



**SUBJECT:** Application Process for Discretionary Exemptive Order under Section 203(r) of the Pennsylvania Securities Act of 1972 to Use Solicitation of Interest Materials Prior to the Registration of Securities under Section 205 or 206 of the Pennsylvania Securities Act of 1972

**RELEASE NO.:** 00-CF-2

**DATE OF RELEASE:** April 25, 2000

**TYPE:** Commission Policy

**PRIOR REFERENCE:** 94-CF-1

#### **AVAILABILITY OF DISCRETIONARY EXEMPTIVE ORDER**

A discretionary exemptive order under this Release **is not available** for issuers engaged in petroleum exploration or production or mining or other extractive industries or "blind pool" offerings. Also, persons who have previous disciplinary history in the securities business are ineligible for an exemptive order. If an issuer is not organized under the laws of Pennsylvania or does not have its principal place of business in Pennsylvania, it must have filed a copy of its solicitation of interest materials with the U.S. Securities and Exchange Commission (SEC) pursuant to SEC Rule 254 of Regulation A prior to requesting an exemptive order under this Release.

#### **BACKGROUND**

In connection with a proposed securities offering to be made under Regulation A of the federal Securities Act of 1933 (1933 Act), the SEC has adopted rules that permit issuers to "test the waters" as to public receptivity to such an offering by publicly disseminating certain information about the issuer designed to solicit indications of interest. This process is intended to assist issuers in realistically evaluating investor interest in a proposed securities offering prior to incurring the time and expense of making a filing with the SEC. **"Testing the Waters", however, is not a substitute for a registered securities offering and delivery of a prospectus describing the offering.**

This Release establishes a similar process in Pennsylvania for use of solicitation of interest materials in conjunction with a proposed Regulation A offering or a proposed registered intrastate offering by a Pennsylvania issuer under Section

3(a)(11) of the 1933 Act. For purposes of this Release, solicitation of interest materials means Form SOI and Pennsylvania SOI Supplement appended hereto (SOI Forms).

Disclosures on SOI Forms may be written or scripted for electronic broadcast. At a minimum, SOI Forms must contain all the information (including required legends, information and responses) set forth in this Release. Language and graphics used in the SOI Forms and any subsequent communication with persons who have received the SOI Forms may not exaggerate the investment opportunity, minimize the risks of the enterprise or predict revenues, profits or payment of dividends (including financial projections and forecasts).

### **HOW TO REQUEST AN EXEMPTIVE ORDER**

Under the Pennsylvania Securities Act of 1972 (1972 Act), distribution of the SOI Forms is deemed to constitute an offer. The exemptive order to be issued under Section 203(r) of the 1972 Act allows issuers to use SOI Forms prior to filing a registration statement for a securities offering under Section 205 or 206 of the 1972 Act and exempts offers made by means of the SOI Forms, but not sales resulting from such offers, from the registration requirements of Section 201 of the 1972 Act.

To request an exemptive order under this Release, a letter on company letterhead and signed by an officer should be sent to the Pennsylvania Securities Commission, Division of Corporation Finance, 17 North 2<sup>nd</sup> Street, Suite 1300, Harrisburg, PA 17101-2290. Included with the letter should be:

- (1) Two copies of the attached SOI Forms;
- (2) A signed copy of the Issuer Affirmations attached to this Release; and
- (3) Two copies of any other materials to be used to conduct solicitations of interest, including, but not limited to, the script of any broadcast to be made and a copy of any notice to be published.

### **REVIEW OF APPLICATIONS FOR AN EXEMPTIVE ORDER**

All applications will be reviewed under the anti-fraud provisions of the 1972 Act by Commission staff within five business days of being filed with the Commission. Comments arising from a review of the application will be conveyed to the issuer or, at the issuer's direction, to its counsel. While each question on the SOI Forms must be completed, the issuer may include additional disclosures relating to these questions, provided these disclosures do not include predictions of future revenues, profits or payments of dividends.

**Only the Commission may grant the exemptive order.** The Commission meets twice per month and the exemptive order request will be scheduled for the next available Commission meeting date occurring after completion of staff review and satisfaction of staff comments, if any. An exemptive order issued under this Release is effective until the earlier of: the date a registration statement is filed with the

Commission under Section 205 or 206 of the 1972 Act or 12 months from the date of issuance of the order.

### **ORAL COMMUNICATIONS, FREE WRITING AND AMENDMENTS**

An exemptive order allowing use of SOI Forms exempts all **subsequent** oral communications between the issuer and recipients of the SOI Forms if the issuer complies with the following:

1. All communications with recipients of the SOI Forms cease the earlier of: (1) the date a registration statement is filed with the Commission under Section 205 or 206 of the 1972 Act or (2) 12 months from the date of issuance of the order.
2. If an issuer wishes to modify or add information to its SOI Forms after the exemptive order has been granted, these materials must be filed with the Commission at its Harrisburg office five business days prior to them being given to prospective investors in Pennsylvania with whom the issuer still is communicating. No new or additional exemptive order is required for these amendments but the Commission has the authority to issue a summary denial order under Section 204 of the 1972 Act prohibiting their use if the information contained in the amendments is false or misleading in any material respect.
3. If a prospective investor makes a specific request for materials, this would not require an amendment to the SOI Forms. The issuer, however, must maintain a file identifying with reasonable specificity, the materials that were given to an offeree pursuant to a specific request and the dates of every communication with that person (**see Record Retention**).
4. In any written or oral communication, including a response to a specific request from a prospective investor, the issuer may not exaggerate the investment opportunity, minimize the risks of the enterprise or predict revenues, profits or payment of dividends.

### **SALES OF SECURITIES**

No **SALES** of securities may be made pursuant to the exemptive order. Sales may be made solely in compliance with a registration statement declared effective under Section 205 or 206 of the 1972 Act or in reliance upon an exemption that is not otherwise prohibited under the terms of the exemptive order (**see Prohibition on Use of Certain Exemptions**).

### **PROHIBITION ON USE OF CERTAIN EXEMPTIONS**

#### **Sales of the Issuers' securities.**

Under the terms of the exemptive order, the issuer may not rely upon the exemptions in Sections 203(f), 203(d) and 203(s) of the 1972 Act and Commission Regulations 203.187, 203.189 (except for reliance on the waiver in Section

203.189(b)(1)) and 204.010 to offer or sell its securities to prospective investors who received SOI Forms for six months from the date of the last communication with any prospective investor.

**Sales of securities by an affiliate of the Issuer:**

Where an officer, director, general partner, promoter or control person of the issuer during the period in which an offer was made under the exemptive order either simultaneously or subsequently serves in a similar capacity with another company, that other company may not rely upon the exemptions in Sections 203(f), 203(d) or 203(s) of the 1972 Act or Commission Regulations 203.187, 203.189 (except for reliance on the waiver in Section 203.189(b)(1)) or 204.010 to offer or sell its securities to a prospective investor in Pennsylvania who responded to the SOI Forms for a period of six months after the date of the issuer's last communication with that person.

**For purposes of this Release, a sale is deemed to have occurred when the issuer accepts money or a commitment to purchase securities.**

**RECORD RETENTION**

As a condition of the issuance of an exemptive order, issuers must agree to maintain a list that includes (1) the names and addresses of all prospective investors responding to the SOI Forms; (2) the dates of all communications with such persons and (3) in the event that materials were provided in response to a specific request, a description of reasonable specificity as to the materials provided and to whom they were provided. Issuers also must agree to maintain this list for three years from date of receipt of the last investor communication as a result of the solicitation.

**ANTI-FRAUD PROVISIONS APPLY**

The SOI Forms and oral communications with recipients of the SOI Forms are subject to the anti-fraud provisions of Section 401 of the 1972 Act. Therefore, issuers must insure that these materials and communications do not contain omissions of material fact or misstatements of material facts. Material facts are those which a reasonable person would want to know in order to make an informed investment decision with respect to the securities that are the subject of the SOI Forms.

**SOLICITATION OF INTEREST MATERIALS AS ADVERTISEMENTS**

The exemptive order also will constitute a waiver of the provisions of Commission Regulation 606.031, "Advertising literature".

**ATTACHMENTS TO THIS RELEASE:**

**ISSUER AFFIRMATIONS**

**SOLICITATION OF INTEREST FORM (SOI)**

**PENNSYLVANIA SOI SUPPLEMENT SAMPLE**

**SECTION 203(r) EXEMPTIVE ORDER  
FEDERAL AND STATE DISQUALIFICATIONS**

**ISSUER AFFIRMATIONS**

In support of the request of (Insert Name and Address of Company) (Issuer) filed with the Pennsylvania Securities Commission (Commission) to issue an order under Section 203(r) of the Pennsylvania Securities Act of 1972 (1972 Act) permitting the Issuer to distribute Form SOI and Pennsylvania SOI Supplement (SOI Forms) in Pennsylvania to offer the Issuer's securities (Order), the Issuer affirms and agrees to the following:

**About the Issuer:**

A. The Issuer: (1) is organized under the laws of the Commonwealth; (2) has its principal place of business in the Commonwealth or (3) has filed a copy of the solicitation of interest materials with the SEC under SEC Rule 254 of Regulation A.

B. The Issuer and each officer, director, general partner or control person of the issuer is not subject to a federal disqualification under SEC Rule 262 of Regulation A or a state disqualification under Commission Regulation 204.010(b)(1).

C. The Issuer is engaged or proposes to engage in a business other than petroleum exploration or production or mining or other extractive industries and is not a "blind pool" offering or an offering for which the specific business or properties cannot now be described.

**D. The Issuer and each officer, director, general partner or control person of the Issuer is familiar with the anti-fraud provisions of Section 401 of the 1972 Act.**

**About the SOI Forms:**

A. The Issuer is filing two copies of its SOI Forms with its request and agrees not to distribute, publish or otherwise disseminate the SOI Forms until the Order is granted by the Commission.

B. If the Issuer wishes to amend its SOI Forms, it agrees to file these amendments with the Commission at its Harrisburg Office five business days prior to them being given to prospective investors in Pennsylvania with whom the issuer still is communicating.

C. The issuer agrees not to include information in the SOI Forms or in materials provided to a recipient of the SOI Forms pursuant to a specific request that would exaggerate the investment opportunity, minimize the risks of the enterprise or predict revenues, profits or payment of dividends, including financial projections and forecasts.

**About the Offers:**

A. The Issuer may not make offers under an Order granted by the Commission unless the prospective investor has received a copy of the SOI Forms.

B. The Order exempts only the offer, BUT NOT THE SALE, of the Issuer's securities.

C. The Issuer agrees that a sale occurs when the Issuer accepts money or a commitment to purchase the securities.

D. The Issuer agrees to maintain a list that includes (1) the names and addresses of all prospective investors responding to the SOI Forms; (2) the dates of all communications with such persons and (3) in the event that materials were provided in response to a specific request, a description of reasonable specificity as to the materials provided and to whom they were provided. The issuer also agrees to maintain this list for three years from date of receipt of the last investor communication as a result of the solicitation.

**About Prohibition on Use of Certain Exemptions:**

The Issuer agrees to the following in the event the securities being offered by means of the SOI Forms are not registered under Section 205 or 206 of the 1972 Act.

A. Under the terms of the exemptive order, the issuer may not rely upon the exemptions in Sections 203(f), 203(d), and 203(s) of the 1972 Act and Commission Regulations 203.187, 203.189 (except for reliance on the waiver in Section 203.189(b)(1)) and 204.010 to offer or sell its securities to prospective investors who received SOI Forms for six months from the date of the last communication with any prospective investor.

B. Where an officer, director, general partner, promoter or control person of the issuer during the period in which an offer was made under the exemptive order either simultaneously or subsequently serves in a similar capacity with another company, that other company may not rely upon the exemptions in Sections 203(f), 203(d) or 203(s) of the 1972 Act or Commission Regulations 203.187, 203.189 (except for reliance on the waiver in Section 203.189(b)(1)) or 204.010 to offer or sell its securities to a prospective investor in Pennsylvania who responded to the SOI Forms for a period of six months after the date of the issuer's last communication with that person.

\_\_\_\_\_  
(Name of Issuer )

\_\_\_\_\_  
BY:

\_\_\_\_\_  
(Officer's Title)

DATED: \_\_\_\_\_

SOI 

SOI Supplement 

COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE  
PENNSYLVANIA SECURITIES COMMISSION

IN THE MATTER OF:

\_\_\_\_\_  
:  
:  
:  
\_\_\_\_\_  
ORDER

WHEREAS, \_\_\_\_\_ (the "Issuer") has filed with the Pennsylvania Securities Commission (the "Commission") a request pursuant to Section 203(r) of the Pennsylvania Securities Act of 1972 (the "1972 Act") to exempt the offer, but not the sale of \_\_\_\_\_ (the "Securities") in contemplation of filing a registration statement for the Securities under Section 205 or 206 of the 1972 Act (the "Exemption Request"); and

WHEREAS, The Issuer has filed with the Commission a copy of Form SOI and Pennsylvania SOI Supplement (the "SOI Forms") that it proposes to disseminate publicly in the Commonwealth to effect the offers which are the subject of the Exemption Request; and

WHEREAS, The Issuer has represented that the Issuer and each promoter, officer, director, general partner or control person of the Issuer is not subject to a federal disqualification under United States Securities & Exchange Commission (the "SEC") Rule 262 of Regulation A or a state disqualification under Commission Regulation 204.010(b)(1); and

WHEREAS, The Issuer has represented that it is organized under the laws of the Commonwealth, has its principal place of business in the Commonwealth, or has filed a copy of the solicitation of interest materials with the SEC under SEC Rule 254 of Regulation A; and

WHEREAS, The Issuer is engaged or proposes to engage in a business other than petroleum exploration or production or mining or other extractive industries and is

not a "blind pool" offering or other offering for which the specific business or properties cannot now be described; and

WHEREAS, the Commission, after due deliberation, finds that it is necessary or appropriate in the public interest and for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the 1972 Act to issue the following Order:

NOW, THEREFORE, THIS \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
The Commission, pursuant to the grant of authority in Section 203(r) of the 1972 Act, exempts offers (but not sales) of Securities effected by means of the SOI Forms, subsequent oral communications with recipients in

Pennsylvania of the SOI Forms or materials provided to a recipient of the SOI Forms in Pennsylvania pursuant to a specific request by that recipient and, pursuant to the grant of authority in Section 609(a) of the 1972 Act, waives the requirements of Commission Regulation 606.031 with respect to such offers, provided that:

1. No communication is made by the Issuer with any person in Pennsylvania unless that person has received a written copy of the SOI Forms or any amendments thereto in accordance with paragraph two below and that such communication does not use or contain material information that is false or misleading or exaggerates the investment opportunity, minimizes the risks of the enterprise or predicts revenues, profits or payment of dividends; and
2. No amendments to the SOI Forms may be distributed to any person in Pennsylvania unless filed with the Commission five (5) business days prior to them being given to prospective investors in Pennsylvania with whom the issuer still is communicating; and
3. The Issuer will not solicit or accept money or a commitment to purchase the Securities; and
4. After the Issuer commences making offers in the Commonwealth under this Order, the Issuer does not rely upon the exemptions in Sections 203(f), 203(d), and 203(s) of the 1972 Act and Commission Regulations 203.187, 203.189 (except for reliance on the waiver in Section 203.189(b)(1)) and 204.010 to offer or sell the Securities to prospective investors who received SOI Forms pursuant to this Order for six months from the date of the last communication with any prospective investor, and
5. Where an officer, director, general partner, promoter or control person of the issuer during the period in which an offer was made under the exemptive order either simultaneously or subsequently serves in a similar capacity with another company, that other company may not rely upon the exemptions in Sections 203(f), 203(d) or 203(s) of the 1972 Act or Commission Regulations 203.187,

203.189 (except for reliance on the waiver in Section 203.189(b)(1)) or 204.010 to offer or sell its securities to a prospective investor in Pennsylvania who responded to the SOI Forms for a period of six months after the date of the issuer's last communication with that person; and

6. The Issuer maintains a list that includes:

(A) The names and addresses of all prospective investors responding to the SOI Forms;

(B) The dates of all communications with such persons; and

(C) In the event that materials were provided in response to a specific request, a description of reasonable specificity as to the materials provided and to whom they were provided ("List"); and

7. The Issuer maintains the List for three years from date of receipt of the last investor communication as a result of the solicitation.

The effective period of this Order shall be from \_\_\_\_\_ until the earlier of:

(1) The date a registration statement for the Securities has been filed with the Commission under Section 205 or 206 of the 1972 Act, or

(2) Twelve consecutive months from the date of issuance of this Order.

BY ORDER OF THE COMMISSION:

\_\_\_\_\_  
M. Joanna Cummings, Secretary

Date Issued and entered: \_\_\_\_\_

## **APPENDIX TO FORM SOI**

### Federal Disqualifications

§230.262 Disqualification provisions.

Unless, upon a showing of good cause and without prejudice to any other action by the Commission, the Commission determines that it is not necessary under the circumstances that the exemption provided by this Regulation A be denied, the exemption shall not be available for the offer or sale of securities, if:

(a) the issuer, any of its predecessors or any affiliated issuer:

(1) has filed a registration statement which is the subject of any pending proceeding or examination under section 8 of the Act, or has been the subject of any refusal order or stop order thereunder within 5 years prior to the filing of the offering statement required by §230.252;

(2) is subject to any pending proceeding under §230.258 or any similar section adopted under section 3(b) of the Securities Act, or to an order entered thereunder within 5 years prior to the filing of such offering statement;

(3) has been convicted within 5 years prior to the filing of such offering statement of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission;

(4) is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, entered within 5 years prior to the filing of such offering statement, permanently restraining or enjoining, such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the Commission; or

(5) is subject to a United States Postal Service false representation order entered under 39 U.S.C. §3005 within 5 years prior to the filing of the offering statement, or is subject to a temporary restraining order or preliminary injunction entered under 39 U.S.C. §3007 with respect to conduct alleged to have violated 39 U.S.C. §3005. The entry of an order, judgment or decree against any affiliated entity before the affiliation with the issuer arose, if the affiliated entity is not in control of the issuer and if the affiliated entity and the issuer are not under the common control of a third party who was in control of the affiliated entity at the time of such entry does not come within the purview of this paragraph (a) of this section.

(b) any director, officer or general partner of the issuer, beneficial owner of 10 percent or more of any class of its equity securities, any promoter of the issuer presently connected with it in any capacity, any underwriter of the securities to be offered, or any partner, director or officer of any such underwriter:

(1) has been convicted within 10 years prior to the filing of the offering statement required by §230.252 of any felony or misdemeanor in connection with the purchase or sale of any security, involving the making of a false filing with the Commission, or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, or investment adviser;

(2) is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily enjoining or restraining, or is subject to any order, judgment, or decree of any court of competent jurisdiction, entered within 5 years prior to the filing of such offering statement, permanently enjoining or restraining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, involving the making of a false filing with the Commission, or arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer or investment adviser;

(3) is subject to an order of the Commission entered pursuant to section 15(b), 15B(a), or 15B(c) of the Exchange Act, or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.);

(4) is suspended or expelled from membership in, or suspended or barred from association with a member of, a national securities exchange registered under section 6 of the Exchange Act or a national securities association registered under section 15A of the Exchange Act for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade; or

(5) is subject to a United States Postal Service false representation order entered under 39 U.S.C. § 3005 within 5 years prior to the filing of the offering statement required by §230.252, or is subject to a restraining order or preliminary injunction entered under 39 U.S.C. §3007 with respect to conduct alleged to have violated 39 U.S.C. §3005.

(c) any underwriter of such securities was an underwriter or was named as an underwriter of any securities:

(1) covered by any registration statement which is the subject of any pending proceeding or examination under section 8 of the Act, or is the subject of any refusal order or stop order entered thereunder within 5 years prior to the filing of the offering statement required by §230.252; or

(2) covered by any filing which is subject to any pending proceeding under §230.258 or any similar rule adopted under section 3(b) of the Securities Act, or to an order entered thereunder within 5 years prior to the filing of such offering statement.

### Pennsylvania Disqualifications

64 Pa. Code §204.010(b)(1) and (c)

(b) Conditions.

(1) Disqualification. The issuer or a person who is an officer, director, principal, partner (other than a limited partner), promoter, or controlling person of the issuer or a person occupying a similar status or performing a similar function on behalf of

the issuer, has not been convicted of a crime, made the subject of a sanction, or otherwise found to have met any of the criteria described in section 305(a)(ii)-(xiii) of the act (70 P.S. § 1-305(a)(ii)-(xiii)) unless the person subject to the disqualification is registered under section 301 of the act (70 P.S. §1-301).

\* \* \*

(c) Exceptions.

(1) Subsection (b)(1) does not apply if the person subject to the disqualification enumerated therein is licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against the person or if the broker-dealer employing the person is licensed or registered in this Commonwealth and in the Form BD filed with the Commission has disclosed the order, conviction, judgment or decree relating to this person. Nothing in this paragraph shall be construed to allow a person disqualified under subsection (b)(1), to act in a capacity other than that for which the person is registered.

(2) A disqualification created under this section is automatically waived if the state securities administrator or agency of the state which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

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