

**PENNSYLVANIA SECURITIES COMMISSION
DIVISION OF CORPORATION FINANCE**

SUBJECT: Staff Position on 50CR offerings (Small Company Offering Registrations) filed with the Pennsylvania Securities Commission under the Pennsylvania Securities Act of 1972.

RELEASE NO.: 97-CF-2

DATE OF RELEASE: July 2,1997

TYPE: Staff Position

PRIOR REFERENCE: 91-CF-3

At its July 2, 1997 meeting, the Pennsylvania Securities Commission (Commission) permitted the publication of the following positions of the staff of the Division of Corporation Finance (Staff Position) with respect to SCOR offerings filed under Sections 205 or 206 of the Pennsylvania Securities Act of 1972 (1972 Act). This Release supersedes Release 91-CF-3, issued on September 11, 1991.

STAFF POSITION

Availability of SCOR

With respect to the type of companies and type of offerings that may use the Small Corporate Offering Registration Form (Form U-7), the staff follows the Statement of Policy on Small Company Registrations adopted by the North American Securities Administrators Association on April 28, 1996 (NASAA SCOR Policy) except that companies engaged in the business of extension of credit that plan to offer and sell debt securities to the public may not use Form U-7. (*see Tab entitled, "NASSA SCOR Policy"*)

Briefly, a company may do a SCOR offering if it is relying upon an exemption from registration with the U.S. Securities and Exchange Commission (SEC) under the federal Securities Act of 1933 (1933 Act) provided by SEC Regulation A, Rule 504 of SEC Regulation D or Section 3(a)(11) of the 1933 Act and SEC Rule 147. Under SEC Regulation A, the aggregate amount of the offering cannot exceed \$5 million. Under Rule 504 of SEC Regulation D, the aggregate offering amount cannot be more than \$1 million.

An offering under Section 3(a)(11) of the 1933 Act and SEC Rule 147 may be any amount but, among other requirements, all securities must be offered and sold only to

Pennsylvania residents. The company also must be resident and doing business in Pennsylvania and 80% of the net proceeds of the offering must be used in the operation of the company's business in Pennsylvania.

Required Financial Statements

With respect to required financial statements, the staff follows the NASAA SCOR Policy except that staff will not recommend registration of SCOR offerings which only have compiled financial statements or use a statement of receipts and disbursements. Audited statements must comply with the requirements of Commission Regulations 609.031 through 609.037. The written consent of the accountants for the use of the financial statements in connection with the SCOR offering also must be filed with the Commission. SCOR offerings which include prospective financial information (e.g., financial projections) must comply with Commission Regulation 609.010. (*see Tab entitled, "PA Requirements"*)

Substantive Review of a SCOR Offering

Staff will apply its Corporate Equity Guidelines (Guidelines) in the review and analysis of offerings made by companies utilizing Form U-7. These Guidelines address Section 207(g) of the 1972 Act relating to the escrow of promotional shares and proceeds of the offering and Section 208(a)(v) relating to limitations on promoters' profits and participations (including restrictions on the amount of promotional shares to be held by promoters). In applying the Guidelines, staff looks to the totality of the offering and consideration will be given to special circumstances surrounding small public offerings of corporate equity securities. (*see Tab entitled, "PA Requirements"*)

Completing Form U-7

With respect to completing Form U-7, which will be used as the company's prospectus for the SCOR offering, staff recommends that companies consult the NASAA SCOR Issuer's Manual. (*see Tabs entitled, "Form U-7 and "SCOR Issuer's Manual"*)

Forms and Filing Fees

Filing of Form U-7 with the Commission must be accompanied by a completed and executed Commission Form 205 or Form 206, a Uniform Application to Register Securities (Form U-1) and the requisite filing fee. (*see Tab entitled, "PA Requirements"*)

The filing fee for a SCOR offering being made in reliance upon SEC Regulation A and filed under Section 205 of the 1972 Act is \$500. The filing fee for an offering being made in reliance upon Rule 504 of SEC Regulation D or Section 3(a)(11) of the 1933 Act and SEC Rule 147 and filed under Section 206 of the 1972 Act is \$350 plus 1/20 of 1% of the maximum aggregate offering price at which the securities are to be offered in

Pennsylvania during the effective period of the registration with a maximum fee of \$2,150. Checks should be made payable to the “Commonwealth of Pennsylvania.” A portion of the fee will be returned if the offering is withdrawn prior to effectiveness.

When Offers and Sales of SCOR Offerings may be made in Pennsylvania

A SCOR offering being made in reliance upon SEC Regulation A may be registered by coordination in Pennsylvania under Section 205 of the 1972 Act. A company may use Section 205 only if it files the offering with the Commission before the offering is qualified by the SEC. A company may make offers in Pennsylvania once it has complied with Section 203(h) of the 1972 Act by filing with the Commission a copy of the offering circular filed with the SEC. A registration by coordination becomes effective in Pennsylvania at the same time the Regulation A offering is qualified by the SEC, provided that the company has complied with all Pennsylvania requirements and satisfied all outstanding disclosure and substantive review comments.

A SCOR offering being made in reliance upon Rule 504 of SEC Regulation D or Section 3(a)(11) of the 1933 Act and SEC Rule 147 must be filed under Section 206 of the 1972 Act. Under Section 206, **no offers or sales of securities may occur in Pennsylvania until the Commission has declared the offering effective.**

SCOR Offerings Filed under Section 206 of the 1972 Act

For SCOR offerings which are filed under Section 206 of the 1972 Act, the following items are required (*see Tab entitled, “PA Requirements”*):

Legal Opinion. Section 206(b)(14) of the 1972 Act requires the inclusion in the Form U-7 of the fact that an attorney has rendered an opinion that the security when sold will be legally issued, fully paid, and non-assessable and, if a debt security, a binding obligation of the issuer.

Notice of Right of Withdrawal. Section 207(m)(1) of the 1972 Act requires that written notice be given of the right of a purchaser to withdraw an acceptance within a specific time period without any liability to the purchaser.

Annual Financial Reports to Pennsylvania Residents

For SCOR offerings that become registered under Section 205 or Section 206 of the 1972 Act, the company, pursuant to Commission Regulation 606.011, must provide annual financial statements to Pennsylvania security holders within 120 days after the end of the issuer’s fiscal year for as long as the securities are held of record by a Pennsylvania resident. These statements must be prepared by an independent accountant in accordance with generally accepted accounting principles and must be audited. If the financial statements used in the offering were reviewed, then the issuer may use reviewed statements. (*see Tab entitled, “PA Requirements”*)

SCOR Offerings and the Internet

Placing an offering on the Internet provides a low cost method of reaching a large number of potential purchasers and, for this reason, may be especially attractive to companies undertaking a SCOR offering. Companies should be aware of the following issues relating to making offerings on the Internet:

- **An Offer on the Internet is an Offer in Pennsylvania.** Any communication on the Internet designed to raise capital is considered an offer under current regulatory interpretations of both federal and state securities laws (Internet Offer). Therefore, Internet Offers must be made pursuant to a registration or an exemption from registration under the 1972 Act.
- **When an Internet Offer can be made in Pennsylvania.** For a SCOR offering being made in reliance upon SEC Regulation A and filed in Pennsylvania under Section 205 of the 1972 Act, a company may make an Internet Offer upon complying with the requirements of Section 203(h) of the 1972 Act. For a SCOR offering being made in reliance upon Rule 504 of SEC Regulation C or Section 3(a)(11) of the 1933 Act and SEC Rule 147 and filed under Section 206 of the 1972 Act, an Internet Offer cannot be made in Pennsylvania until the SCOR offering has been declared effective by the Commission.
- **Using the Internet for Offerings not being made available in Pennsylvania.** Where a company has registered a SCOR offering in other states but does not intend to make the offering available in Pennsylvania, the company may rely upon an Internet Offer Exemption adopted by order of the Commission. This order provides a self-executing exemption (i.e., no filing required) and facilitates use of the Internet to communicate Internet Offers to persons residing in states in which the SCOR offering is registered. Most states have adopted similar exemptions for Internet Offers. (*see Tab entitled, "PA Internet Offer Exemption"*).
- **Need to Keep Internet Offering Current.** If a company is placing its SCOR offering on the Internet and the information in the Form U-7 changes, either as a result of regulatory comments or business events, the company is under a legal obligation to update all information material to the offering promptly.

SCOR Offerings and ACE-Net

50CR offerings being made in reliance upon SEC Regulation A or Rule 504 of SEC Regulation C may be eligible to participate in the Angel Capital Electronic Network (ACE-Net) which was formed under the auspices of the U.S. Small Business Administration. SCOR offerings accepted for ACE-Net are posted on a Internet Web site whose access is restricted solely to Accredited Investors.

Many states, including Pennsylvania, have granted an exemption from registration for SCOR offerings participating in ACE-Net which reduces the time and cost of filing for a registration. An exemption notice is required to be filed with the Commission prior to making sales in Pennsylvania and a fee must be paid. The company also must comply with several other conditions, such as providing a written notice of a right to withdraw and not paying sales commissions to persons who are not registered with the Commission as securities agents. (*see Tab entitled, "ACE-Net Release"*)

"Test the Waters"

In connection with a proposed securities offering to be made under SEC Regulation A, the SEC adopted rules that permit companies to "test the waters" as to public receptivity to such an offering by publicly disseminating certain information about the company designed to solicit indications of interest. This process is intended to assist companies in realistically evaluating investor interest in a proposed offering prior to incurring the time and expense of making a filing with the SEC. "Test the Waters," however, is not a substitute for a registered securities offering and delivery of a prospectus describing the offering.

In 1994, the Commission established a similar process in Pennsylvania for the use of solicitation of interest materials to "test the waters" in conjunction with a proposed SEC Regulation A offering, a Rule 504 offering under SEC Regulation D or a proposed registered intrastate offering by a Pennsylvania company pursuant to the exemption in Section 3(a)(11) of the 1933 Act and SEC Rule 147 (SOI Materials). SOI Materials constitute "offers" under the 1972 Act and the company must obtain an exemptive order from the Commission to use SOI Materials in Pennsylvania (*see Tab entitled, "Test the Waters"*)

Advertisement of a SCOR Offering

In connection with a SCOR offering which is relying upon SEC Regulation A that is filed with the Commission under Section 205 of the 1972 Act, a company, prior to effectiveness of the offering in Pennsylvania, only may distribute a tombstone advertisement permitted under the 1933 Act and SEC rules adopted thereunder, a preliminary offering circular filed under Section 203(h) of the 1972 Act or advertising literature prepared, submitted and cleared in conformity with the applicable regulations or procedures adopted by the SEC or the National Association of Securities Dealers, Inc. (NASD). Advertising literature includes an advertisement, display, pamphlet, brochure, letter or other communication used or circulated in connection with the primary or secondary offering of securities. No formal filing with, or approval by, the Commission is required with respect to this advertising literature but companies are reminded that the anti-fraud provisions of Sections 401-407 of the 1972 Act do apply to these materials.

In connection with a SCOR offering which is relying upon Rule 504 of SEC Regulation

D or Section 3(a)(11) of the 1933 Act and SEC Rule 147 and being filed under Section 206 of the 1972 Act, a company may not disseminate publicly any advertising literature, including a tombstone advertisement, in Pennsylvania prior to the offering being declared effective by the Commission. After effectiveness the company may disseminate publicly advertising literature which complies with Commission Regulation 606.031. (see Tab entitled, “*Advertising*”)

Professional Assistance

Undertaking a SCOR offering will require a substantial commitment of time on the part of the company’s officers, promoters and directors. Independent accountants will be required to prepare the company’s financial statements. While company personnel can prepare the information requested on Form U-7 and file the appropriate documents with the Commission, it often is appropriate for a company to seek the assistance of counsel experienced in securities law issues. Although assistance of experienced counsel adds a transactional cost to the company for the offering, the dollars invested may return important dividends in terms of more timely resolution of regulatory issues and achievement of an earlier effectiveness date than would be the case without the effective assistance of experienced counsel.

Assistance from the Commission

Questions concerning this Release may be directed to the Commission’s Division of Corporation Finance by calling (717) 787-5401 or toll-free in Pennsylvania (800) 600-0007. This Release and other information also is available on the Commission’s Web site at **www.psc.state.pa.us**.

Availability in Alternative Formats

This Release may be made available in alternative formats upon request. TDD users should use the AT&T Relay Center (1-800-854-5984). To make arrangements for alternative formats, please contact the ADA Coordinator at (717) 787-6828.

ADVISORY: This Staff Position is not a rule or interpretation or order of the Commission nor has it been published as bearing the Commission’s official approval. It represents guidance to the staff by the Commission with respect to the administration of the Pennsylvania Securities Act of 1972 by the Division of Corporation Finance.