

SECURITIES ACT POLICY STATEMENT-10

RE: WAC 460-16A-205(p) - PROMOTIONAL SHARES RULE - THREE YEAR LIMITATION

Question presented:

When will the Securities Administrator apply the "promotional shares" treatment to shares issued more than three years ago?

Rules:

WAC 460-16A-205(p) adopts the September 3, 1987 NASAA Statement of Policy on promotional shares:

except that the term promotional shares shall be limited to those equity securities which were issued within the last three years and that all promotional shares in excess of twenty-five percent of the shares to be outstanding upon completion of the offering may be required to be deposited in escrow absent adequate justification that escrow of such shares is not in the public interest and not necessary for the protection of investors. . . .

The Introduction to the NASAA Statement of Policy (CCH NASAA Reports ¶ 3201) provides that NASAA:

has determined it to be in the public interest, and consistent with the goals of investor protection in public offerings of EQUITY SECURITIES, to provide guidelines to ensure that the potential rewards to public investors and to PROMOTERS bear a reasonable relationship to the respective risks assumed. . . . Nothing contained in these guidelines shall prevent a state Securities Administrator from considering variations in the application of any, or all, of the standards when such variations are justified in light of all the facts and circumstances surround a particular public offering.

Discussion:

Normally, under the above-cited provision in WAC 460-16A-205, shares issued more than three years before the date of the public offering will not be considered "promotional shares". Issuers should note, however, that the Statement of Policy allows for a State Administrator to consider variations in the application of its standards. The Securities Administrator has determined there are certain circumstances which justify waiver of the three year limitation. These circumstances may include situations where the issuer has not conducted operations or had significant operations for the last three years; where the issuer's operations and earnings, although significant, are not in the same type of business that is the subject of the propose public offering; or, where the proposed public offering is of such a large scale that the issuer's past earnings and operations are insubstantial in comparison to the business to be conducted.

Conclusion:

The Administrator may extend promotional shares treatment to shares which were issued more than three years before the proposed public offering in certain situations.

Adopted: January 1, 1991; As amended: May 31, 1996

Replaces: Statement of Policy 84-55

Deborah R. Bortner, Securities Administrator

Prepared by: William M. Beatty and Nelda Shannon, Securities Examiners