individuals and business organizations during the early stages of the development of new technology-based business ventures. Such assistance generally includes the provision of equipment, administrative and managerial support, planning assistance and on infrequent occasions, facilities.

In addition, the Company is a Qualified Economic Development Organization under Mo. Rev. Stat. § 348.300(4) by virtue of a contract with the Department. As a Qualified Economic Development Organization, the Company administers a tax credit program on behalf of the Department under Mo. Rev. Stat. § 348.300 et seq. The Company approves the issuance of tax credits to investors providing investments of seed capital, start-up capital or follow-up capital (not defined by statute) in developing companies. Such credits can be applied against certain types of Missouri taxes in an amount equal to thirty percent of such investment. The term "seed capital" is defined by Mo. Rev. Stat. § 348.300(8) as "capital provided to a commercial activity located in Missouri for research, development and precommercialization activities to provide for a new product or process or service, and for activities related thereto." The term "start-up capital" is defined by Mo. Rev. Stat. § 348.300(9) as "capital provided to a commercial activity located in Missouri for use in preproduction product development or initial marketing thereof, and for activities related thereto."

In the course of engaging in activities of the type described above, the Company has recognized the difficulties faced by developing companies and other small businesses in obtaining access to debt and equity capital to fund their growth and development. While the Company recognizes that these difficulties are due to the relative investment risks of investing in early stage opportunities, it also believes that they result from the inability of small businesses to publicize their needs for capital and a lack of generic investor understanding of the nature of such investment opportunities.

To address this need, the Company is proposing to offer administrative assistance and consultation to Missouri entrepreneurs in the process of raising seed, start-up and follow-up capital (collectively referred to herein as "Small Business Capital"). To that end, the Company essentially proposes to offer three types of service: (i) assistance to entrepreneurs in connection with the use of the Missouri issuer registration procedure under 15 CSR 30-52.271 (hereinafter "MoReg"), a simplified securities registration procedure for certain Missouri issuers; (ii) assistance to entrepreneurs in obtaining certain tax credits for

investors applicable to certain Missouri taxes described below; and (iii) the distribution of general educational information to Missouri residents to create greater understanding of Small Business Capital investments through the publication of a newsletter called "Missouri Market Maker" (the "Newsletter"), which, as described below, will also include specified summaries of MoReg offerings.

1. MoReg Assistance.

To clarify the Company's role, each issuer that engages the Company's services will sign an engagement letter that will contain certain disclaimers regarding the Company's services. These disclaimers will make clear that: (i) the Company is not soliciting the purchase or sale of a security by assisting the issuer; (ii) all decisions regarding information that is included in any document or presentation to potential investors are the issuer's sole responsibility; and (iii) the Company represents neither the issuer or investor in these transactions.

In assisting entrepreneurs with the use of MoReg, the Company proposes to familiarize entrepreneurs with the regulatory framework and limitations of the MoReg process and to provide entrepreneurs with a basic strategy for preparing the MoReg disclosure document, normally a form U-7 ("U-7"). The Company will offer consultation and examples drawn from U-7's prepared by other issuers or from comments of the Missouri Division of Securities (the "Division") staff on a particular U-7 for instructive purposes. However, the Company will not participate in the actual drafting of a particular U-7, and each issuer will be solely responsible for the content of the U-7. Furthermore, the Company will end its involvement in this process upon the conclusion of the "test the waters" period (see infra), if the issuer engages in such "test the waters" solicitation, or otherwise upon the effectiveness of registration. Additionally, the Company will strongly encourage issuers to engage lawyers and accountants with experience in securities law matters generally and in preparing U-7's in particular. The Company plans to emphasize that such representation is particularly important if sufficient investor interest is developed during the "test the waters" period (see infra) to justify the expense of preparing a complete disclosure document.

The Company may provide similar assistance to an issuer in preparation for its "test the waters" presentation under MoReg.<sup>1</sup> In this regard, the Company staff will observe one or more practice versions of an investor presentation and will offer critical comparisons

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<sup>1</sup> MoReg allows an issuer to solicit up to \$100,000 during a "test the waters" period without a formal offering document on the basis of a business plan disclosing the type of business, use of proceeds and risks associated with the offering. The proceeds solicited must be placed in escrow until the offering is formally registered, at which time the investors may elect to maintain their investment. If an investor does not elect to maintain his investment, his investment is returned to him. 15 CSR 30-52.271.



of such presentation with past presentations. Such comparisons may focus on specific aspects of the presentation such as the organization and clarity of the presentation.

The Company will receive no compensation for any of the various types of assistance described in this section 1, except for a possible minimal flat fee to cover administrative expenses, such as the costs of copies and supplies utilized in connection therewith.

The Company may offer similar assistance to issuers that do not qualify for MoReg but only if such issuer's offering will be subject to review by the Division. A decision to offer assistance to such issuers will be made on a case by case basis.

2. Assistance in Obtaining Tax Credits.

As noted on page 2 of this letter, Sections 348.300 to 348.318 of the Mo. Rev. Stat. authorize Qualified Economic Development Organizations ("QEDOs"), which are essentially incubators for emerging businesses and technologies in Missouri, to obtain a contract with the Missouri Department of Economic Development to operate an innovation center to promote, assist and coordinate research and development of new services, products or processes in Missouri. Qualified Funds, which are defined to mean any type of organization that makes qualifying investments (*i.e.*, an investment of seed capital, start-up capital or follow-up capital in any commercial activity located in Missouri), are required to enter into a contract with a QEDO that entitles the QEDO to receive not less than ten percent of all distributions of equity and dividends or other earnings of the fund. Qualified investments in QEDOs entitle the investor to receive a 30 percent tax credit which can be applied against taxes due in the year of the investment or for up to 10 years thereafter. The Company qualifies as a QEDO and, as a matter of practice, like other QEDOs acts on behalf of the Missouri Department of Economic Development to assure that the investments meet the statutory criteria and that investors are entitled to receive tax credit certificates. The Company plans to continue to assist small businesses in understanding the requirements for obtaining tax credits for the investors who invest in Qualified Funds which are in turn used to make a qualified investment in that small business.

In addition, the Company will provide the necessary forms and general guidance to issuers for obtaining tax credits for the investor under Mo. Rev. Stat. § 135.400 et seq. Those credits are also equal to 30% of qualifying investments made in qualifying small businesses and are in addition to those authorized under § 348.300 et seq. However, the Company will receive no compensation for assistance with tax credits under Mo. Rev. Stat. § 135.400 et seq.

3. Newsletter Publication.

The Newsletter will be published at least quarterly and is intended to be distributed primarily to Missouri residents. Distribution of the Newsletter will be primarily

by means of a supplement to be included in local business periodicals in Missouri, including the Branson Business Journal, the Columbia Business Times, the Kansas City Business Journal, the Kansas City Small Business Monthly, the Mid Missouri Business Journal, the Saint Louis Business Journal, the Saint Louis Small Business Monthly and the Springfield Business Journal. These periodicals are expected to charge the Company a fee for including this supplement which will be paid for out of the Company's financial resources (which resources are derived primarily from funding from the Missouri Department of Economic Development, contributions from individuals and organizations interested in promoting economic development in Mid-Missouri, the Company's interests in QEDOs described in Section 2 above, and its investments). The Newsletter will also be available upon request by persons who do not subscribe to those publications for a small fee that will only defray the Company's estimated out-of-pocket expenses for mailing, reproduction and handling. The payment and amount of the foregoing fees will have no relationship to the consummation of any transactions in securities described in the Newsletter that may or may not take place. Issuers will not be charged a fee for including in the Newsletter the Mo. Reg. summaries described below.

The Newsletter will include at least two principal segments.

A. General Education Segment. The first segment will provide general investor education (the "General Education Segment") on the nature of Small Business Capital investments and general guidance on how to approach and analyze those investments. In many instances, this segment will summarize relevant guidance on this subject provided by the Commission, the Division, other state securities law authorities, the NASD and other self-regulatory organizations. It may also provide basic guidance in analyzing financial statements or business plans of the sort found in introductory text books on accounting or finance. In addition to providing basic overview knowledge of how to assess the merits and risks presented by Small Business Capital investments, there will be illustrative case studies of a theoretical investment opportunity of this sort which addresses some of the more important factors bearing upon the prudence of making an investment in such a business.

The General Education Segment will also, from time to time, include excerpts from interviews with securities regulators, attorneys and accountants with experience in financing transactions and securities law matters, venture capitalists, bankers and entrepreneurs who have been involved in operating or raising capital for businesses in various stages of growth. They will be called upon to share their knowledge, experience and insights in a more personalized and informal format with respect to both the matters referred to in the immediately preceding paragraph as well as lessons learned in the school of hard knocks. In the latter regard, entrepreneurs involved in successful as well as unsuccessful ventures will relate their understanding of how to discern the merits and risks of businesses and their prospects, with particular emphasis on discerning danger signs and trouble spots. This segment will contain a boldface disclaimer that the views expressed (i) are solely those of the interviewee, (ii) do not necessarily represent the views of the Company, (iii) are not intended to constitute investment advice or recommendations to purchase securities of any

company, and (iv) are based on particular experiences which may not be capable of replication in the future.

Interviews will not be conducted of entrepreneurs involved with companies as to which: (i) the Company has made an equity investment or loan, (ii) the Company has been involved in the preparation of the U-7 or investor presentation, or (iii) the Company is involved, or is expected to be involved, in authorizing tax credits under Mo. Rev. Stat. § 348.300 et seq. In addition, no Mo. Reg. summary will be included with respect to any interviewee whose issuer has then been the subject of such summary within a window period of six months on either side of such interview, as measured from the date of the publication that included such interview or Mo. Reg. summary. The six month period is patterned after the integration safe harbor set forth in Rule 502 of Regulation D to demonstrate that the interview is not connected to the prior or subsequent publication of the Mo. Reg. summary relating to the issuer with which the interview is involved. In addition, these exclusions will collectively eliminate any connection between publication of views and perceived self-interest such as from possible indirect financial benefits to the Company.

B. MoReg Summaries. A separate and distinct segment of the Newsletter will list and briefly describe in narrative fashion Missouri issuers and their proposed offerings that have been recently filed with the Division under MoReg.

The Company itself will prepare the summaries of each such filed offering by extracting information from each issuer's offering materials. The Company will limit the contents of each summary to the information permitted by the "tombstone advertising" exemption under 15 CSR § 30-53.010(3), a copy of which is attached hereto. Although the Division does not require materials containing only such information to be filed with it, the Company will voluntarily submit such summaries to the Division seven days prior to their dissemination. The Division, however, will neither issue a formal approval of such materials nor be responsible for the accuracy and reliability of such materials and their conformance with state law.

The Newsletter and the included summaries will not offer any endorsement, analysis or recommendations with respect to the securities of any issuer noted therein or their investment quality or value. Furthermore, the Company does not intend for investors to equate the submission of the summaries to the Division with a recommendation or endorsement by the Division of such issuers and the securities offered. Therefore, such summaries will be accompanied by a boldface disclaimer to the effect that: (i) in preparing the summaries, the Company has relied on each issuer's offering materials without independent investigation or verification of their truth or accuracy; (ii) the summaries are prepared by the Company without the involvement, investigation or verification of the Division; (iii) investors should carefully read the U-7 and should not rely on the Company, the Division or these summaries in making their investment decisions; (iv) neither the Company nor the Division is recommending, advising, or otherwise endorsing an investment in the securities of the issuer being described; (v) and that the summaries do not constitute an

offer to sell, or the solicitation of an offer to purchase such securities, which offer will be made only by means of the MoReg prospectus.

If the Company has made an investment in an issuer<sup>2</sup> and either has been involved in the preparation of that issuer's U-7 registration statement or presentation to investors, then no summary of any such offering will be included in the Newsletter. This exclusion is intended to avoid situations where the Company might be viewed as indirectly receiving compensation in connection with any offering where it has a consultative role in the development of the underlying soliciting material being summarized. However, founders, incorporators, officers, directors and employees of the Company will in any event be prohibited from investing in, or having any other financial interest in, any small business which seeks a listing in the Newsletter. There are two historic exceptions to the foregoing, one of which involved an equity investment representing approximately two percent of the equity of the issuer referred to in the immediately following paragraph, and the other involves a loan to the founder of an issuer. Both of these occurred prior to the time the Newsletter was conceived. As the Company had no expectation at the time such investment or loan was made that the Newsletter would come to fruition, the Company should not be viewed as indirectly receiving compensation in connection with any current offering of such issuers which may be listed in the Newsletter.

In addition, the Newsletter will exclude any summaries of offerings by issuers where the Company is involved, or is expected to be involved in, authorizing tax credits under Mo. Rev. Stat. § 348.300 et seq. because of the compensation the Company receives in that capacity. One exception to the above exclusion is that the Company approved the issuance of tax credits under Mo. Rev. Stat. § 348.300 et seq. in the summer of 1994, prior to the Newsletter's conception, for an issuer currently conducting a MoReg offering which is proposed to be listed in the Newsletter. Since such tax credits were approved with respect to this issuer without a view to listing such issuer in the Newsletter because the Newsletter was not even being contemplated at such time, tax credit compensation received in connection with such past offering should not be linked to current listings of such issuer in the Newsletter. The Company will not hereafter approve tax credits for such issuer if such issuer is listed in the Newsletter.

Collectively, the above described exclusions should preclude any linkage between offerings where the Company is arguably furnishing advice and disseminating material that is arguably soliciting further interest from potential investors.

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<sup>2</sup> The Company on some occasions makes small loans to or equity investments in a small business from its seed capital fund. Proceeds from such investments are utilized for such purposes as research and development, initial capitalization, hiring a business consultant, attending a trade show, management training or support services.

The Company will not have any involvement in any communications, discussions or negotiations between the issuer and any interested investors regarding the making of a proposed investment. The Company will therefore serve only as a provider of public information that is available in more detail from the U-7 which can be obtained from the issuer or the Division. The Company will not match borrowers and lenders, or buyers or sellers and will not act as an agent for any party. Parties will therefore conduct their own discussions or negotiations on an independent basis in an independent forum. In addition, the Company will not have possession of, or otherwise handle, any funds, securities or properties of any person receiving the Newsletter or any other third parties.

## DISCUSSION

### Definition of Investment Adviser

Section 202(a)(11) of the Advisers Act defines an "investment adviser" as follows:

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....

The essential elements of this definition encompass one who (i) for compensation (ii) is engaged in the business of (iii) giving advice or promulgating analyses or reports on the value of securities and the advisability of investing in securities. We believe that the Company's proposed activities do not satisfy any of these elements and it is therefore not an investment adviser under the above definition.

A. Giving advice or analyses on securities. The SEC has determined that a broad range of activities constitute giving advice or analyses concerning securities. According to the SEC, even advice that does not pertain to "specific" securities satisfies the definition.

The staff believes that a person who provides advice, or issues or promulgates reports or analyses, which concern securities, but which do not relate to specific securities, generally is an investment adviser under Section 202(a)(11), assuming the services are performed as part of a business and for compensation. The staff has interpreted the definition of investment adviser to include persons who advise clients concerning the relative advantages and disadvantages of investing in securities in general as compared to other

investments...[S]pecific investment advice includes a recommendation or report about specific securities or specific categories of securities....(emphasis added)

Release IA-1092, Fed. Sec. L. Rep (CCH) ¶ 56,156E at 44,057-3, 44,057-4 (October 8, 1987) [hereinafter 1987 Advisers Act Release].

In assisting entrepreneurs with the MoReg procedure and the obtaining of tax credits, the Company will not make recommendations or give advice about securities. The Company will merely provide administrative assistance with these matters. In the preparation of a U-7 or of a "test the waters" presentation, the Company will offer consultation on the regulatory framework surrounding the process and the techniques used within the process. However, the Company will not draft any portion of the U-7 or investor presentation, and the content of any such U-7 or investor presentation will be the sole responsibility of the issuer.

With respect to the General Education Segment of the Newsletter, we believe that this activity is not giving advice or analyses on securities under the Advisers Act. First, in this segment, the Company will not recommend or endorse the securities of specific issuers. The Company will discuss hypothetical situations which in some cases will be drawn from past experience. Such hypothetical will serve to illustrate various factors to consider in making these general types of investments. Furthermore, with respect to the interview excerpts, such excerpts will serve only an educational function as they will disclose the interviewees' role in the process of offering Small Business Capital investments and methods of analyzing Small Business Capital investments, with particular emphasis on spotting and evaluating risks with respect to such investments.

Additionally, this part of the Newsletter will not recommend a specific type of investment such as "unit offerings of debt securities with warrants" or a specific category of issuers such as "medical technology companies." The Newsletter will educate investors about small business issuers and Small Business Capital investments in general. Seed capital companies do not form a "category" of issuers because the group is an undefinable cross-section of issuers as a whole that represents a wide variety of size, industries, risk and return characteristics.

Furthermore, the purpose of the Newsletter is to educate investors, not promote or persuade an investor to make an investment in Small Business Capital investments. The Newsletter proposes to help investors make decisions on a more informed basis.

Analyses or reports within the Advisers Act definition include those items containing "judgmental" components. See 1 Tamar Frankel, The Regulation of Money Managers at 159 (1978 & Supp. 1993) [hereinafter Frankel]. Information relating to securities does not constitute such an analysis or report if (i) the information provided is

readily available to the public in its raw state; (ii) the categories of information are not highly selective; and (iii) the information is not organized or presented in a manner that suggests the purchase, holding or sale of any securities. Investex Investment Exchange Inc., [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,649 (April 9, 1990) [hereinafter Investex]; Charles Street Securities, Incorporated, (avail. February 27, 1987).

The listing and brief description of issuers filing with the Division in the Newsletter will not constitute an analysis or report because such listing satisfies the above three-prong safe harbor. The categories of information will not be highly selective because the issuers listed will only be those that have filed with the Division under MoReg. Finally, the list will not be organized in a manner to suggest the sale of securities because the list will be alphabetical by issuer.

The listing and description of issuers in the Newsletter will be very similar to that in the Investex letter. Investex involved a computer data base listing of all limited partnerships that subscribe to a limited partnership information service and a monthly newsletter listing and briefly describing all subscribing partnerships. The Division of Investment Management concluded that such an operation did not require registration as an investment adviser.

Finally, the Newsletter listing will not act as a targeting or matching service for investors and issuers. See Petroleum Information Corporation at 11618 (July 18, 1989) (on-line listing and description of oil and gas properties, which does not act as a matching service, does not qualify as investment adviser or broker-dealer) [hereinafter Petroleum Information]. The list of issuers will be for informational purposes only.

*B. For compensation.* The Advisers Act contains no definition of "compensation," but the SEC has determined that "compensation" means "any economic benefit." 1987 Advisers Act Release at 44,057-5. The Company will receive prescribed compensation under Missouri statutes for assisting issuers in obtaining tax credits for their investors. However, such compensation is a flat percentage of total investor contributions and is not related to executing the transaction or giving investment advice. The Company may also receive payments to cover the out-of-pocket costs of its services, such as the provision of supplies and securities forms, the performing of background checks on principals of potential issuers and copying costs.

The SEC has considered the situation of a not-for-profit corporation that charges a fee to cover its administrative costs and concluded that such not-for-profit corporation was not required to register as an investment adviser. Technology Capital Network, [1992 Transfer Binder] Fed. Sec. L. Rep. ¶ 76,273 (June 5, 1992) (non-profit corporation which operates matching program for potential investors and charges fee to cover administrative costs not an investment adviser) [hereinafter Technology Capital]. In the Company's case, like that of the not-for-profit corporation in Technology Capital, any

economic benefit received by the Company will be applied to defray the Company's administrative costs and not accumulated to turn a profit.

C. Engaged in the business. Investment Management considers a person to be "in the business" of providing investment advice if the person: (i) holds himself out as an investment adviser, (ii) receives any separate or additional compensation that represents a clearly definable charge for giving investment advice or (iii) on anything other than a rare instance, provides specific investment advice. 1987 Advisers Act Release at 44,057-4.

The Company will not be "in the business" of giving investment advice pursuant to the above three-part test. First, the Company will not hold itself out as an investment adviser because of the limitations described above and a disclaimer in the Newsletter that it is not acting as an investment adviser, broker or dealer. Second, the Company will receive no separate fee for giving investment advice. The only fees the Company will receive will be the statutorily provided compensation for obtaining tax credits and any charges for administrative costs for the use of Company facilities or supplies. Finally, as discussed above, the Company's activities will not involve the giving of specific investment advice.

#### Definition of Broker and Dealer

Section 3(a)(4) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others...." Section 3(a)(5) of the Exchange Act defines "dealer" as "any person engaged in the business of buying and selling securities for his own account...." The Company will not be engaged in the business of buying or selling securities. Therefore, the Company will not be subject to registration as a dealer. Thus, the question is whether the Company will be (i) engaged in the business of (ii) effecting transactions in securities for the account of others.

The Company will not be "engaged in the business" of effecting transactions in securities because its activities do not reflect "regularity of participation in securities transactions at key points in the chain of distribution." See SEC v. Hansen, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,426 at 98,119 (S.D.N.Y. 1984). The Company will serve as an informational resource to entrepreneurs. Any connection with actual securities transactions will be remote because the Company will limit itself to informational, non-promotional activities. Furthermore, the Company's assistance with MoReg will cease once the "test the waters" period ends (if the issuer is making such "test the waters" solicitation) or otherwise once registration goes effective. The Company will have no involvement in soliciting sales.

Second, the Company will not be "effecting transactions in securities." The Company will provide only informational assistance to entrepreneurs. The Company's assistance with the preparation of the U-7 and presentation to investors will be administrative and strategic assistance only. The Company will not act as an agent on behalf of issuers.



Furthermore, an entity that acts merely as a consultant for an issuer and does not solicit purchasers or handle securities of the issuer does not qualify as a broker. Benjamin and Lang, Incorporated, [1978-1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,998 (August 1, 1978) (financial consultant of issuer that recommends methods of financing not a broker); Dominion Resources, Incorporated, 1985 WL 54428 (July 23, 1985) (consultant that assists in structuring securities transactions and their placement not a broker).

In assisting entrepreneurs with MoReg and tax credits, the Company will only act as a consultant and will not solicit purchasers, negotiate with purchasers or handle securities of the issuer. With respect to the preparation of offering literature or investor presentations, the Company will provide administrative assistance and commentary but will not take part in the actual drafting of any such materials. The Company's staff may attend investor presentations during the "test the waters" period but only for observational purposes.

The Company's publication of the Newsletter will not bring it within the definition of broker. The General Education Segment addressing investment in Small Business Capital investments will provide general educational information to investors and not promote sales of securities. Also, the publication of a list and brief description of Missouri filings will be similar to the newsletter in the Investex letter. In the Investex letter, supra, a company's operation of a data base and newsletter that listed and described subscribing limited partnerships did not bring such company within the definition of broker because the company was not engaged in selling securities and was not acting as the custodian of a subscriber's funds or securities. In its publication and dissemination of the Newsletter, the Company will not engage in selling securities or act as a custodian or agent for investors.

Furthermore, like the on-line listing service in Petroleum Information, supra, no negotiations or transactions with respect to issuers listed in the Newsletter will be conducted through the Newsletter or the Company, and as noted above, the Company will not perform a matching service through the Newsletter. See Petroleum Information at 11620.

Finally, the Company will receive no transaction based commission for its services. The Company will receive only compensation for office services such as copying and statutory tax credit compensation. The Company will receive no tax credit compensation with respect to investments in issuers that are listed in the Newsletter, subject to the historic exceptions noted above.

### Conclusion

It is our understanding, based on recent published interpretive opinions of Investment Management and Market Regulation, that the activities of the Company described above would not require the Company to register as an investment adviser under the Advisers Act or as a broker or dealer under the Exchange Act. Accordingly, we respectfully

request that you confirm that each of Investment Management and Market Regulation would not recommend enforcement action with respect to such activities.

If, for any reason, clarification or additional information is needed with respect to the matters discussed above, or if either Investment Management or Market Regulation do not concur with the views expressed in this letter, we respectfully request that you telephone John A. Granda of this office prior to issuing any written response to this letter.

Sincerely,

STINSON, MAG & FIZZELL, P.C.

By

  
John A. Granda

JAG/lkf

(E) The amount of securities to be offered in this state and the states in which a registration statement or similar document in connection with the offering has been or is to be filed and any adverse order, judgment or decree entered by the securities agency or administrator in any state or by a court or the Securities and Exchange Commission (SEC) in connection with the offering;

(F) A copy of the latest prospectus filed with the registration statement under and satisfying the requirements of section 10 of the Securities Act of 1933; and

(G) The consent of service of process required by section 409.415(g), RSMo.

(3) If the information and documents required to be filed by subsection (2) have been on file with the commissioner for at least five (5) business days, or any shorter period as the commissioner, by rule or order, allows and the applicable registration fee has been paid before the effectiveness of the federal registration statement, a registration state-

ment under this section automatically becomes effective concurrently with the effectiveness of the federal registration statement. If the federal registration statement becomes effective before the conditions in this subsection are satisfied and they are not waived, the registration statement becomes effective when the conditions are satisfied. The registrant shall promptly notify the commissioner by telephone or telegram of the date and time when the federal registration statement became effective and the content of the price amendment, if any, and shall file promptly a post effective amendment containing the information and documents in the price amendment. The commissioner shall promptly acknowledge receipt of notification and effectiveness of the registration statement as of the date and time the registration statement became effective with the SEC.

[Added eff. 10-27-86.]

### Ch. 53—Sales and Advertising Literature

[§ 35,491]

**Sec. 30-53.010. Promotional materials to be filed, permitted without filing, and prohibited.** (1) Any advertisement, display, pamphlet, brochure, letter, article or communication published in any newspaper, magazine or periodical, or script or any recording, radio or television announcement, broadcast or commercial to be used or circulated in connection with the sale and promotion of a public offering of securities will be subject to the following requirements and restrictions:

(A) All sales and advertising literature and promotional material, other than that exempted by the Act (section 409.403) and this rule, shall be governed by the following:

1. The applicant shall file with the commissioner, at least five days before its intended dissemination, one copy of each item of literature or material.

2. If not disallowed by the commissioner by written notice or otherwise within three business days from the date filed, the literature or material may be disseminated.

3. No formal approval of the literature or material shall be issued by the commissioner.

4. The disseminator of the literature or material shall be responsible for the accuracy and reliability of the literature and material, and its conformance with the Act and this rule;

§ 35,491

(B) The following devices or sales presentation, and the use thereof, will be deemed deceptive or misleading practices:

1. Comparison charts or graphs showing a distorted, unfair or unrealistic relationship between the issuer's past performance, progress or success and that of another company, business, industry or investment media.

2. Lay-out, format, size, kind and color of type used so as to attract attention to favorable or incomplete portions of the advertising matter, or to minimize less favorable, modified or modifying portions necessary to make the entire advertisement a fair and truthful representation.

3. Statements or representations which predict future profit, success, appreciation, performance or otherwise relate to the merit or potential of the securities unless such statements or representations clearly indicate that they represent solely the opinion of the publisher thereof.

4. Generalizations, generalized conclusions, opinions, representations and general statements based upon a particular set of facts and circumstances unless those facts and circumstances are stated and modified or explained by such additional facts or circumstances as are necessary to make the

entire advertisement a full, fair, and truthful representation.

5. Sales kits or film clips, displays or exposures, which, alone or by sequence and progressive compilation, tend to present an accumulative or composite picture or impression of certain, or exaggerated potential, profit, safety, return or assured or extraordinary investment opportunity or similar benefit to the prospective purchaser.

6. Distribution of any non-factual or inaccurate data or material by words, pictures, charts, graphs, or otherwise, based on conjectural, unfounded, extravagant, or flamboyant claims, assertions, predictions or excessive optimism.

7. Any package or bonus deal, prize, gift, gimmick or similar inducement, combined with or dependent upon the sale of some other product, contract or service, unless that unit or combination has been fully disclosed and specifically described and identified in the application as the security being offered; and

(C) All sales and advertising literature and promotional material other than that described in subsection (3)(A) of this rule and including that intended for broker-dealer and internal use only shall be submitted to the commissioner for comment upon request. Literature and material containing representations inconsistent with the offering document and that employing deceptive and misleading practices as described in subsection (1)(B) of this rule shall be prohibited.

(2) No sales or advertising literature or promotional material containing any ranking or rating of offering terms or prospective program performance shall be disseminated unless specifically permitted by the commissioner by written notice or otherwise.

(3) The following forms and types of advertising are permitted without the necessity for filing or prior authorization by the commissioner, unless specifically prohibited.

(A) So-called "tombstone" advertising, containing no more than the following information:

1. Name and address of issuer.

2. Identity or title of security.

3. Per unit offering price, number of shares and amount of offering.

4. Brief, general description of business.

5. Name and address of underwriter, or address where offering circular or prospectus can be obtained.

6. Date of issuance.

(B) Dividend notices, proxy statements and reports to shareholders, including investment company quarterly and semi-annual reports.

(3)(C) Unless requested by the commissioner pursuant to subsection (1)(C) of this rule, sales literature, advertising or market letters prepared in conformity with the applicable regulations and in compliance with the filing requirements of the SEC, and NASD or an approved securities exchange;

(D) Factual or informative letters, bulletins or releases, similar to "news letters", relating to issuer's progress or activities, status of the offering or current financial condition.

(E) Dissemination of any data incorporated in the offering circular or prospectus, so long as the use of such material, out of context, does not tend to detract from, distort, supersede or express a different meaning of the representations or disclosures contained therein.

(4) Any person who prepares, distributes or causes to be issued or published any sales literature which is knowingly inaccurate, false, misleading or tending to mislead in any material respect or otherwise in violation of the provisions herein may be held responsible and accountable therefor in any administrative or civil proceeding arising under the Act or these rules.

[Last amended eff. 11-25-74; 6-12-89; 4-8-93.]

#### Ch. 54—Exemptions

##### [† 35,501]

Sec. 30-54.010. General. (1) The commissioner may render interpretative opinions upon the request of applicants with respect to the availability of any exemption (section 409.414(e) of the Act). For fees, see 15 CSR 30-50.030. The opinions of the commissioner do not constitute any approval of the securities or transactions concerned and

it is unlawful for an applicant to represent to any prospective purchaser, customer or client that the commissioner has announced approval (section 409.405 of the Act).

(2) The burden of proof that the offer and sale of large blocks of securities by any person or of any securities by controlling persons (15 CSR 30-50.010(1)(G)), is not directly or indirectly for the benefit of the issuer and