



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

RELEASE NO.: 07-CF-2

TYPE: Staff Position

PRIOR REFERENCE: 91-CF-3; 97-CF-2; 99-CF-2

At its September 10, 2007 meeting, the Pennsylvania Securities Commission (Commission) permitted 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, 70 P.S. §§1-205 and 1-206, of the Pennsylvania Securities Act of 1972 Act (1972 Act). This release supersedes Release 99-CF-2.

STAFF POSITION

Background

Prior Release 99-CF-2 permitted Regulation A offerings (Regulation A) to be filed as SCOR offerings under Sections 205 or 206 of the 1972 Act. Regulation A is technically an exemption from registration with the US Securities and Exchange Commission (SEC) under the federal Securities Act of 1933 (1933 Act); however, disclosure documents such as the Form 1-A and an Offering Circular must be filed with the SEC and after SEC review, the offering is deemed qualified. In Pennsylvania, a Regulation A offering may be filed under Section 205, Registration by Coordination, irrespective of SCOR eligibility. Staff conducts the same substantive review utilizing the NASAA Statements of Policy. Therefore, a Regulation A offering filed under the SCOR program pursuant to Section 205 or 206 of the 1972 Act does not afford an issuer any additional benefit than a Regulation A offering filed outside of the SCOR program. (See Corporation Finance Release 07-CF-3.) Indeed, a Regulation A offering filed under Section 206 has higher filing fees and is subject to more stringent standards than a Registration by Coordination.

Therefore, to maintain the simplicity of filing a SCOR offering for offerings exempt from federal registration requirements under Rule 504 of SEC Regulation D or Section 3(a)(11) of the 1933 Act, and to avoid confusion regarding the applicable

forms to be filed, fees to be paid, and availability of advertising, Staff proposed to remove Regulation A offerings from the SCOR program as discussed below.

Availability of SCOR

Staff follows the Statement of Policy on Small Company Offering Registrations adopted by the North American Securities Administrators Association on April 28, 1996 (NASAA SCOR Policy) except that SCOR is not available to companies engaged in the business of extension of credit that plan to offer and sell debt securities to the public. In addition, with respect to financial statements, Staff will not recommend registration of SCOR offerings which use a statement of receipts and disbursements.

A company is eligible for SCOR if it is relying upon an exemption from registration with the SEC under the federal Securities Act of 1933 (1933 Act) provided by Rule 504 of SEC Regulation D, or Section 3(a)(11) of the 1933 Act and corresponding SEC Rule 147.

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.

Substantive Review of a SCOR Offering

Staff will utilize the following Statements of Policy adopted by NASAA (NASAA SOPs) in the review and analysis of offerings made by companies making a SCOR offering.

Statement of Policy Regarding Corporate Securities Definitions
Statement of Policy Regarding Loans and Other Material Affiliated Transactions
Statement of Policy Regarding Preferred Stock
Statement of Policy Regarding Underwriting Expenses, Underwriter's Warrants, Selling Expenses and Selling Security Holders
Statement of Policy Regarding Options and Warrants
Statement of Policy Regarding Promoter's Equity Investment
Statement of Policy Regarding Promotional Shares
Statement of Policy Regarding Impoundment of Proceeds
Statement of Policy Regarding Specificity in Use of Proceeds
Statement of Policy Regarding Unsound Financial Condition
Statement of Policy Regarding Unequal Voting Rights
Statement of Policy Regarding Specificity in Use of Proceeds

Accordingly, staff will recommend registration of equity securities of companies that file SCOR offerings and satisfy all the requirements of the NASAA SOPs. With respect to issuers that file SCOR offerings with the Commission that do not satisfy certain requirements of the NASAA SOPs, staff will utilize the following criteria:

1. Where an issuer does not have two independent directors, it will not be deemed a basis for denial of registration.
2. If the underwriting expenses exceed the amount set forth in the NASAA SOP, it will not be deemed a basis for denial of registration, provided that the underwriting compensation has been approved by the National Association of Securities Dealers, Inc. (NASD).
3. While failure to meet the above standards will be not be deemed an automatic basis for denial of registration, it will be deemed a basis for locking in all the promoter's promotional equity securities (Restricted Securities).
4. Failure to comply with the standard for Promoter's Equity Investment will not be deemed an automatic basis for denial or registration; however, the lock-in agreement may exceed the time periods set forth in the NASAA SOP. In order to determine the length of time the Restricted Securities will be required to remain subject to the lock-in agreement (which may exceed the time periods set forth in the NASAA SOP), staff will consider such factors as the amount of promoter's equity investment in the corporation, the financial condition of the company, and any other factor relating to amounts of promoters' profits or participation.
5. Staff will require that all loans by the company to promoters, officers, directors, its affiliates, or their controlling persons be repaid by the close of the offering, except where such loans were made for bona fide business purposes. Additionally, staff will require a representation in the offering disclosure document that all future loans made by the company to promoters, officers, directors, its affiliates, or their controlling persons will be for bona fide business purposes.

Furthermore, the Commission will utilize all amendments to the NASAA SOPs subsequently adopted by NASAA unless (1) the Commission makes an affirmative statement to the contrary or (2) the amendment relates to a Statement of Policy or section thereof which the Commission previously indicated it would not utilize.

Required Financial Statements

Audited Financial Statements must comply with the requirements of Commission Regulations 609.031 through 609.037. SCOR offerings that do not exceed \$1 million may file reviewed financial statements in lieu of audited statements. 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.

Annual Financial Reports to Pennsylvania Residents

For SCOR offerings that become registered under 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, except if the financial statements used in the offering were reviewed, then the issuer may use reviewed statements.

Completing the SCOR Form (Form U-7)

A company must use as its prospectus, the Form U-7, Disclosure Document adopted by NASAA on September 28, 1999 (New Form U-7), if the company is relying upon an exemption from registration with the SEC under the 1933 Act provided by Rule 504 of SEC Regulation D or Section 3(a)(11) of the 1933 Act and SEC Rule 147, and is seeking to register its securities under Section 206 of the 1972 Act.

For specific instructions for completing the New Form U-7, staff recommends that companies consult the appropriate NASAA SCOR Issuer's Manual.

Forms and Filing Fees

Filing of Form U-7 with the Commission must be accompanied by a complete and executed Commission Form R, a Uniform Application to Register Securities (Form U-1) (available at www.dobs.state.pa.us), and the requisite filing fee.

The filing fee for an offering being made in reliance upon Rule 504 of SEC Regulation D, Section 3(a)(11) of the 1933 Act and SEC Rule 147, filed under Section 206 of the 1972 Act is \$500 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 \$3,000. 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 Rule 504 of SEC Regulation D or Section 3(a)(11) and SEC Rule 147 must be filed under Section 206 of the 1972 Act. Under Section 206, **no advertisements or offers or sales of securities may occur in Pennsylvania until the Commission has declared the offering effective.**

Legal Opinion and Notice of Right of Withdrawal

For SCOR offerings which are filed under Section 206 of the 1972 Act, the following items are required:

- Section 206(b)(14) of the 1972 Act requires that an attorney render 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
- 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. Commission Regulation 207.130 specifies the manner in which the right of withdrawal notice may be given, and includes illustrative language that complies with the notice required by this section.

Advertisement of a SCOR Offering

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.

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 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, an Internet Offer cannot be made in Pennsylvania until the SCOR offering has been declared effective by the Commission.
- **Using the Internet for Offerings where sales will not be made 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 the Internet Offer Exemption provided by Commission Regulation 203.190. This regulation 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.
- **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 material information promptly.

“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 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 use of solicitation of interest materials (**SOI 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 constitute “offers” under the 1972 Act and the company must obtain an exemptive order from the Commission to use SOI Materials in Pennsylvania.

Specific information on “Testing the Waters” and obtaining an exemptive order for SOI Materials is contained in Release 94-CF-1 dated July 6, 1994.

Mid-Atlantic Region Review Program (CR--SCOR--MAR)

At its meeting on April 6, 1999, the Commission indicated its agreement to participate in Mid-Atlantic Region Review Program (CR--SCOR--MAR). Staff from the states of Pennsylvania, Maryland, West Virginia, New Jersey, Virginia, Delaware and the District of Columbia (Participating States) have created a protocol for the review of offerings of companies seeking to raise capital in those states through a public offering of securities under Rule 504 of SEC Regulation D, or SEC Regulation A.

CR--SCOR--MAR provides a coordinated procedure designed to streamline the process for registration of a company’s securities in the Participating States. CR--SCOR--MAR offers an issuer efficiencies in completing the registration process by reducing the number of comment letters an issuer receives and the number of individuals with whom the issuer must negotiate resolution of comments, by establishing a time line for review of offerings and one common review standard.

- **Standard of Review.** The Pennsylvania standard of review for SCOR offerings was adopted by CR--SCOR--MAR as the common review standard.
- **Program Administrator State and Lead Jurisdiction.** The Maryland Securities Division acts as Program Administrator for CR--SCOR--MAR. As such, Maryland is responsible for choosing the lead jurisdiction for review of offerings. Only one lead jurisdiction will be designated. Generally, the lead jurisdiction will be the jurisdiction where the issuer’s principal place of business is located; however, that jurisdiction may decline to act as lead examiner, in which case Maryland will designate another jurisdiction to act as lead examiner.

For more specific information on the CR--SCOR--MAR Program, visit www.dobs.state.pa.us.

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 transaction 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 registration 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.

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.