



SUBJECT: Changes Made by Act 109 of 1998 Affecting Securities Registration and Exemption Provisions of the Pennsylvania Securities Act of 1972

RELEASE NO.: 98-CF-2

DATE OF RELEASE: December 22, 1998

TYPE: Statutory Change

PRIOR REFERENCE: 96-CF-3 (October 17, 1996)

Background

On November 24, 1998, Governor Tom Ridge signed Senate Bill 1385 into law as Act 109 of 1998. Act 109, which makes numerous and substantial changes to the Pennsylvania Securities Act of 1972 (1972 Act), becomes effective **Monday, January 25, 1999.**

In this Release, staff of the Pennsylvania Securities Commission (Commission) address major changes made by Act 109 that generally affect the securities registration and exemption provisions of the 1972 Act, many of which act to conform the 1972 Act with the National Securities Markets Improvement Act of 1996. ***Persons are cautioned not to substitute a reading of this Release for careful examination of applicable sections of the 1972 Act, as amended by Act 109, and regulations promulgated thereunder.***

DEFINITIONAL CHANGES RELATING TO SECURITIES TRANSACTIONS

Section 102(c). An individual is excluded from the definition of "agent" if: (1) the individual represents an issuer in effecting transactions in securities exempted by Section 202, transactions exempted by Section 203 or transactions in a covered security described in Section 18(b)(3) ("Qualified Purchaser") or 18(b)(4) ("Rule 506 Offerings") of the Securities Act of 1933 (1933 Act) **AND** (2) no compensation is paid or given directly or indirectly for soliciting any person in Pennsylvania in connection with any of the foregoing transactions.

Section 102(e). A person whose dealings in securities are limited to transactions exempt by Section 203(j) no longer is excluded from the definition of "broker-dealer."

Section 102(f.2). A security that is a covered security under Section 18(b) of the 1933 Act is defined as a "federally covered security."

Section 102(k). The term "other financial institution" has been deleted from the definition of "institutional investor" and public school districts of the Commonwealth specifically have been excluded from coming within the definition.

Section 102(o). For purposes of applying the provisions of Section 207 and 208 of the 1972 Act, the definition of "promoter" has been expanded to be uniform with the definition of promoter as used in the Statement of Policy of the North American Securities Administrators Association (NASAA) on Corporate Securities Definitions (see NASAA Reports (CCH) ¶3812). Commission staff utilize the NASAA Statements of Policy on Corporate Equity Offerings in its review of public offerings of corporate equity securities filed under Section 205 or 206 of the 1972 Act (see Commission Release 97-CF-3 (September 24, 1997)).

SECURITIES REGISTRATION REQUIREMENT

The registration requirement in Section 201 of the 1972 Act has been amended to make it "unlawful for any person to offer or sell any security in this State unless the security is registered under the act, the security or transaction is exempted under section 202 or 203 hereof **or the security is a federally covered security.**"

EXEMPT SECURITIES

Section 202(g). The requirement, under certain circumstances, to file a notice with the Commission on Form 202-G to perfect the availability of the exemption has been **repealed** as has the \$50 notice filing fee. The exemption becomes self-executing in all respects.

Section 202(g) and SEC Rule 701. Effective January 25, 1999, staff will not recommend enforcement action to the Commission if an issuer relies on the exemption in Section 202(g) for offers and sales of securities in Pennsylvania for which the issuer is in good faith compliance with the requirements of SEC Rule 701 (17 CFR §230.701).

EXEMPT TRANSACTIONS

Section 203(d). Sales of securities to persons in Pennsylvania under Sections 203(f) or (s) will count against the numerical limitations set forth in Section 203(d). The fee schedule for 203(d) offerings has been changed (see **Revised Fees** on page 5 herein). In conjunction with the effectiveness of new Sections 203(s) and (t), the Commission will implement new Commission Form E that will allow issuers

to use one form to claim an exemption under Section 203(d), (s) or (t). Form E is available at www.dobs.state.pa.us.

Section 203(e). Act 109 clarifies that this section refers only to offers made in Pennsylvania.

Section 203(h). The "mail" date has been deleted and the exemption becomes available when all the criteria have been met and a copy of the registration statement or offering circular has been *filed* with the Commission.

Section 203(i.1). The "mail" date has been deleted and the exemption becomes available when all the criteria have been met and a copy of the registration statement or offering circular has been filed with the Commission.

Section 203(j). The availability of this exemption has been further conditioned on: (1) no general solicitation being utilized in connection with soliciting the transaction and (2) no compensation is paid or given directly or indirectly for soliciting any person in Pennsylvania in connection with the transaction.

Section 203(n). The requirement to file a notice with the Commission on Form 203-N to perfect availability of the exemption has been **repealed** as has the \$50 notice filing fee.

Section 203(o). No filing is required under this section **except** in the case of a proposed transaction where (1) no proxy materials are required or permitted to be filed with the SEC by either party to the transaction **and** (2) more than 25% of the security holders of either party to the transaction are residents of Pennsylvania.

Section 203(q). The requirement, under certain circumstances, to file a notice with the Commission on Form 203-Q to perfect the availability of the exemption has been **repealed**.

Section 203(s). This new section creates a transactional exemption for the offer and sale of securities in Pennsylvania which are exempt from registration with the SEC under Rule 505 of SEC Regulation D. Availability of the exemption is conditioned on: (1) the issuer filing a pre-sale notice and paying a filing fee; (2) the issuer refraining from using general solicitation; (3) no one receiving compensation in connection with a sale (except a broker-dealer registered under Section 301) and (4) the issuer and certain affiliates not meeting any of the disqualification provisions. The 12-month written re-sale restriction and the two-business day right of withdrawal applicable to Section 203(d) sales **do not apply** to sales made under this section.

FEE:

For an offering of less than \$1 million in Pennsylvania: \$150

For an offering of \$1 million or more in Pennsylvania \$400

FORM: New Commission Form E

Section 203(t). This section creates an exemption for offerings exempt from registration with the SEC under Section 5 of the 1933 Act pursuant to Section 3(a)(11) thereof or SEC Regulation A or Rule 504 of SEC Regulation D where **all sales** (both within and outside of Pennsylvania) must be made to Accredited Investors as that term is defined in Rule 501 of SEC Regulation D. Availability of the exemption is conditioned on: (1) the issuer filing a pre-sale notice and paying a filing fee; (2) no one receiving compensation in connection with a sale (except a broker-dealer registered under Section 301) and (3) the issuer and certain affiliates not meeting any of the disqualification provisions. Use of general solicitation is permitted. The 12-month written re-sale restriction and the two-business day right of withdrawal applicable to Section 203(d) sales **do not apply** to sales made under this section. This exemption supercedes 64 Pa. Code §204.012 and is more liberal than the NASAA Model Accredited Investor Exemption (see NASAA Reports (CCH) ¶1361).

FEE: \$500

FORM: New Commission Form E

REGISTRATION BY COORDINATION

Section 205(c)(2). The requirement that a statement of the maximum and minimum proposed offering price and the maximum underwriting discounts and commissions be on file with the Commission for two full business days has been **repealed**.

Section 207(j.1). The maximum time that the effectiveness of a registration by coordination may be extended beyond the initial one year effectiveness period is two years, *i.e.* the total effectiveness periods may not extend beyond three years from the initial effective date. A Form 207-J filed on or after January 25, 1999 will be governed by the provisions of this section.

REGISTRATION BY COORDINATION OR QUALIFICATION

Section 207(g). With respect to the escrow of promotional shares, this section has been revised to be uniform with the NASAA Statement of Policy on Promotional Shares (see NASAA Reports (CCH) ¶13203) which is part of the NASAA Statements of Policy on Corporate Equity Offerings that staff utilizes in its review of public offerings of corporate equity securities filed under Section 205 or 206 of the 1972 Act (see Commission Release 97-CF-3 (September 24, 1997)). This section also has been amended to allow the Commission to require that the proceeds from the sale of a registered security in Pennsylvania be escrowed for a specific use as set forth in the prospectus.

Section 208(a)(viii). The Commission may deny, suspend or revoke effectiveness of a registration statement for an offering of debt securities if: (1) the offering

involves an excessive debt to equity ratio; or (2) the issuer, at the time it filed its application with the Commission, had received an auditor's report for the immediately preceding fiscal year expressing substantial doubt about the issuer's ability to continue as a "going concern."

Section 208(a)(ix). The Commission now may deny, suspend or revoke effectiveness of a registration statement for an offering by a development stage company that has no specific plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies or other entity or person.

Section 208(c). The summary order provisions relating to denial, postponement, suspension or revocation of a registration statement now are uniform with similar provisions applicable to exempt securities and exempt transactions set forth in Section 204(b).

FEDERALLY COVERED SECURITIES

Section 211(a). This new section addresses notice filing requirements relating to the offer of securities in Pennsylvania by registered investment companies and specifies the effectiveness period of the notice filings. The Commission will continue to accept Form NF for notice filing purposes. Effective January 25, 1999, the Commission no longer will require filing of copies of registration statements, prospectuses or post-effective amendments filed with the SEC **except** for those materials relating to reorganizations. For a detailed discussion of notice filings to be made by investment companies, please refer to Commission Release **98-CF-1** (December 8, 1998) and Commission Release **97-CF-1** (May 21, 1997).

Section 211(b). This new section mandates the filing of a notice with the Commission on SEC Form D (as in effect on September 1, 1996) with respect to an offering in which the issuer is relying on Rule 506 of SEC Regulation D no later than 15 calendar days after the first sale occurs in Pennsylvania, together with a filing fee of \$500. Since the filing fee will be a flat \$500, issuers need not file the State Appendix to SEC Form D with the Commission after January 25, 1999. This section also acts to supersede relevant portions of Sections III and VII of Commission Release **97-CF-3** (October 17, 1996).

Section 211(c). Under this new section, the Commission may issue a stop order suspending the offer or sale of a security described in Section 211(a) or (b) if: (1) the order is necessary or appropriate for the protection of investors and (2) there is a failure to comply with any condition established by Section 211.

REGISTRATION OF AGENTS

Section 302(e). This section exempts from the registration provisions of Section 301 any person who receives compensation in connection with representing an issuer in effecting transactions in: (1) securities that are exempted by Section 202(e), (f) or (g); (2) securities involved in a transaction exempted by Section

203(c), (g), (k), (l) or (m) or (3) securities which are covered securities under Section 18(b)(1) of the 1933 Act.

Section 302(e.1). This section exempts from the registration provisions of Section 301 any person who represents an issuer in effecting transactions in securities registered under Section 205 or 206 who: (1) is a *bona fide* officer, director, partner or employee of the issuer or an individual occupying similar status or performing similar functions **and** (2) does not receive any compensation, directly or indirectly, for effecting the transactions.

STATUTORY BARS

Section 512(a). After giving notice and opportunity for hearing, the Commission, where it has determined that a person willfully violated the 1972 Act or any rule or order thereunder or knowingly aided in the act or transaction constituting such violation, may issue an order which bars, conditionally or unconditionally, and either permanently or for such period as the Commission shall determine, such person from: (1) representing an issuer offering or selling securities in Pennsylvania; (2) acting as a promoter, officer, director or partner of an issuer (or an individual occupying a similar status or performing similar functions) offering or selling securities in Pennsylvania or of a person who controls or is controlled by such issuer; (3) being registered as a broker-dealer, agent, investment adviser or investment adviser representative under Section 301; (4) being an affiliate of any person registered under Section 301; or (5) relying upon an exemption from registration contained in Section 202, 203 or 302.

Section 512(d). It is unlawful for any issuer to permit, without the consent of the Commission, a person as to whom an order is in effect under Section 512(a) to participate in the offer or sale of the issuer's securities in Pennsylvania in contravention of such order if the issuer knew, or in the exercise of reasonable care, should have known of such order.

RESCISSION OFFERS

Section 513. After giving notice and opportunity for hearing, the Commission, where it has determined that an issuer willfully violated Section 201 or 401, may issue an order which requires the issuer or control person of the issuer who knowingly aided in the act or transaction constituting such violation to effect a rescission offer in a manner which the Commission, by rule or order may prescribe, to persons in Pennsylvania who purchased securities of the issuer while the issuer or control person was in violation of the 1972 Act.

Section 509(c). Any person violating an order of the Commission requiring a rescission issued under Section 513 from which no appeal has been taken or which has been sustained on appeal or which has been appealed but where no supersedeas has been granted for the period in which the order has been violated, shall be deemed to be in contempt of such order. Upon petition and certification of such order by the Commission, the Commonwealth Court or any of the courts of

common pleas, if it finds after hearing or otherwise that the person is not in compliance with the order, shall adjudge the person in contempt of the order and shall assess such civil penalties of an amount not less than \$3,000 nor greater than \$10,000 per violation and issue such further orders as it may deem appropriate.

REVISED FEE SCHEDULE

Section 602(b.1). Filing fees revised by Act 109 relating to non-investment company notice filings are set forth below. Act 109 also provides that there shall be no refund of any filing fee submitted in connection with these filings.

Notice filings under Section 203(d) or (s)

If the offering in Pennsylvania is less than \$1 million: \$150

If the offering in Pennsylvania is \$1 million or more: \$400

Notice filings under Section 203(t): \$500

Notice filings under Section 211(b) \$500

REPORTS TO SECURITY HOLDERS

Section 606(a). Only issuers of securities registered under the 1972 Act and issuers relying on the Section 203(d) exemption, which issuers have not filed reports with the SEC under Section 13 or 15(d) of the Securities Exchange Act of 1934, need comply with 64 Pa. Code §606.011 (financial reports to security holders).

FINANCIAL STATEMENTS

Section 609(c). Financial statements must be prepared reflecting conformity with generally accepted accounting principles in the United States consistently applied unless otherwise permitted by regulation or order of the Commission.

EFFECTIVE DATE OF THE STATUTORY CHANGES

The statutory changes discussed in this Release become effective on **Monday, January 25, 1999.**

TEXT OF THE 1972 ACT AS AMENDED BY ACT 109

To view the entire text of the 1972 Act, as amended by Act 109 of 1998, please visit the Commission's Web site at www.psc.state.pa.us.

Questions concerning this Release may be directed to staff of the Division of Corporation Finance at (717) 787-8059. Alternative formats of this

**document may be available on request. Call (717) 787-1165 or TTY Users:
via AT&T Relay Center 1-800-654-5984.**