



SUBJECT: Staff Interpretive Guidance on Offerings under Section 203(t) of the Pennsylvania Securities Act of 1972 , the Pennsylvania "Accredited Investor" Exemption

RELEASE NO.: 00-CF-3

DATE OF RELEASE: June 20, 2000

TYPE: Commission Staff Position

PRIOR REFERENCE: None

BACKGROUND

On January 25, 1999, Act 109 amending the Pennsylvania Securities Act of 1972 (1972 Act) became effective. Act 109 added Section 203(t) as a category of securities transaction exempt from the registration requirement of Section 201 of the 1972 Act. Section 203(t) exempts offers where all sales would be made to Accredited Investors, as that term is defined in Rule 501 of SEC Regulation D, and subsequent sales to Accredited Investors. The exemption is available only if the offering is being made in reliance on Section 3(a)(11) of the Securities Act of 1933 (1933 Act), Rule 504 of SEC Regulation D or SEC Regulation A. The exemption permits use of general solicitation and contains a disqualification provision. The two-business day right of withdrawal in Section 207(m) and the requirement for review of prospective financial statements in 64 Pa. Code §609.010 do not apply to offers and sales made under Section 203(t).

Subsequent to enactment of this exemption and adoption of an implementing regulation at 64 Pa. Code §203.201 (effective January 1, 2000), questions have arisen concerning integration of the provisions of the Section 203(t) exemption with other exemptions provided by the 1972 Act or regulations adopted thereunder. At its June 20, 2000 meeting, the Commission authorized publication of the following Commission Staff Positions concerning Section 203(t).

STAFF POSITION

Scenario 1

An issuer either organized under the laws of the Commonwealth of Pennsylvania or which has its principal place of business in the Commonwealth sold securities to 7

individuals. The issuer now wants to make a second offering of securities to 3 non-Accredited Investors and 50 Accredited Investors. The issuer will not use public advertising.

Q. May the issuer offer and sell securities to the 3 non-Accredited Investors first in reliance on 64 Pa. Code §203.187 (Small Issuer Exemption) before offering and selling the securities in reliance on Section 203(t)?

A. Yes. No filing with the Commission is required for offers or sales made in reliance on 64 Pa. Code §203.187 but the issuer must file Commission Form E prior to making sales to Accredited Investors in reliance on Section 203(t) and pay a filing fee of \$500.

Q. Would the answer to the previous question be the same if the issuer first made sales to non-Accredited Investors in reliance on 64 Pa. Code §203.184 (Principal Exemption)?

A. Yes.

Q. Would the Commission's staff position be different if the issuer used public advertising in conformity with Section 203(t)(vi) prior to making sales to the 3 non-Accredited Investors in reliance on 64 Pa. Code §203.187?

A. Yes. 64 Pa. Code §203.187(a)(5) prohibits use of public advertising.

Scenario 2

An issuer files Commission Form E to make sales in Pennsylvania in reliance on Section 203(d) of the 1972 Act. After making sales to 3 non-Accredited Investors in Pennsylvania under Section 203(d), the issuer wants to make all remaining sales to Accredited Investors.

Q. May the issuer rely on Section 203(t) for sales to the Accredited Investors?

A. Yes, if (1) all remaining sales, both within and without Pennsylvania, are made to Accredited Investors; (2) the sales to the Accredited Investors are exempt from registration under the 1933 Act pursuant to Section 3(a)(11) thereof, Rule 504 of SEC Regulation D or SEC Regulation A; (3) the issuer terminates the Section 203(d) offering; (4) the issuer files an amended Form E; and (5) the issuer pays a filing fee of \$500. Section 602(b.2) states that there is no refund of a Section 203(d) filing fee.

Q. May the issuer use public advertising in connection with the remaining sales to Accredited Investors?

A. Yes, if it conforms to Section 203(t)(vi).

Scenario 3

An issuer filed Commission Form E to exempt sales of securities under Section 203(t). The issuer engages in public advertising in conformity with Section 203(t)(vi) but no Accredited Investors are interested in purchasing the securities.

Q. May the issuer switch to making sales in the same offering to non-Accredited Investors in reliance on Section 203(d)?

A. If the prospective investor responded to the Section 203(t) public advertising, the answer is no because Section 203(d)(ii) prohibits public advertising. For other prospective investors, Commission staff would assert a presumption that the investors became known to the issuer as a result of the Section 203(t) public advertising unless the issuer, pursuant to its burden under Section 204(c), demonstrates otherwise and proves the availability of the Section 203(d) exemption.

With respect to prospective investors who responded to the Section 203(t) public advertising and those prospective investors for whom the issuer was unable to demonstrate the availability of the Section 203(d) exemption, Commission staff would not recommend enforcement action to the Commission if the issuer intended to rely on Section 203(d) at the end of a six month period beginning with the date of the last publication of advertising used in connection with soliciting sales of securities under Section 203(t) to re-solicit these prospective investors.

Q. Would the answer to the previous question be different if the issuer wanted to sell a different type of security to non-Accredited Investors under Section 203(d)?

A. No.

Q. Would the answer to the first question in this scenario be the same if the issuer wanted to rely on the exemption in 64 Pa. Code §203.187?

A. Yes, provided the issuer previously had not sold securities to more than 10 persons.

Scenario 4

An issuer files Commission Form E to rely upon the Section 203(t) exemption but does not use any public advertising.

Q. If the issuer made no sales, may the issuer switch to Section 203(d)?

A. Yes, but the issuer must (1) terminate the Section 203(t) offering; (2) file an amended Commission Form E; and (3) pay the filing fee specified in Section 602(b.1)(viii). Section 602(b.2) states that there is no refund of a Section 203(t) filing fee.

Q. If the issuer makes sales to 4 Accredited Investors in reliance on Section 203(t), may the issuer then rely on Section 203(d) to make additional sales?

A. Yes, if the issuer (1) terminates the Section 203(t) offering; (2) files an amended Form Commission Form E; and (3) pays the filing fee specified in Section 602(b.1)(viii). Section 602(b.2) states that there is no refund of a Section 203(t) filing fee.

Q. May an issuer simultaneously make sales in reliance on Sections 203(t) and 203(d)?

A. Generally, no. Section 203(t) is available only where sales of securities of the entire offering will be made (both within and without of this Commonwealth) to Accredited Investors. Although highly unlikely and dependent on specific factual situations, it may be possible that sales made to Accredited Investors in Pennsylvania under Section 203(d) might also be eligible for the exemption in Section 203(t).

Scenario 5

An issuer, subsequent to using solicitations of interest under a Commission order issued under Section 203(r) to "test the waters" (see Commission Release No. 00-CF-2), determines to make an offering only to Accredited Investors.

Q. May the issuer rely on Section 203(t) even though persons who were not Accredited Investors saw the solicitation of interest.

A. Yes. Any offers made as a result of the solicitations of interest (SOI) were made under Section 203(r) of the 1972 Act. To switch to a Section 203(t) offering, the issuer would have to (1) terminate the "testing the waters" solicitation of interests; (2) file Commission Form E; and (3) pay a \$500 filing fee.

Scenario 6

An issuer proposes to engage in an offering in reliance on Section 203(t) but may wish to simultaneously utilize another exemption under the 1972 Act.

Q. Is the issuer foreclosed from using any other exemption in the 1972 Act simultaneous with an offering under Section 203(t)?

A. Only to the extent that there is a substantive condition in the exemption which would not make it available simultaneously with Section 203(t), e.g. prohibition on public advertising, numerical limitations, etc.

FURTHER ASSISTANCE

Any questions concerning this Release may be directed to the Division of Corporation Finance at (717) 787-5401.

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