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transactions with such individuals, the number of individuals to which sales were made, and the methods employed by the bank to inform private investors of the availability of the bank's services as a municipal securities dealer.

See ¶ 25,937, "Exchange Act—Securities Assns.; Municipal Trading" division, Volume 3.

[SEC Correspondence]

Enclosed is a copy of Securities Exchange Act Release No. 13446 (April 14, 1977), in which the Commission granted an exemption from Section 15B of the Securities Exchange Act of 1934 and the rules and regulations thereunder to the Bank of North Dakota ("Bank"). Registration under that section and the requirements applicable to municipal securities dealers generally are necessary for the protection of investors. In granting this exemption, the Commission was influenced by the fact that the Bank's activities in municipal securities consist primarily of purchases and sales of North Dakota issues on a substantially non-profit basis, and that there appears to be little incentive for abuse.

In its application for exemption, the Bank represented that less than 10 percent of the municipal securities sold by the Bank are sold to private individuals. While the Commission deemed it appropriate to grant the exemption, it also believed it important to obtain from the Bank for possible future consideration more precise information concerning sales to private individuals. In that regard, we would appreciate receiving from the Bank at an early date information covering the Bank's last two fiscal years concerning:

(a) The aggregate annual dollar volume of transactions with such private individuals;

(b) The number of such individuals to which sales were made in each year; and

(c) The methods employed by the Bank to inform private individuals of the availability of the Bank's services as a municipal securities dealer.

In any event, should the Bank's activities change materially, the Commission might wish to consider the appropriateness of continued exemption. In that regard, we would appreciate being informed of any significant change in the character of the Bank's municipal securities activities. You must also realize that the anti-fraud provisions of the federal securities laws continue to apply to the Bank's securities activities and that, in that connection, the Bank's exemption from registration does not relieve the Bank of its obligation to make appropriate disclosures to customers purchasing municipal securities from it.

[No Letter of Inquiry. CCH.]

[¶ 81,198] Exxon Corporation.

Securities and Exchange Commission, Division of Corporation Finance. April 7, 1977. (Available May 9, 1977). Correspondence in full text.

Securities Act—Invitations for Competitive Bids—Dutch Auction.—Invitations for competitive bids used in connection with a proposed Dutch Auction of securities may omit certain information or documents required by Securities Act Rule 428(a), provided that the omitted material is contained in the registration statement for the offering.

See ¶ 4120, "Securities Act—Prospectuses" division, Volume 1.

Securities Act—Competitive Bidding Registration Statements—Dutch Auction.—A post-effective amendment to a registration statement for a proposed Dutch Auction of securities need not comply with the requirements of Securities Act Rule 415(b), provided that the amendment is accompanied by a letter from the issuer stating that it has received the consent of the underwriters named in the prospectus to the filing of the amendment.

See ¶ 3031, "Securities Act—Registration" division, Volume 1.

Securities Act—Prospectus—Underwriters—Dutch Auction—Purchasers.—Purchasers of securities in a Dutch Auction who are not broker-dealers need not be specifically named as underwriters in a prospectus. The SEC Commissioners, however, were unable to agree among themselves as to the propriety of omitting from the prospectus a

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statement that, in connection with any public resale of the securities by a purchaser other than the broker-dealers named in the prospectus, such a reseller, under certain circumstances, might be deemed to be an underwriter.

See ¶ 1501, "Securities Act—Definitions" division, Volume 1.

[SEC Staff Reply]

This is in response to your letters of January 14 and February 10, 1977 and intervening conference with members of the staff of the Division of Corporation Finance concerning the use of the Dutch Auction method in connection with a registered offering of medium-term debt (the "Securities") of Exxon Pipeline Company ("Exxon Pipeline") a wholly-owned subsidiary of Exxon.

The pertinent facts, as more fully set forth in your letters, are as follows. The Dutch Auction is proposed to be used as a method for distributing debt securities of Exxon Pipeline directly to the public rather than through negotiated underwritings. The Dutch Auction eliminates underwriting commissions, and may result in the reduction of the interest rate on the offering.

The Dutch Auction differs in certain material respects from the practice of competitive bidding. Principally, the bids which are submitted need not cover the entire amount of the offering in order to be accepted. Each bidder, including institutions and individuals as well as registered broker-dealers, indicates the amount of the offering which is wanted, and the yield. Each bid received will, on the final date designated for entry of bids, become an irrevocable offer to purchase the amount of bonds indicated unless the bid is withdrawn.

In addition, the offering price is based upon the yields specified in the bids. After closing the invitation period, the bids are listed in ascending order of yields. The bid with the lowest yield is accepted first, and then other bids at successively higher yields are accepted up to those bids with the highest yield required to reach the total amount of the offering. The highest accepted yield is the yield at which all of the bonds are awarded. Upon determination of the yield, the interest rate and price are fixed by the issuer. The securities will be awarded to the successful bidders at a uniform price based upon the accepted yield.

Finally, there is no managing underwriter creating an underwriting syndicate, and no underwriting discount or commissions. There are no agreements entered into covering resale prices. As a result, prices can vary among resellers.

Specifically, you have raised questions relating to registration of the proposed offering under the Securities Act of 1933 (the "Act"). First, will the invitation for bids be required to include the entire prospectus as required by clause (a) of Rule 428? Second, will the requirements of Rule 415(b) be properly satisfied if a letter from Exxon Pipelines, stating that it has received the consents of the underwriters named in the prospectus to the filing of such amendment, accompanies the post-effective amendment to the registration statement in lieu of the required consent "of a managing underwriter acting on behalf of all the principal underwriters?"

With respect to these questions you propose that the Commission amend clause (a) of Rule 428 and clause (b) of Rule 415 to broaden their application to encompass the Dutch Auction herein proposed. If, however, such amendments would require public notice and opportunity for comment you would propose alternatively that the Commission limit its response to an appropriate no-action position by the staff.

Finally, you proposed to name as principal underwriters any registered broker-dealers purchasing from Exxon Pipeline for resale, but not to name anywhere in the prospectus an individual or institution (which is not a broker-dealer). Further, you propose not to include a statement in the prospectus that, in connection with any public resale of the securities by a purchaser other than the broker-dealers named in the prospectus, such a reseller, under certain circumstances, might be deemed to be an underwriter as that term is defined in the Act.

After considering the questions and proposals presented in your letters the Commission has authorized me to advise that it has determined not to adopt amendments to Rules 415(b) and 428(a) without public notice and opportunity for comment and that such amendments will not be published for comment at this time.

In lieu of adopting amendments to these Rules and based on the facts presented the Commission has authorized this Division to raise no objection if; (1) the invitations for competitive bids used by Exxon in connection with the proposed Dutch Auction of securities omit certain information or documents, as required by Rule 428(a) provided the information or documents are contained in a registration statement filed with respect to the offering,

(2) the post-effective amendment filed by Exxon pursuant to the requirement of Rule 415(a), does not comply with the requirements of 415(b) provided the amendment is accompanied by a letter from Exxon stating that it has received the consent of the underwriters named in the prospectus to the filing of the amendment, (3) if individual purchasers or institutional purchasers, which are not broker-dealers are not specifically named as underwriters in the prospectus.

With respect to your related inquiry, the Commission has instructed this Division to inform Exxon, that the Commissioners are unable to agree among themselves as to the propriety of omitting from the prospectus a statement that, in connection with any public resale of the securities by a purchaser other than the broker-dealers named in the prospectus, such a reseller, under certain circumstances, might be deemed to be an underwriter as that term is defined in the Securities Act of 1933.

Because the positions taken in this letter are based upon the representations made in your letters, it should be noted that any different facts or conditions might require a different conclusion. Further, this letter does not purport to express any legal conclusions on the questions presented.

[*Letter of Inquiry*]

This is to supplement our recent telephone conversations with respect to (1) the nature of the Commission's response to the problems relating to the application of clause (a) of Rule 428 and Rule 415(b) under the Securities Act of 1933 to the Dutch Auction method of pricing and offering securities which we outlined to you in our letter of January 14, 1977; (2) the form of published invitation for bids proposed to be used in accordance with Rule 428; (3) whether or not Exxon would consider naming as "underwriters" in the prospectus individuals or non-broker dealer institutions which purchased more than a stated amount of the issue, say 10%; and (4) the inclusion of language that purchasers other than the successful broker-dealer bidders who will be named in the prospectus might, in certain circumstances, be deemed to be underwriters within the meaning of the Securities Act of 1933.

We also agreed that I would send directly to Kenneth S. Spirer, Esq., of the Division of Market Regulation, the supplemental information which he requested at our January 24, 1977 conference. A copy of my letter of today's date to Mr. Spirer is enclosed.

1. In my January 14, 1977 letter [**Reproduced at ¶ 81,171. CCH.**], I indicated that we did not believe that Rule 428 would be available to Exxon in a Dutch Auction of securities because Exxon would invite and most probably accept bids some of which would be for less than the entire amount of the offering, which amount, itself, would be stated in terms of a specified minimum principal amount of securities with the right to increase the size of the issue up to a stated maximum amount should the response to the invitation for bids be more favorable than initially anticipated. Consequently, we proposed that the Commission amend clause (a) of Rule 428. We suggest that the language previously proposed be clarified slightly to read as follows: "or that the issuer will reject all bids if the total amount of bids which the issuer is prepared to accept at a single uniform price for all successful bidders is less than the entire amount of one or more of the issues, such entire amount having been stated in the terms of the bidding as a fixed amount or as a minimum amount which the issuer may increase to a stated maximum amount." In addition, we pointed out in such letter that, since there would be no managing underwriter in a Dutch Auction, the post-effective amendment filed in connection therewith could not be accompanied by the consent "of a managing underwriter, acting on behalf of all the principal underwriters" as required by Rule 415(b); and, accordingly, we proposed that the Commission amend Rule 415(b) to add the following words: "or by a letter from the issuer stating that it has received the consent of the underwriters named in the prospectus to the filing of such amendment". We also indicated that, as the proposed amendments would represent a relaxation of the requirements of the respective Rules, we believed that, pursuant to the Administrative Procedure Act, notice and publication for comment of the proposed amendments would not be necessary.

At the time of our meeting in your office on January 24, 1977 to discuss the Dutch Auction, you stated that our proposed amendments to clause (a) of Rule 428 and to Rule 415(b) might not constitute the most appropriate response of the Commission to the problems associated with the application of such Rules to a Dutch Auction and that such response might instead take the form of a no-action letter

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from the Staff. Furthermore, you indicated that, if amending the respective Rules was deemed to be the most appropriate response to such problems, notice and publication for comment of the amendments might be appropriate.

As we indicated during the January 24, 1977 meeting, and as I stated again during our telephone conversation, while we continue to believe the most appropriate action by the Commission to be the Rule amendments substantially as proposed in my January 14, 1977 letter, in view of Exxon's desire to determine in the near future whether or not to proceed with a Dutch Auction and, if its decision is affirmative, to complete the Dutch Auction in the relatively near term, if the Commission decides that notice and publication for comment (with the attendant delays) is required in connection with such amendments, we would prefer that the Commission limit its response to the problems in question to an appropriate no-action position by the Staff. I understand from the statements made by the Staff at the January 24, 1977 meeting and from our telephone conversation that the presentation in the January 14, 1977 letter in support of the proposed amendments to the Rules would constitute a satisfactory basis for the Staff's considering a no-action position.

2. I am enclosing as Annex A hereto a form of invitation for bids substantially in the form which Exxon would propose to cause to be published if it were to determine to proceed with a Dutch Auction of securities of Exxon Pipeline Corporation guaranteed by Exxon Corporation.

3. Exxon would be opposed to naming as an underwriter in the prospectus an individual or institution (which is not a broker-dealer) purchasing more than a specified percentage of the issue, such as 10%.

It would appear unreasonable to presume that an individual or institution would be purchasing high-grade fixed-income debt securities in a Dutch Auction with a view to resale simply because of the size of the participation of the individual or institution in the successful award of securities. Indeed, it is my understanding that the presumptive underwriter doctrine has been applied by the Commission Staff almost exclusively to the purchase and sale of equity securities (See Charles Nathan, "Presumptive Underwriter," *The Review of Securities Regulation*, Vol. 8, No. 13, July 24, 1975). The only instance of which I am aware where its application to the purchase and sale of a fixed-income security was considered by the Staff was in the Staff's no-action letter, dated December 19, 1975, to Jersey Central Power and Light Company (available January 22, 1976); and there the Staff took the position that the presumptive underwriter doctrine did not apply to an issue of 250,000 shares of non-convertible preferred stock of which 30,000 shares were to be sold to one institutional investor.

Exxon would also be opposed to naming in the prospectus the successful bidders other than broker-dealers even if they were not named as "underwriters."

The effect of any such requirement would in Exxon's opinion seriously restrict or even eliminate completely the participation in the Dutch Auction by purchasers other than broker-dealers. Many individuals and institutions purchasing for investment would not wish to have the amounts of their purchases set forth in a public document. Some might also consider that there would be a risk of their being deemed "underwriters" within the meaning of the Securities Act if they were named in the prospectus even though not named as underwriters. Since there is no requirement in the statute or in the forms for naming purchasers other than underwriters, a court might well take the view that this requirement indicated a presumption on the part of the Commission's Staff that they were "underwriters."

4. Mr. McCoy suggested that consideration should be given to setting forth in the prospectus a statement that, in connection with any public resale of the securities by a purchaser other than the broker-dealers named in the prospectus, such a reseller, under certain circumstances, might be deemed to be an underwriter as that term is defined in the Securities Act of 1933. Exxon would propose to place a statement to such effect in the invitation for bids, but not in the prospectus. Exxon believes that placing such a statement in the official invitation for bids will be effective in preventing non-broker-dealers from bidding for and purchasing securities with a view to their distribution. However, in Exxon's view the inclusion of such a statement in the prospectus would deter individuals and institutions purchasing for investment from participating because, among other factors, they might regard it as increasing their potential liability to suit as statutory underwriters. The statement in the invitation for bids would appear together with the provisions relating to the naming in the

prospectus of successful broker-dealer bidders and the indemnification provisions contained in the statement of terms and conditions of purchase by which Exxon Pipeline and Exxon would agree to indemnify successful broker-dealer bidders who resell the securities (but not non-broker-dealer bidders) in respect of any material misstatement or omission in the prospectus, I am enclosing as Annex B hereto a draft of that section of the official invitation for bids which deals with such matters in substantially the form which Exxon would propose to use if it determines to proceed with a Dutch Auction.

Since Exxon's management would very much like to take into account the Commission's position on these various points in connection with its report to the Board of Directors of Exxon on the previous Dutch Auction and on the applicability of the technique to future financings at the Board's next meeting on February 23, we would very much appreciate it if we could hear from you prior to that time.

[The next page is 88,169.]

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