



SUBJECT: SEC Rule 506 Notice Filings and Investment Company Notice Filings

RELEASE NO.: 03-CF-1

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TYPE: Staff Position

PRIOR RELEASES: 96-CF-3 (October 17, 1996); 97-CF-1 (May 21, 1997)

Section 602(b.1) was amended to increase the notice filing fee for Rule 506 Filings to \$525.

SEC RULE 506 NOTICE FILINGS

Conversion of Section 203(d) Filings to Rule 506 Notice Filings

Subsequent to passage of the National Securities Markets Improvement Act of 1996 (NSMIA), staff of the Division of Corporation Finance (Division) received requests by issuers whose offerings were being made in reliance on Section 203(d) of the Pennsylvania Securities Act of 1972 (203-D Filing) to convert their offering to take advantage of federal preemption contained in Section 18(b)(4)(D) of the Securities Act of 1933 (1933 Act), as amended by NSMIA.

Upon filing a complete and executed SEC Form D indicating reliance on SEC Rule 506, Division staff granted the request and "converted" the 203-D Filing to a Rule 506 notice filing in accordance with NSMIA (Rule 506 Filing). The Division did not require payment de novo of a filing fee but did require payment of any additional filing fee due if the issuer increased the amount of securities to be offered in Pennsylvania from the amount stated on the original 203-D which would trigger an additional filing fee.

Act 109 of 1998 amended the Pennsylvania Securities Act of 1972 (1972 Act) to conform the 1972 Act provisions to NSMIA (Act 109). Section 211 was adopted which set forth the requirements for Rule 506 Filings and amended Section

602(b.1) to provide a notice filing fee of \$500 for Rule 506 Filings. These provisions of Act 109 became effective January 25, 1999.

Over six years after enactment of NSMIA, Division staff continues to receive requests to "convert" 203-D Filings to Rule 506 Filings. It is the position of the Division that adequate time has been allowed for issuers to become aware of NSMIA and its preemptive provisions. Therefore, the Division no longer will honor requests for conversion of a 203-D Filing to a Rule 506 Filing. In such cases, the Division will require filing of a complete and executed SEC Form D indicating reliance on SEC Rule 506 and payment of the \$500 notice filing fee.

Amendments to Pre-January 25, 1999 Rule 506 Notice Filings

Between October 11, 1996 (effective date of NSMIA) and January 25, 1999, (effective date of Act 109), the maximum filing fee paid by an issuer making a Rule 506 Filing with the Commission was \$400. Effective January 25, 1999, the filing fee increased to a flat \$500.

It is the position of the Division that filing of an amendment to a Rule 506 Filing made with the Commission after October 11, 1996 but prior to January 25, 1999 to increase the offering amount in Pennsylvania will be subject to payment of a notice filing fee of the difference between the amount of the filing fee previously paid and \$500.

For example, an issuer made a Rule 506 Filing with the Commission on December 1, 1997 and paid a \$400 notice filing fee to offer \$1.5 million of securities in Pennsylvania. On December 10, 2002, the issuer files an amendment to its Rule 506 Filing indicating that it now will be offering \$2.5 million of securities in Pennsylvania. It is the Division's position that the issuer is liable for an additional \$100 notice filing fee (the difference between the \$400 previously paid and the \$500 notice filing fee that became effective on January 25, 1999).

Conversion of Section 203(s) and (t) Filings to Rule 506 Filings

Act 109 adopted two new statutory exemptions. Section 203(s) provides a coordinating exemption for offerings exempt from registration under Section 5 of the 1933 Act pursuant to SEC Rule 505. Section 203(t) provides an exemption for offerings where sales will be made only to Accredited Investors as that term is defined in SEC Rule 501(a). A pre-sale notice filing with the Commission on Commission Form E is required as a condition of availability of each exemption. If an issuer that has filed Commission Form E to claim an exemption under Section 203(s) or (t) determines at any time after filing Form E with the Commission to make a Rule 506 Filing to claim preemption under NSMIA, it is the Division's position that the issuer must: (1) file a completed and executed SEC Form D indicating reliance on Rule 506; and (2) pay a notice filing fee of \$500. If the issuer paid a filing fee in connection with the claim of exemption under Section 203(s) or (t), Section 602(b.2) prohibits refunding of that filing fee.

Amendments to Rule 506 Filing Changing Securities to be Offered

The Division has received several Rule 506 Filings wherein the issuer subsequently changes (sometimes many months later) the securities to be offered from those indicated on the original Rule 506 Filing (eg. offering Preferred Stock instead of Common Stock). The question has arisen whether such a change necessitates another Rule 506 Filing and payment of another notice filing fee. In this situation, the Division takes the position that the issuer is making a new offering consisting of a different security. Therefore, the Division will request a new Rule 506 Filing reflecting the new security to be offered and payment of a \$500 notice filing fee. This position would not apply if the issuer merely is changing (by adding or subtracting) a class or classes of the same security, eg adding Class B Common Stock to an offering previously filed offering only Class A Common Stock.

Rule 506 Filings and PA Offering Amount

Since January 25, 1999, the applicable notice filing fee for Rule 506 Filings is a flat \$500. Therefore, upon payment of the \$500 notice filing fee, the Division will not object to issuers inserting an "indefinite" offering amount on SEC Form D.

INVESTMENT COMPANY NOTICE FILINGS

Act 109 conformed the 1972 Act to the provisions in NSMIA concerning the offering of securities by registered investment companies in Pennsylvania. Section 602(b.1) established notice filing fees for investment companies based upon the amount of securities to be offered in Pennsylvania. In Release No. 97-CF-1 (May 21, 1997), the Commission approved use of Form NF as a uniform notice filing form for investment companies.

Section 210 of the 1972 Act provides for retroactive amendment by a registered investment company of its initial Form NF notice filing in circumstances where the registered investment company sold securities in Pennsylvania in excess of the amount stated on its initial notice on Form NF. Availability of Section 210 is conditioned upon payment of an oversale assessment set forth in Section 602.1(d) (Oversale Assessment).

The Oversale Assessment is calculated as 3x the difference between the notice filing fee that would be payable under Section 602(b.1) for the total amount of securities actually sold in Pennsylvania and the total amount of notice filing fees previously paid by the registered investment company with a minimum assessment of \$350 and a maximum of \$3,000.

A question has arisen whether an Oversale Assessment is due when a registered investment company files under Section 210 for a retroactive amendment to its initial Form NF filing but the notice filing fee under Section 602(b.1) for the amount shown on the initial Form NF and the amount actually sold as detailed on the retroactive amendment is the same.

For example, if a registered investment company filed an initial Form NF indicating an offering of \$10 million of securities in Pennsylvania, the notice filing fee would be \$3,000. Subsequently, the registered investment company files under Section 210 for a retroactive amendment to its initial Form NF to show that it actually sold \$20 million in Pennsylvania. Since the original notice filing fee for \$10 million or \$20 million of securities offered in Pennsylvania is the same (ie, \$3,000), should the registered investment company be required to pay an Oversale Assessment under Section 602.1(d) of \$350?

The Division responds in the negative. The Division's position is that it will impose the Oversale Assessment in Section 602.1(d) only where the offering amount indicated on the initial Form NF and the actual amount of securities sold indicated on the Section 210 retroactive amendment would have required payment of two different notice filing fees pursuant to Section 602(b.1).

EFFECTIVE DATE

The Division will take the positions described in this Release with effect from July 1, 2003.

STAFF ASSISTANCE

Questions concerning this Release should be addressed to Division of Corporation Finance at 717.787.5401.