Bulldog Investors, 60 Heritage Drive, Pleasantville, NY 10570
(914) 747-5262 // pgoldstein@bulldoginvestors.com

September 5, 2007

Nancy M. Morris
Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-18-07 -- Revisions of Limited Offering Exemptions in Regulation D

Dear Ms. Morris:

In a previous comment letter, we argued that Regulation D's prohibition on "general solicitation and general advertising" in connection with an offering of unregistered securities should be eliminated (and not merely liberalized) as a first step to eliminating all securities regulations that violate the First Amendment.

Since then, we came across another opinion that provides strong support for our position that a prohibition on truthful speech related to a securities offering violates the First Amendment. In 2004, in Swedenburg v. Kelly the Second Circuit Court of Appeals upheld a New York State law that required out-of-state wineries to be licensed by the state in order to sell wine directly to New York consumers. However, the Court also found that a section of the law that prohibited an advertisement or solicitation for wine sales from being sent to New York was clearly unconstitutional. (The decision was subsequently overturned by the Supreme Court which found that the licensing law violated the "dormant" Commerce Clause. As a result, it apparently found no need to reconsider the Second Circuit's ruling regarding the constitutionality of the law's ban on liquor advertising). The portion of the Second Circuit Court's opinion regarding advertising and solicitation is as follows:

> III. CONSTITUTIONALITY OF SECTION 102(1)(A) UNDER THE FIRST AMENDMENT
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> Finally, plaintiffs-appellees challenge the constitutionality of section 102(1)(a), which provides:
>
> > No person shall send or cause to be sent into the state any . . . publication of any kind containing *an advertisement or a solicitation of any order for any alcoholic beverages*, irrespective of whether the purchase is made or to be made within or without the state, or whether intended for commercial or personal use or otherwise, unless *such person shall be duly licensed.*

N.Y. Alco. Bev. Cont. Law § 102(1)(a) (McKinney 2000) (emphasis added). In the district court, plaintiffs-appellees argued that section 102(1)(a) was unconstitutionally overbroad in violation of the First Amendment. The district court agreed, but only after deciding that sections 102(c) and (d) were unconstitutional. *See Swedenburg*, 232 F. Supp. 2d at 152. On appeal, plaintiffs appellees maintain that this section is unconstitutionally overbroad, independent of the constitutional status of sections 102(c) and (d). We agree with plaintiffs-appellees that the statute is overbroad and violates the First Amendment.

It is well established that states may prohibit commercial speech concerning unlawful activity. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980). If, however, commercial speech concerns lawful activity and is not misleading, courts must then look to whether there is a substantial governmental interest in prohibiting the commercial speech at issue. *Id.* at 566. If the government has identified a substantial interest in regulating the speech, courts "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* The state "carries the burden of showing that the challenged regulation advances [its] interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal quotation marks and citation omitted).

New York contends that the SLA interprets section 102(1)(a) narrowly to prohibit only unlawful activity – "the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed producers or sellers." In so doing, the State argues, SLA's interpretation prohibits only the advertising of unlawful activity, and thus does not run afoul of the First Amendment.

An agency's interpretation of a statute it is charged to administer deserves broad deference when the interpretation has been adopted in a rule-making or other formal proceeding. New York has not argued that it has a substantial interest in limiting advertising of wines in general, or that the prohibition advances any potential interest such as temperance. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Here, however, the State relies only on an affidavit submitted in this litigation as an expression of the agency's view. This Court has held that an opinion letter or a position taken in the course of litigation is entitled to deference only to the extent that it is persuasive. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001). Here, we find the State's affidavit unpersuasive.

Section 102(1)(a) plainly encompasses a broader prohibition than the solicitation of orders by unlicensed, out-of-state wineries for direct shipment of wine to New York consumers. The statute's broad language prohibits unlicensed persons from causing *any* publication to enter the state that contains an "advertisement or a solicitation of any order for any alcoholic beverages." N.Y. Alco. Bev. Cont. Law § 102(1)(a) (McKinney 2000). While the state can limit illegal sales of alcohol,

> section 102(1)(a) broadly encompasses protected speech. For example, if plaintiffs-appellees' wineries advertised on the Internet and included an order form that is lawful in their own states, the advertisement would be illegal in New York, even if it contained language limiting sales to states in which such orders were lawful. Under the broad terms of section 102(1)(a), the limitation would be insufficient, as the statute prohibits *any* advertising activity by unlicensed wineries.
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> The State's efforts to defend section 102(1)(a) on the ground that it is narrowly interpreted are unavailing.15 "[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *44 Liquormart*, 517 U.S. at 516. Accordingly, we hold that, in impermissibly regulating protected commercial speech, section 102(1)(a) is overbroad and impermissibly violates the First Amendment.

In the 1990's and early 2000's, the Food and Drug Administration lost a series of legal challenges to various regulations that restricted the promotion of (1) "off-label" (non-FDA approved) uses of pharmaceuticals or medical devices, (2) compounding of prescription drugs by pharmacies, and (3) health benefits for food supplements. All of these regulations were analyzed by federal courts using the standard set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Com'n of N. Y., 447 U.S. 557 (1980). Under Central Hudson, for a regulation prohibiting truthful nonmisleading commercial speech to withstand judicial scrutiny, the government must prove that the regulation (1) relates to a substantial government interest; (2) directly and materially advances the asserted interest; and (3) is narrowly tailored, i.e., it is no "more extensive than necessary."[1]

Any asserted public interest in the prohibition of advertising of securities offerings is certainly less compelling than the FDA's interest in assuring the safety and efficacy of pharmaceuticals, medical devices and food supplements. After all, the products the FDA regulates can have implications of life and death. By contrast, in Mercier v. Inter-Tel (Delaware), Incorporated, 2007 WL 2332454 (Del. Ch. Aug. 14, 2007), Vice Chancellor Leo Strine bluntly noted that the goal of investors in securities is "to make moolah, cash, ching, green, scratch, cabbage, benjamins -- to obtain that which Americans have more words for than Eskimos have for snow -- money." Therefore, the notion that limitations on speech about securities offerings merit a less strict level of scrutiny than limitations on speech about FDA-regulated products is unlikely to impress a court, to say the least.

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[1] In Thompson, et al. v. Western States Medical Center Pharmacy, 535 U.S. 357, the United States Supreme Court affirmed a decision of the U.S. Court of Appeals for the Ninth Circuit that invalidated a provision of the Federal Food, Drug, and Cosmetic Act (FDCA) that exempted a pharmacy selling a compounded drug from certain of the FDCA's requirements provided the pharmacy did not advertise or promote the compounded drug. (""[I]t is well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield* v. *Fane*, 507 U. S., at 770 (quoting *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 71, n. 20 (1983)). The Government simply has not provided sufficient justification here. If the First Amendment means anything, it means that regulating speech must be a last-not first-resort. Yet here it seems to have been the first strategy the Government thought to try.")

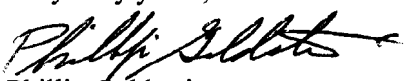
The Commission might assert that Regulation D does not violate the First Amendment because it is only a safe harbor and thus it does not absolutely prohibit truthful general solicitation or general advertising by an issuer of unregistered securities offerings. In fact, Paragraph 3 of the Preliminary Notes to Regulation D states:

> 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. (Emphasis added.)

Still, what is the point of retaining a provision of a safe harbor rule if the Commission is not confident that the provision will be upheld if challenged? As noted above, in Thompson, et al. v. Western States Medical Center Pharmacy the Supreme Court invalidated a similar anti-solicitation requirement for an exemption from certain FDCA requirements. Therefore, a court would almost certainly find that conditioning the exemption from registration of securities not offered to the public on a prohibition of general solicitation or general advertising is what Federal District Court Judge Royce C. Lamberth in Washington Legal Foundation v. Friedman called "constitutional blackmail."

Isn't it better to simply eliminate Regulation D's prohibition on general solicitation and general advertising rather than risk a finding that the prohibition is unconstitutional – especially since it serves no purpose where the securities being offered can only be purchased by investors that can "fend for themselves?"[2]

Very truly yours,



Phillip Goldstein
Principal

[2] SEC v. Ralston Purina, 346 U.S. 119, 125 (1953),