pennsylvania
DEPARTMENT OF BANKING
AND SECURITIES

# INVESTMENT ADVISER REGISTRATION PACKET

**FEBRUARY 2024**

# DEPARTMENT OF BANKING AND SECURITIES
## Securities Registration Office
## Market Square Plaza, Suite 1300
## 17 N. Second Street
## Harrisburg, PA 17101
## Filing Requirements: February 2024

# PENNSYLVANIA INVESTMENT ADVISER REGISTRATION REQUIREMENTS


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## GENERAL INSTRUCTIONS & FILING REQUIREMENTS:

An initial application for registration as an investment adviser in Pennsylvania must be filed through the Investment Adviser Registration Depository (IARD). If the applicant is not already a participant in the IARD, participation must be initiated before applying for Pennsylvania registration. For detailed information, forms, and instructions on IARD participation see www.iard.com. If already an IARD participant, skip to step 3.

1. The first step in getting started on the IARD is setting up an IARD User Account. This is accomplished via the "Entitlement" process (see www.iard.com). Applicant must file an "Entitlement" application online (which consists of one online form) with the IARD Entitlement Group at FINRA.

2. Once IARD receives your Entitlement, they will set-up the IARD User Account, assign a Firm CRD Number, create a Flex-Funding IARD billing account and send the investment adviser a confirmation email. The "Entitlement" application is available online only at www.iard.com.

Upon receipt of the confirmation email, details described at www.iard.com it will be necessary to log-in to the IARD to activate and set-up your firm IARD account.

**NOTE: Please note, financial remittances to the IARD are not submitted to the regular IARD addresses. The E-Bill system that enables entitled users to view accounting details, fund the accounts and view and pay invoices is handled by the Super Account Administrator of the Firm. To set up E-Bill system and user rights to access this area directly go to www.iard.com**

**All checks and payments to your IARD account should be submitted directly to FINRA – questions regarding funding should be directed to FINRA Gateway Call Center:**

**IA's 240-386-4848 or entsupport@finra.org**

3. File FORM ADV, Parts 1A, 1B, and appropriate schedules electronically through the IARD. "PA" must be identified under Part 1B, Item 1.

FORM ADV, Parts 2.A. and 2.B. must be uploaded as an attachment to the firm's IARD record in a searchable PDF format.

4. The $400.00 Pennsylvania Investment Adviser Filing Fee will be deducted from your IARD account.

**In addition to applying for registration in Pennsylvania through the IARD, the firm will be required to submit additional documents directly with this agency through the Department Portal. The firm will be contacted with further instruction after filing the registration through IARD. Please refer to: https://www.dobs.pa.gov/Businesses/Securities/Investment%20Advisors/Pages/Investment%20Advisers.aspx "News" to obtain additional information and resources."**

5. For an Applicant that maintains discretionary authority over client funds or securities, has custody over client funds or securities, or that requires payment of advisory fees 6 months or more in advance and in excess of $1,200 per client, provide the following:

A Statement of Financial Condition, which meets the requirements of the Department's Regulation §303.042 (copy enclosed). Also, see §404.014 (copy enclosed).

6. Reference Item 8, Form ADV-Part 1A. If Applicant has provided an affirmative response to Item 8H, provide specimen copies of the solicitor's agreement and disclosure statement.

7. Submit the Firm's suitability documentation, which meets the requirements of Department Regulation 304.012(18) (copy enclosed). The documentation can be in the form of an investor questionnaire or a client profile and should address the client's current investment objectives, financial situation, risk tolerances, investment experience and liquidity.

8. An investment adviser shall establish, implement and maintain written procedures relating to a business continuity and succession plan, reference §304.071 (copy enclosed).

9. The investment adviser must have written procedures addressing a privacy policy. Provide a copy of that statement. Reference potential violation of §305.019(c)(3)(xvii) (copy enclosed).

10. Provide specimen copies of all forms of contracts and/or agreements to be used by the Applicant for its investment advisory clients. (*See Section 405, Pennsylvania Securities Act of 1972* ("1972 Act") and Regulation 305.019(c)(3)(xvi), attached).

11. It is unlawful for any investment adviser to employ an "Investment Adviser Representative" (IAR) to represent him in Pennsylvania unless registered. Failure to properly register an IAR may result in administrative action by the Department and civil liability for unregistered investment advisory activity. See Section 102(j.1) of the 1972 Act for the definition of Investment Adviser Representative.

An initial application for registration as an IAR ("RA" designation) must be filed through the IARD.

NOTE: The investment adviser (entity) must be an IARD participant and have an IARD entitlement before the IARD will accept IAR applications.

A. Once entitled, the firm can now begin the process of filing an electronic Form U-4 (See Chapter Four of the IARD Firm User's Manual on FINRA's website) It should be noted that the firm does not have to complete the entire Form U-4 at one time. The firm can enter and save the date and then return at a later time to complete and electronically submit the Form U4.

B. The $135.00 Pennsylvania IAR filing fee will be deducted from your IARD account. In addition, the IARD will charge each IAR a one-time initial set-up fee of $10.00 with an annual maintenance fee of $10.00. See Item 2. for instructions on submitting payments.

C. Pennsylvania does **not** require the filing of fingerprint cards on behalf of the IAR applicant.

D. The RA must meet one of the following qualifications (see Department Regulation §303.032):

1. Passing results:

a. Received, on or after January 1, 2000, and within 2 years immediately prior to the date of filing an application with the Department, a passing

grade on The Uniform Investment Adviser Law Examination (Series 65), or successor examination.

-OR-

b. Received, on or after January 1, 2000, and within 2 years immediately prior to the date of filing an application with the Department, a passing grade on the General Securities Representative Examination (Series 7) administered by FINRA and the Uniform Combined State Law Examination (Series 66) or successor examinations.

-OR-

c. Received, on or after January 1, 2000, a passing grade on either the Series 65 examination or passing grades on both the Series 7 and Series 66 examinations and has not had a lapse in registration as an investment adviser or investment adviser or investment adviser representative in any state other than this Department for a period exceeding 2 years immediately prior to the date of filing an application with the Commission.

NOTE: Grandfathering and examination waivers are set forth in Department Regulation §303.032(b) and (c) respectively.

Registration exemption for solicitors set forth in Department Regulation §302.071 (copy enclosed).

**SUPPLEMENTAL REQUIREMENTS:**

1. In the event your filing contains deficiencies, you will receive a letter identifying such deficiencies with a request that appropriate information be filed with this agency within 60 days from the date of the letter. Reference 60-day abandonment rule §303.016 (copy enclosed).

2. FORM ADV-Parts 1A; 1B; 2A or 2B amendments must be filed electronically through the IARD, for any material change in its application no later than 30 days after the occurrence of the event.

3. Regulation §303.042(b) requires **immediate notification** if net worth falls below minimum requirements.

4. When requesting waiver of the examination requirements for having a current and in good standing CPA or Law Degree, the following must be provided:

   a. A letter from the Firm (including a signature on behalf of the Firm) requesting a waiver of the examination requirement setting forth your basis for the request;

   b. Verification of the current CPA degree with an expiration date OR Law Degree and proof a practicing member of the Bar.

5. Registrant must notify the Department in writing within 30 days after the termination of or withdrawal from employment of any “Investment Adviser Representative” furnishing investment advice in Pennsylvania. In accordance with Department Regulation §305.061(c) notification shall be filed on Form U-5, “Uniform Termination Notice for Securities Industry Registration.”

**Enclosures:**

## Pa. Securities Act of 1972

| | |
|---|---|
| Section 102(j). | Definition of "Investment adviser" |
| Section 102(j.1). | Definition of "Investment adviser representative" |
| Section 301. | Registration requirement |
| Section 302. | Exemptions |
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## 64 Pa. Code

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| §102.021. | Definitions |
| §302.070. | Registration exemption for investment advisers to private funds |
| §302.071. | Registration exemption for solicitors |
| §303.012. | Investment adviser registration procedure |
| §303.014. | Investment adviser representative registration procedures |
| §303.016. | Considered as abandoned |
| §303.021. | Registration and notice filing procedures for successors to a broker dealer investment adviser or Federally-covered adviser |
| §303.032. | Examination requirements for investment advisers and investment adviser representatives |
| §303.042. | Investment adviser capital requirements |
| §303.051. | Surety bonds |
| §304.012. | Investment adviser required records |
| §304.022. | Investment adviser required financial reports |
| §304.052. | Investment adviser compensation |
| §304.071. | Business continuity and succession planning |
| §305.011. | Supervision of agents, investment adviser representatives and employees |
| §305.019. | Dishonest and unethical practices |
| §305.020. | Use of senior specific certifications and professional designations |
| §305.061. | Withdrawal of registration or notice filing |
| §404.010. | Advertisements by investment advisers and investment adviser representatives |
| §404.011. | Investment adviser brochure disclosure |
| §404.012. | Cash payment for client solicitation |
| §404.014. | Custody requirements for investment advisers |
| §606.031. | Advertising literature |
| §609.012. | Computing the number of offerees, purchasers and clients |

**Section 102(j) "Investment adviser"** means any person who, for compensation, engages in the business of advising others, either directly or through publications, writings or electronic means, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include:

(i) A bank;

(ii) A lawyer, accountant, engineer or teacher whose performance of these services is solely incidental to the practice of his profession;

(iii) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and does not receive special compensation for the investment advice;

(iv) A publisher of any bona fide newspaper, news column, newsletter, news magazine or business or financial publication or service, whether communicated in hard copy form or by electronic means or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client and is of general, regular and paid circulation; and the agents and servants thereof in the performance of their regular duties on behalf of such publication or service;

(v) A person whose advice, analyses or reports relate only to securities exempted under section 202(a);

(vi) A person who has no place of business in this State if his only clients in this State are other investment advisers, federally covered advisers, broker-dealers or institutional investors;

(vii) A person who has a place of business in this State and during the preceding twelve-month period has had not more than five clients in or out of this State and does not hold himself out generally to the public as an investment adviser;

(viii) A person that is an investment adviser representative;

(ix) A federally covered adviser;

(x) A person excluded from the definition of "investment adviser" under section 202(a)(11) of the Investment Advisers Act of 1940 (54 Stat. 847, 15 U.S.C. § 80b-2(a)(11)); or

(xi) Other persons not within the intent of this subsection whom the department by regulation designates.

**Section 102(j.1) "Investment adviser representative"** means:

(i) Except as provided in paragraph (iii), with respect to any investment adviser registered or required to be registered under this act, any partner, officer, director or person occupying a similar status or performing similar functions, or other individuals employed by or associated with an investment adviser who performs any of the following:

(A) Makes any recommendations or otherwise renders advice regarding securities;
(B) Manages accounts or portfolios of clients;
(C) Determines which recommendation or advice regarding securities should be given;
(D) Provides investment advice or holds himself or herself out as providing investment advice;
(E) Supervises employees who perform any of the foregoing; or
(F) Receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice.

(ii) With respect to any federally covered adviser, any individual employed by or associated with a federally covered adviser who is an "investment adviser representative" and who has a "place of business" in this State as those terms are defined in the rules and regulations of the Securities and Exchange Commission.

(iii) An investment adviser representative may not include;

(A) individuals who perform only clerical or ministerial acts;
(B) an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services; or
(C) other individuals that the department determines by regulation.

## Section 301. Registration Requirement

Unless exempted under section 302 hereof:

(a) It is unlawful for any person to transact business in this State as a broker-dealer or agent unless he is registered under this act.
(b) It is unlawful for any broker-dealer or issuer to employ an agent to represent him in this State unless the agent is registered under this act. The registration of an agent is not effective during any period when he is not associated with a specified broker-dealer registered under this act or a specified issuer. No agent shall at any time represent more than one broker-dealer or issuer, except that where affiliated organizations are registered broker-dealers, an agent may represent one or more of such organizations. When an agent begins or terminates an affiliation with a broker-dealer or issuer, or engages in activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the department. The department may adopt a temporary registration procedure to permit agents to change employers without suspension of their registrations hereunder.
(c) It is unlawful for any person to transact business in this State as an investment adviser unless he is so registered or registered as a broker-dealer under this act or unless he is exempted from registration. It is unlawful for any person to transact business in this State as an investment adviser representative unless he is so registered or exempted from registration.

(c.1) The following apply:

(1) It is unlawful for any:

(i) Person required to be registered as an investment adviser under this act to employ an investment adviser representative unless the investment adviser representative is registered under this act or exempted from registration, provided that the registration of an investment adviser representative is not effective during any period when he is not employed by an investment adviser registered under this act; or

(ii) Federally covered adviser to employ, supervise or associate with an investment adviser representative having a place of business in this Commonwealth unless such investment adviser representative is registered under this act or exempted from registration.

(2) If a registered investment adviser representative begins or terminates employment with an investment adviser or a federally covered adviser, the investment adviser in the case under paragraph (1)(i) or the investment adviser representative in the case of paragraph (1)(ii) shall promptly notify the department.

(3) The department may adopt a temporary registration procedure to permit investment adviser representatives to change employers without suspension of their registrations under this act.

(d) It is unlawful for any licensed broker-dealer, agent, investment adviser or investment advisor representative to effect a transaction in securities, directly or indirectly, in this State if the registrant is in violation of this act, or any regulation or order promulgated under this act of which he has notice, if such violation (i) is a material violation; (ii) relates to transactions effected in this State; and (iii) has been committed by such registrant, or if the information contained in his application for registration, as of the date of such transaction, is incomplete in any material respect or is false or misleading with respect to any material fact.
(e) Every registration or notice filing expires on December 31 of each year unless renewed. No registration or notice filing is effective after its expiration, unless a renewal application has been timely filed, and expiration of a registration for which no renewal application has been filed is deemed an application for withdrawal under section 305(f).
(f) It is unlawful for any federally covered adviser to conduct advisory business in this State unless such person complies with the provisions of section 303(a)(iii).

## Section 302. Exemptions.

The following persons shall be exempted from the registration provisions of section 301:

(a) A broker-dealer registered under the Securities Exchange Act of 1934, who has not previously had any registration denied or revoked under this act or any predecessor statute, if he has no place of business in this State and, during the preceding 12 months, he does not direct offers to sell or buy into this State in any manner to persons other than broker-dealers, institutional investors or governmental agencies and other instrumentalities designated by regulation of the department, or to more than five other customers in this State, whether or not the offeror or any of the offerees is then present in this State.
(b) An agent in so far as he effects transactions on behalf of a broker-dealer who is exempted by the provisions of subsection (a).
(c) A 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 employe 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.

(d) An investment adviser who does not have a place of business in this State that is registered or exempt from registration under the securities act of the state in which the person has his principal place of business and during the preceding twelve-month period has had not more than five clients who are residents of this State exclusive of other investment advisers, federally covered advisers, broker-dealers or institutional investors.

(d.1) An investment adviser representative who is employed by or associated with an investment adviser insofar as he transacts business in this State on behalf of an investment adviser who is exempted by the provisions of subsection (d).

(d.2) An investment adviser representative who has a place of business in this State and is employed by or associated with a federally covered adviser and the federally covered adviser meets any of the criteria described in section 303(a)(iii)(A), (B) or (C).

(e) Any person who represents 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 Securities Act of 1933 (48 Stat. 74, 15 U.S.C. § 77r(b)(1)).

(e.1) A person that comes within the exclusion described in section 4(b)(1) and (2) of the Securities Act of 1933 (48 Stat. 74, 15 U.S.C. §77d(b)).

(e.2) A funding portal, as that term is defined in Section 3(a)(80) of the Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. §78c(a)(80)), that is registered as a funding portal with the Securities and Exchange Commission and has its principal place of business, as such term is defined by rules of the Securities and Exchange Commission, in this State. The funding portal, however, shall be subject to the provisions of sections 304(d) and 510(f).

(f) The department may by such regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions or for specified periods, exempt from the provisions of section 301 any class of persons specified in such regulations.

## Section 405. Contract Requirements.

It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract if such contract:

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide in writing that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide in writing that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

**Clause (1) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates or taken as of a definite date, or in any other manner permitted by the Investment Advisers Act of 1940 (54 Stat. 847, 15 U.S.C. § 80b-1 et seq.), and the rules and regulations promulgated thereunder or any contract for the rendering of investment advisory services to an institutional investor. "Assignment," as used in clause (2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.**

## § 102.021. Definitions.

(a) The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

*3(c)(1) fund*—A qualifying private fund that is eligible for exclusion from the definition of "investment company" in section 3(c)(1) of the Investment Company Act of 1940 (15 U.S.C.A. § 80a-3(c)(1)).

*203(d) restricted securities*—Securities purchased under section 203(d) of the act (70 P.S. § 1-203(d)) if the purchaser is subject to the restriction not to resell the security for 12 months after the date of the purchase.

*Accountant's report*—A document prepared by an independent certified public accountant indicating the scope of the audit with either of the following:

(i) An opinion regarding the financial statements taken as a whole.

(ii) An assertion that an overall opinion cannot be expressed and the reason why.

*Accredited investor*—As defined in Rule 501 of Regulation D (17 CFR 230.501) (relating to definitions and terms used in Regulation D).

*Act*—The Pennsylvania Securities Act of 1972 (70 P.S. § § 1-101—1-703.1).

*Advertisement*—

(i) As defined in section 102(a) of the act (70 P.S. § 1-102(a)) wherein the term:

(A) Communication includes, without limitation, letters, brochures, pamphlets, displays, sales literature and any form of electronic communication, including e-mail, which is used in connection with a sale or purchase, or an offer to sell or purchase a security.

(B) Publicly disseminated means communication directed to or communicated to more than 50 persons in this Commonwealth.

(ii) For purposes of § 404.010 (relating to advertisements by investment advisers and investment adviser representatives), any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication, by radio or television, or by electronic means, which offers:

(A) An analysis, report or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell.

(B) A graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell.

(C) Other investment advisory service with regard to securities.

*Agent*—As defined in section 102(c) of the act:

(i) Including a person considered an officer, director, partner or employee of an issuer, or an individual occupying a similar status or performing similar functions, if the designation is applied for the purpose of avoiding registration as an agent under the act.

(ii) Excluding persons acting as transfer agents and registrars on behalf of issuers or performing only ministerial duties in handling securities and maintaining lists of securityholders.

*Aggregate indebtedness*—As defined in 17 CFR 240.15c3-1 (relating to net capital requirements for brokers or dealers), promulgated under the Securities Exchange Act of 1934 (15 U.S.C.A. § § 78a—78qq).

*Agricultural cooperative association*—

(i) An association which admits to membership only persons engaged in agriculture and is organized and operated to engage in a cooperative activity for persons engaged in agriculture in connection with:

(A) Producing, assembling, marketing, buying, selling, bargaining or contracting for agricultural products; harvesting, preserving, drying, processing, manufacturing, blending, canning, packing, ginning, grading, storing, warehousing, handling, transporting, shipping or utilizing the products; or manufacturing or marketing the by-products of agriculture.

(B) Manufacturing, processing, storing, transporting, delivering, handling, or buying for or furnishing supplies to its members and patrons.

(C) Performing or furnishing business, educational, recreational or other services, including the services of labor, buildings, machinery, equipment, trucks, trailers and tankers, or other services connected with the purposes in this subparagraph and subparagraph (ii) on a cooperative basis.

(ii) A federation of individual agricultural cooperative associations if the federation does not possess greater powers or purposes and engages in operations no more extensive than an individual agricultural cooperative association.

*Agricultural cooperative association member*—A patron, to the extent that the organic law or another law to which the agricultural cooperative association is subject requires the patron to be treated as a member.

*Amount*—A quantity, which for the purpose of:

(i) Evidence of indebtedness is the principal amount.

(ii) Shares is the number of shares.

(iii) Any other kind of security is the number of units.

*Any credit union*—An institution organized as a credit union under the applicable laws of the Commonwealth, the business of which is:

(i) Confined substantially to the credit union business (the receipt of deposits from and the making of loans to bona fide members of the credit union).

(ii) Supervised and examined as a credit union by the appropriate Commonwealth authorities having supervision over that institution.

*Audit*—The examination of historical financial statements by an independent certified public accountant in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon.

*Auditor's report*—A written report by an independent certified public accountant which contains either an expression of opinion on an entity's financial statements, taken as a whole, or an assertion that an opinion cannot be expressed.

*Bank*—

(i) As defined in section 102(d) of the act.

(ii) The term does not include:

(A) A holding company for a bank.

(B) A bank-in-organization if the state or Federal regulator with primary authority over the bank-in-organization determines that it is not a bank under the law governing that bank-in-organization.

*Bank holding company*—A person engaged, either directly or indirectly, primarily in the business of owning securities of one or more banks for the purpose, and with the effect, of exercising control.

*Beneficial ownership*—

(i) For purposes of § § 203.184 and 609.012 (relating to offers and sales to principals; and computing the number of offerees, purchasers and clients) and section 203(s)(v) and (t)(v) of the act, as defined in 17 CFR 240.13d-3 (relating to determination of beneficial owner).

(ii) For purposes of § 302.070 (relating to registration exemption for investment advisers to private funds), as defined in 17 CFR 270.2a51-2 (relating to definitions of beneficial owner for certain purposes under sections 2(a)(51) and 3(c)(7) and determining indirect ownership interests).

(iii) For purposes of § § 304.012, 305.019 and 404.011 (relating to investment adviser required records; dishonest and unethical practices; and investment adviser brochure disclosure), as defined in 17 CFR 275.204A-1 (relating to investment adviser codes of ethics).

*Bona fide distribution*—A distribution not made solely to avoid the registration provisions of section 201 of the act (70 P.S. § 1-201).

*Bona fide pledgee*—

(i) A secured party who takes securities in pledge to secure a bona fide debt.

(ii) The term does not include a secured party who takes securities in pledge under either of the following circumstances:

(A) Without any intention or expectation that they will be redeemed but merely as a step in the distribution to the public.

(B) Without having secured knowledge, in the exercise of reasonable diligence, before the consummation of the pledge that the securities taken in pledge are lawfully owned by the party making the pledge.

*Bond*—

(i) A debt obligation, including a note, debenture or other evidence of indebtedness.

(ii) For purposes of § 202.092 (relating to guaranties of certain debt securities exempt), an exempt security under section 3(a)(2) of the Securities Act of 1933 (15 U.S.C.A. § 77c(a)(2)) when either of the following applies:

(A) The issuer of the security is located in this Commonwealth.

(B) The guaranty issued in connection with the bond, note, debenture or other evidence of indebtedness is considered to be a separate security under Securities and Exchange Commission Rule 131 (17 CFR 230.131) (relating to definition of security issued under governmental obligations).

*Branch office*—As defined in FINRA Rule 3110(e) or any successor rule.

*Broker-dealer*—

(i) As defined in section 102(e) of the act.

(ii) The term does not include persons:

(A) Acting as transfer agents and registrars on behalf of issuers.

(B) Performing only ministerial duties in handling securities and maintaining lists of securityholders.

*CRD*—The Central Registration Depository operated by FINRA, and any successor thereto.

*Class of a series*—Equity securities of an issuer of substantially similar character, the holders of which enjoy substantially similar rights and privileges.

*Client*—

(i) A person to whom an investment adviser or investment adviser representative has provided investment advice for which the investment adviser or investment adviser representative received compensation.

(ii) For purposes of § 404.012 (relating to cash payment for client solicitation), the term includes a prospective client.

(iii) For purposes of § 404.011, the term includes each limited partner of a limited partnership, each member of a limited liability company and each beneficiary of a trust if the investment adviser is the general partner of the limited partnership, manager of the limited liability company or trustee of the trust.

*Commission*—Any form of compensation received by any person for effecting the purchase or sale of a security.

*Comparative financial statement*—A document which includes financial statements for 2 years or more

presented in adjacent columnar form.

*Compensation*—Receipt, directly or indirectly, of any payment or consideration, whether or not in the form of cash, or any economic benefit.

*Confidential information*—Records and other information in the Department's possession which are not available for public inspection and copying under the Right-to-Know Law (65 P.S. § § 67.101—67.3104) or section 603(c) of the act (70 P.S. § 1-603(c)).

*Control*—

(i) As defined in section 102(g) of the act.

(ii) For purposes of § 304.012 and § 404.014 (relating to custody requirements for investment advisers), the term includes the power, directly or indirectly, to direct the management or policies of a person whether through ownership of securities, by contract, or otherwise, including the following presumptions:

(A) Each of the investment adviser's officers, partners or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the investment adviser.

(B) A person is presumed to control a corporation if either of the following apply:

(I) The person directly or indirectly has the right to vote 25% or more of a class of the corporation's voting securities.

(II) The person has the power to sell or direct the sale of 25% or more of a class of the corporation's voting securities.

(C) A person is presumed to control a partnership if the person has the right to receive on dissolution, or has contributed, 25% or more of the capital of the partnership.

(D) A person is presumed to control a limited liability company if any of the following apply:

(I) The person directly or indirectly has the right to vote 25% or more of a class of the interests of the limited liability company.

(II) The person has the right to receive on dissolution, or has contributed, 25% or more of the capital of the limited liability company.

(III) The person is an elected manager of the limited liability company.

(E) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

*Convicted*—A verdict, judgment or plea of guilty, or a finding of guilt on a plea of nolo contendere if the verdict, judgment, plea or finding has not been reversed, set aside or withdrawn, whether or not a sentence has been imposed.

*Cooperative business association*—A person organized exclusively as a retail or wholesale cooperative which admits to membership only persons that legitimately engage, in whole or in part, in the line of business for which the cooperative was organized.

*Custody*—

(i) For purposes of a person, directly or indirectly holding client funds or securities, with authority to obtain possession of them or the ability to appropriate them.

(ii) For purposes of an investment adviser, if a related person holds directly or indirectly, client funds or securities, or has authority to obtain possession of them, in connection with advisory services the investment adviser provides to clients.

(iii) For purposes of subparagraphs (i) and (ii), the term includes:

(A) Possession of client funds or securities, unless the investment adviser receives them inadvertently and returns them to the sender promptly but in any case within 3 business days of receiving them.

(B) Any arrangement (including a general power of attorney) under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian on the investment adviser's instruction to the custodian.

(C) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position or another type of pooled investment vehicle, or trustee of a trust) that gives the investment adviser or its supervised person legal ownership of or access to client funds or securities.

(iv) For purposes of subparagraphs (i) and (ii), the term does not include:

(A) An investment adviser that has inadvertently held or obtained a client's securities or funds and returned them to the client within 3 business days or has forwarded third-party checks within 24 hours, provided that the adviser keeps a ledger or other listing of all securities or funds held or obtained in this manner as required under § 304.012(a)(22).

(B) An investment adviser acting as a trustee for a beneficial trust in which the beneficial owners of the trust are a parent, step-parent, grandparent, step-grandparent, spouse, brother, step-brother, sister, step-sister, grandchild or step-grandchild of the investment adviser if the investment adviser maintains the records required under § 304.012(c)(8).

*Customer*—

(i) As defined in 17 CFR 240.15c3-3 (relating to customer protection—reserves and custody of securities).

(ii) For the purpose of § § 303.041 and 304.061 (relating to broker-dealer capital requirements; and free credit balances), every person other than the broker-dealer.

*Date of filing*—The date on which an application, registration statement, notice filing, financial statements, reports, correspondence or other documents filed or required to be filed directly with the Department, or any material amendment thereto, are received in the Harrisburg office of the Department.

*Development stage company*—A company devoting substantially all of its efforts to establishing a new business if planned principal operations have not commenced, or have commenced, but there has not been significant revenue therefrom.

*Direct participation program*—A program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution including, but not limited to, oil and gas programs, real estate programs, real estate investment trusts, agricultural programs, cattle programs, condominium securities and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof, except tax qualified pension and profit sharing plans under sections 401 and 403(a) of the Internal Revenue Code of 1986 (26 U.S.C.A. § § 401 and 403(a)) and individual retirement plans under section 408 of the Internal Revenue Code of 1986 (26 U.S.C.A. § 408), tax sheltered annuities under section 403(b) of the Internal Revenue Code of 1986, and any company including separate accounts, registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C.A. § § 80a-1—80a-64).

*Discretionary power*—Effecting a transaction or placing a trade order without specific authorization from the client, not including discretion as to the price at which or the time when a transaction is or is to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

*EFD*—The electronic filing depository operated by NASAA, and any successor thereto.

*Engaged in agriculture*—Farming, dairying, livestock raising, poultry raising, floriculture, mushroom growing, beekeeping, horticulture and allied occupations.

*Entity*—A corporation, partnership, association, joint stock company, limited liability company, trust, estate or unincorporated association.

*Equity security*—

(i) A stock or similar security (including interests in a limited liability company).

(ii) A security convertible, with or without consideration, into a stock or similar security, or carrying a warrant or right to subscribe to or purchase a security described in subparagraph (i); or a warrant or right.

(iii) For purposes of § 203.091, the term includes:

(A) Common stock, preferred stock and nondebt securities convertible into common or preferred stock.

(B) Nontransferable warrants to purchase any of the foregoing.

(C) Transferable warrants exercisable within not more than 90 days of issuance to purchase any of the foregoing.

*Equity securityholder*—

(i) Persons who at the time of offers and sales under the exemption in section 203(n) of the act are holders of equity securities.

(ii) The term does not include persons who are holders of equity securities issued in violation of or without compliance with the act and the regulations adopted under the act.

*Examination*—When used in regard to financial information, the review or verification of financial and other information by an independent certified public accountant for the purpose of expressing an opinion thereon.

*Executive officer*—Each person serving as chief executive officer, chief operating officer or chief financial officer of a person.

*Experienced private placement investor*—An individual, or spouse purchasing as a joint tenant or tenant by the entireties, who purchased a minimum of $450,000 of securities within the past 3 years in private placement offerings exclusive of the purchase of securities of an issuer of which the individual, or spouse, was an affiliate at the time of purchase.

*FINRA*—The Financial Industry Regulatory Authority, Inc., and any successor thereto.

*Fair value*—The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date, as set forth and interpreted in Financial Accounting Standards Board Accounting Standards Codification Topic 820.

*Feasibility study*—An analysis of a proposed investment or course of action which may involve the preparation of a financial forecast or a financial projection.

*Financial forecast*—A prospective financial statement which:

(i) Presents, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations and changes in financial position.

(ii) Is based on the responsible party's assumptions reflecting conditions it expects to exist and the course of action it expects to take.

*Financial institution*—A Federal or State chartered bank, savings and loan association, savings bank or credit union, and any service corporation affiliated with these entities.

*Financial projection*—A prospective financial statement which:

(i) Presents, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations and changes in financial position.

(ii) Is based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken, given one or more hypothetical assumptions.

*Financial statements*—A balance sheet, statement of income, statement of stockholders' equity and statement of cash flow and accompanying notes.

*Firm member*—All partners and principals in the firm and all professional employees participating in an audit or located in an office of the firm participating in a significant part of an audit.

*Fiscal year*—

(i) The annual accounting period when a closing date is adopted.

(ii) The calendar year ending on December 31 when a closing date is not adopted.

*Franchise*—An agreement involving a continuing commercial relationship by which a person (franchisee) is

permitted by another person (franchisor) the right to offer the goods manufactured, processed or distributed by the franchisor, or the right to offer services established, organized, directed or approved by the franchisor, under circumstances when the franchisor continues to exert any control over the method of operation of the franchisee, particularly, but not exclusively, through trademark, trade name or service mark licensing, or structural or physical layout of the business of the franchisee.

*Going concern disclosure*—The disclosure of substantial doubt in the auditor's report, based on the criteria in the Statement on Auditing Standard 126 promulgated by the American Institute of Certified Public Accountants, regarding the ability of the issuer to continue as a going concern during the ensuing fiscal year.

*Guarantor*—A person who executes a guaranty.

*Guaranty*—A duly executed written agreement, which cannot be bought, sold or traded as a security or otherwise realized on by a bondholder separately from the bondholder's interest in the bonds, wherein a person, not the issuer, in connection with offer and sale of bonds in this Commonwealth, guarantees the prompt payment of the principal of, and interest on, the bonds whether at the stated maturity, at redemption before maturity or otherwise, and premium, if any, when and as the principal and interest shall become due.

*Hypothetical assumption*—An assumption used in a financial projection to present a condition or course of action that is not necessarily expected to occur, but is consistent with the purpose of the projection.

*IARD*—The Internet-based Investment Adviser Registration Depository operated by FINRA, and any successor thereto.

*Impersonal investment advisory services*—As defined in 17 CFR 275.206(4)-3(d)(3) (relating to cash payments for client solicitations).

*Independent*—As defined in Rule 101 of the Code of Professional Ethics of the American Institute of Certified Public Accounts, Inc. or the interpretations adopted thereunder, regardless of whether the person is a certified public accountant or not.

*Independent certified public accountant*—As set forth in section 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)) (relating to qualifications of accountants).

*Independent party*—A person who meets all of the following:

(i) Is engaged by an investment adviser with respect to payment of fees, expenses or capital withdrawals from a pooled investment vehicle in which the investment adviser has custody solely as a result of serving as a general partner, manager of a limited liability company or a person occupying a similar status or performing a similar function which gives the investment adviser or its supervised person legal ownership or access to client funds or securities.

(ii) Does not control, is not controlled by and is not under common control with the investment adviser.

(iii) Did not derive 5% or more of its gross revenues from the investment adviser who hired the person to be an independent party, including the amount to be received from the investment adviser under the terms of the independent party engagement, within the preceding consecutive 12-month period.

*Independent representative*—A person who:

(i) Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners or a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle and by law or contract is obliged to act in the best interest of the advisory client or the limited partners, members or other beneficial owners.

(ii) Does not control, is not controlled by and is not under common control with investment adviser.

(iii) Does not have, and has not had within the past 2 years, a material business relationship with the investment adviser.

*Individuals controlling*—A general partner and, in the case of a corporation, the president and other officers responsible for making investment decisions with respect to the purchase of the securities described in subparagraph (iv) of the definition of "institutional investor," if the person is currently engaged in that capacity.

*Industrial loan association*—For purposes of section 202(d) of the act (70 P.S. § 1-202(d)), an institution organized as an industrial loan association under the applicable laws of the Commonwealth, the business of which is:

(i) Substantially confined to the industrial loan business.

(ii) Examined and supervised as an industrial loan association by the appropriate Commonwealth authorities having supervision over the institution.

*Industrial loan business*—The making and discounting of secured and unsecured loans to bona fide members of the association.

*Insolvent* or *insolvency*—Except in the case of entities required under law or regulation to submit an auditor's report if the auditor's report does not contain a going concern disclosure, the terms mean either of the following:

(i) The inability to pay debts as they fall due in the person's usual course of business.

(ii) Liabilities in excess of the fair value of the person's assets.

*Institutional investor*—As defined in section 102(k) of the act, including the following:

(i) A corporation, partnership, trust, estate or other entity (excluding individuals), or a wholly-owned subsidiary of the entity, which has been in existence for at least 18 months and which had a tangible net worth on a consolidated basis of $25 million or more.

(ii) A college, university or other public or private institution which has received exempt status under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C.A. § 501(c)(3)) and which has a total endowment or trust funds, including annuity and life income funds, of $5 million or more according to its most recent audited financial statements; provided that the aggregate dollar amount of securities being sold to the person under the exemption in section 203(c) of the act and this title may not exceed 5% of the endowment or trust funds.

(iii) A wholly-owned subsidiary of a bank as defined in section 102(d) of the act.

(iv) A person, except an individual or an entity whose securityholders consist entirely of one individual or group of individuals who are related, which is organized primarily to purchase, in nonpublic offerings, securities of corporations or issuers engaged in research and development activities in conjunction with a corporation and which complies with one of the following:

(A) Has purchased $5 million or more of the securities excluding both of the following:

(I) A purchase of securities of a corporation in which the person directly or beneficially owns more than 50% of the corporation's voting securities, unless the purchase occurred under a leveraged buyout financing in which the person does not intend to provide direct management to the issuer.

(II) A dollar amount of a purchase of securities of a corporation which investment represents more than 20% of the person's net worth.

(B) Is capitalized at $2.5 million or more and is controlled by a person which meets the criteria in clause (A).

(C) Is capitalized at $10 million or more and has purchased $500,000 or more of the securities, excluding a purchase of securities of a corporation in which the person directly or beneficially owns more than 50% of the corporation's voting securities.

(D) Is capitalized at $250,000 or more and is a side-by-side fund.

(v) A small business investment company as the term is defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C.A. § 662) which either:

(A) Has a total capital of $1 million or more.

(B) Is controlled by institutional investors as defined in section 102(k) of the act or this section.

(vi) A seed capital fund as defined in section 2 and authorized in section 6 of the Small Business Incubators Act (73 P.S. § § 395.2 and 395.6).

(vii) A business development credit corporation as authorized by the Business Development Credit Corporation Law (7 P.S. § § 6040-1—6040-16).

(viii) A person whose securityholders consist solely of institutional investors or broker-dealers.

(ix) A person as to which the issuer reasonably believed qualified as an institutional investor under this section at the time of the offer or sale of the securities on the basis of written representations made to the issuer by the purchaser.

(x) A qualified institutional buyer as defined in 17 CFR 230.144A (relating to private resales of securities to institutions) or any successor rule.

(xi) A qualified pension and profit sharing and stock bonus plan under section 401 of the Internal Revenue Code of 1986 and all plans under section 408 of the Internal Revenue Code of 1986 if the plan has either of the following:

(A) Plan assets of $5 million or more.

(B) Investments of $500,000 or more in securities and retained, on an ongoing basis, the services of an investment adviser registered under section 301 of the act (70 P.S. § 1-301) or a Federally covered adviser to give professional investment management advice.

*Insurance holding company*—A person engaged, either directly or indirectly, primarily in the business of owning securities of one or more insurance companies for the purpose and with the effect of exercising control.

*Investment adviser representative*—

(i) As defined in section 102(j.1) of the act.

(ii) For purposes of § 304.012(a)(12), the term includes:

(A) A partner, officer or director of the investment adviser.

(B) An employee who participates in any way in the determination of which recommendations shall be made.

(C) An employee of the investment adviser who, in connection with assigned duties, obtains information concerning which securities are being recommended before the effective dissemination of the recommendations.

(D) Any of the following individuals who obtain information concerning securities recommendations being made by the investment adviser before the effective dissemination of the recommendations:

(I) An individual in a control relationship to the investment adviser.

(II) An affiliated individual of a controlling person.

(III) An affiliated individual of an affiliated person.

(iii) For purposes of § 304.012(a)(13), when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients:

(A) A partner, officer, director or employee of the investment adviser who participates in any way in the determination of which recommendations shall be made.

(B) An employee who, in connection with assigned duties, obtains information concerning which securities are being recommended before the effective dissemination of the recommendations.

(C) Any of the following individuals who obtain information concerning securities recommendations being made by the investment adviser before the effective dissemination of the recommendations as follows:

(I) An individual in a control relationship to the investment adviser.

(II) An affiliated individual of a controlling person.

(III) An affiliated individual of an affiliated person.

*Investment supervisory services*—The giving of continuous advice as to the investment of funds on the basis

of the individual needs of each client.

*Majority-owned subsidiary*—A subsidiary more than 50% of whose outstanding voting shares is owned by its parent or the parent's other majority owned subsidiaries, or both.

*Most recent audited financial statements*—Audited financial statements dated not more than 16 months before the date of the transaction in which the person proposed to purchase securities in reliance on the exemption in section 203(c) of the act.

*NASAA*—The North American Securities Administrators Association, Inc.

*National securities association*—An association of brokers and dealers registered with the Securities and Exchange Commission under section 15A of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78o-3).

*National securities exchange*—Any exchange as defined in section 3(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78c) which is registered with the Securities and Exchange Commission under section 6 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78f).

*Nationally recognized statistical rating organization*—As defined in section 3(a)(62) of the Securities Exchange Act of 1934.

*Net capital*—As defined in 17 CFR 240.15c3-1, promulgated under the Securities Exchange Act of 1934.

*Net worth*—The excess of assets over liabilities as determined by generally accepted accounting principles reduced by:

(i) Prepaid expenses except items properly classified as current assets under generally accepted accounting principles.

(ii) Deferred charges.

(iii) Goodwill, franchises, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, and all other intangible assets.

(iv) Home furnishings, automobiles and any other personal items not readily marketable in the case of an individual.

(v) Advances or loans to:

(A) Stockholders and officers in the case of a corporation.

(B) Members and managers in the case of a limited liability company.

(C) Partners in the case of a partnership.

(vi) Receivables from any affiliate, unless enforceable by contract.

*Networking arrangement or brokerage affiliate arrangement*—A contractual agreement between a broker-dealer registered under section 301 of the act and a financial institution by which the broker-dealer effects transactions in securities for the account of customers of the financial institution and the general public which

transactions are effected on, or emanate from, the premises of a financial institution.

*Nonbranch office*—A location at which a broker-dealer is conducting a securities business that does not come within the definition of "office of supervisory jurisdiction" or "branch office."

*Note* or *footnote*—A clear and concise disclosure of information, including information necessary to make an item or entry in the financial statement not misleading, cross-referenced specifically, if practicable, to an item or entry in a financial statement.

*Office of supervisory jurisdiction*—As defined in FINRA Rule 3110(e) or any successor thereto.

*PCAOB*—The Public Company Accounting Oversight Board, and any successor thereto.

*Parent*—An affiliate controlling a specified person directly or indirectly through one or more intermediaries.

*Pooled investment vehicle*—

(i) A limited partnership, limited liability company or an entity with a similar legal status and performing similar functions.

(ii) The term does not include an investment company that has filed a registration statement under the Investment Company Act of 1940.

*Portfolio management*—The process of determining or recommending securities transactions for any part of a client's portfolio.

*Prime quality*—A description for commercial paper rated in one of the top three rating categories by a Nationally recognized statistical rating organization.

*Principal*—

(i) The chairperson, president, chief executive officer, general manager, chief operating officer, chief financial officer, vice president or other officer in charge of a principal business function (including sales, administration, finance, marketing, research and credit), secretary, treasurer, controller and any other natural person who performs similar functions of one of the following:

(A) The issuer.

(B) A wholly-owned subsidiary of the issuer.

(C) A corporation, partnership or other entity which owns the voting stock or other voting equity interest of the issuer.

(D) A corporation, partnership or other entity which serves as a general partner of the issuer.

(ii) A director, general partner or comparable person charged by law with the management of one of the following:

(A) The issuer.

(B) A wholly-owned subsidiary of the issuer.

(C) A corporation, partnership or other entity which owns the voting stock or other voting equity interest of the issuer.

(D) A corporation, partnership or other entity which serves as a general partner of the issuer.

(iii) A beneficial owner of 10% or more of an outstanding class of voting stock or other voting equity interest of one of the following:

(A) The issuer.

(B) A corporation, partnership or other entity which serves as a general partner of the issuer.

(C) A promoter of the issuer as defined in section 102(o) of the act.

(D) A relative of a person specified in clauses (A)—(C), if "relative" means one of the following:

(I) A spouse.

(II) A parent.

(III) A grandparent.

(IV) An aunt, uncle, child, child of a spouse, sibling, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law.

*Principal place of business*—The executive office of the business from which the officers, partners or managers of the business direct, control and coordinate the activities of the business.

*Private fund adviser*—An investment adviser who provides advice solely to one or more qualifying private funds.

*Private placement offering of securities*—An offering of securities made in reliance on an exemption from the registration provisions of section 5 of the Securities Act of 1933 (15 U.S.C.A. § 77e) under section 3(b) of the Securities Act of 1933 or section 4(a)(2) of the Securities Act of 1933 (15 U.S.C.A. § 77d(a)(2)).

*Pro rata*—

(i) An offering made in this Commonwealth proportionately on the basis of the number of shares owned by the existing equity securityholder or the equity securityholder's percentage ownership interest in the issuer.

(ii) The term includes the issuer offering:

(A) Its existing equity securityholder an opportunity to purchase one new share of stock for each five shares owned as of a record date.

(B) An existing equity securityholder owning 3% of the issuer's stock as of a record date the opportunity to purchase 3% of the issuer's current offering.

*Professional corporation—*

(i) The term includes either of the following:

(A) A corporation incorporated under the 15 Pa.C.S. Part II, Subpart B (relating to Business Corporation Law of 1988) or a corporation included within the scope of that act by virtue of 15 Pa.C.S. § 2904 or § 2905 (relating to election of an existing business corporation to become a professional corporation; and election of professional associations to become professional corporations).

(B) A professional association organized under the 15 Pa.C.S. Chapter 93 (relating to Professional Association Act of 1988), if "shares" includes the interest of an associate in a professional association.

(ii) The term does not include an entity which has as a principal purpose, object or activity, whether expressed in its articles of incorporation or other organic documents, that is other than the rendition of the professional services for which the professional corporation is organized and activities which are in fact incidental thereto.

*Promotional securities*—The term includes any of the following:

(i) Securities issued:

(A) Within the 5-year period immediately preceding the date of the filing of a registration statement for a consideration substantially different from the proposed public offering price and for which price differential there is no commensurate change in the earnings or financial position of the issuer.

(B) In consideration for services.

(C) In consideration for tangible or intangible property, such as patents, copyrights, licenses or goodwill.

(D) Within the 5-year period immediately preceding the date of the filing of a registration statement to a promoter or proposed to be issued to a promoter at a price substantially lower than or on terms and conditions substantially more favorable than those on which securities of the same or a similar class or series have been or are to be sold to public investors.

(ii) Securities subject to an order by the Department finding that the securities are promotional securities.

*Prospective financial statement*—A financial forecast or financial projection, including the summaries of significant assumptions and accounting policies.

*Publish*—As defined in section 102(p) of the act, together with any form of electronic communication, including Internet and e-mail.

*Purchase of securities by an experienced private placement investor*—The sale of securities for cash or for an unconditional obligation to pay cash which obligation is to be discharged within 5 years from the date of the sale of the securities to the experienced private placement investor.

*Qualified custodian*—The term includes:

(i) A bank as that term is defined in section 102(d) of the act.

(ii) A Federally covered adviser as that term is defined in section 102(f.1) of the act.

(iii) A broker-dealer registered with the Securities and Exchange Commission and the Department under section 301 of the act.

(iv) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C.A. § 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon.

(v) A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

*Qualifying private fund*—A private fund as defined in section 202(a)(29) of the Investment Advisers Act of 1940 (15 U.S.C.A. § 80b-2(a)(29)) that meets the definition of "qualifying private fund" in Securities and Exchange Commission Rule 203(m)-1 (17 CFR 275.203(m)-1) (relating to private fund adviser exemption).

*Registrant*—The issuer of the securities for which an application, a registration statement or a report is filed.

*Related*—A relative by marriage residing in the same household or a blood relative.

*Related parties*—

(i) The registrant and its affiliates, principal owners (the owners of record or known beneficial owners of more than 10% of the voting interests of the reporting entity), management (a person having responsibility for achieving the objectives of the organization and the concomitant authority to establish the policies and to make the decisions by which the objectives are to be pursued) and members of their immediate families.

(ii) Entities for which investments are accounted for by the equity method.

(iii) Any other party with which the reporting entity may deal when one party has the ability to significantly influence the management or operating policies of the other to the extent that one of the transacting parties might be prevented from fully pursuing its own separate interests.

(iv) Another entity with the ability to significantly influence the management or operating policies of the transacting parties.

(v) Another entity with an ownership interest in one of the transacting parties and the ability to significantly influence the other to the extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests.

*Related person*—A person that is an affiliate of an investment adviser.

*Rental pool arrangement*—The term includes:

(i) A device by which a person, whether or not the seller, undertakes to rent the property on behalf of the owner during periods of time when the property is not in use by its owner, the rents received from all properties participating in the pool and the expenses attributable to the rents being combined with each property owner receiving a ratable share of the rental proceeds regardless of whether his particular property actually was rented.

(ii) Other devices having like attributes.

*Review*—An analysis of the financial statements by a certified public accountant in accordance with the Statements on Standards for Attestation Engagements promulgated by the American Institute of Certified Public Accountants.

*Review report*—An accountant's document in which the certified public accountant indicates that a review has been performed and, on the basis of that review, the accountant is not aware of any material modifications that should be made to the financial statements for the financial statements to be in conformity with generally accepted accounting principles, except for those modifications, if any, described in the review report.

*Securities and Exchange Commission*—The United States Securities and Exchange Commission.

*Securities issued by a credit union*—For the purpose of section 202(d) of the act, securities issued by a credit union means only those securities which are issued by an entity directly engaged in the credit union business and may not include securities issued by a credit union holding company or other similar entity.

*Securities issued by an industrial loan association*—

(i) Securities issued by an entity directly engaged in the industrial loan business.

(ii) The term does not include securities issued by an industrial loan holding company or other similar entity.

*Security* or *securities*—

(i) As defined in section 102(t) of the act, including:

(A) The offer and sale of real property if any of the following exists:

(I) The purchaser of the property is required under the terms of the purchase or by reason of acquiring title to do either of the following:

(-a-) Use the seller to perform services in connection with a sale, lease or license of the property purchased.

(-b-) Hold the property available to persons other than the purchaser for the other person's lease, license or other use for a specified period of time or for a period of time when the property is not in use by the owner.

(II) The purchaser is required under the terms of the purchase or by reason of acquiring title to participate in a rental pool arrangement.

(B) A franchise where the arrangement between the franchisor and the franchisee:

(I) Is such that the right to engage in the business of offering, selling or distributing goods or services is exercised under a marketing plan or system prescribed in substantial part by the franchisor.

(II) Is such that the franchisee is not required to make significant managerial efforts in the operation of the business that may be expected to affect the success or failure of the franchisee's business.

(III) Arises as a result of an investment of money, notes or other things of value by or on behalf of the franchisee.

(ii) For purposes of § 203.183 (relating to agricultural cooperative associations), membership agreements, capital stock, membership certificates and an instrument or form of advice which evidences either of the following:

(A) A member's equity in a fund, capital investment or other asset of the agricultural cooperative association.

(B) The apportionment, distribution or payment to a member or patron of the net proceeds or savings of the agricultural cooperative association.

(iii) For purposes of § 203.188 (relating to Cooperative Business Associations Exemption), an equity or debt security, membership agreement, membership certificate, patronage dividend or form of advice which evidences either of the following:

(A) A member's interest in a fund, capital investment or other asset of a cooperative business association.

(B) The apportionment, distribution or payment to a member of the net proceeds or savings of a cooperative business association.

*Self-regulatory organization*—As defined in section 3(a)(26) of the Securities Exchange Act of 1934.

*Share*—Stock in a corporation or unit of interest in an unincorporated person.

*Side-by-side fund*—A person which is:

(i) Promoted and controlled by individuals controlling a person meeting the criteria in subparagraph (iv)(A), (B) or (C) of the definition of "institutional investor."

(ii) Formed exclusively to purchase securities of issuers in various amounts and on the same terms and conditions as the person described in subparagraph (i).

*Significant subsidiary*—A subsidiary, or a subsidiary and its subsidiaries meeting any of the conditions in subparagraphs (i)—(iii) based on the most recent annual financial statements including consolidated financial statements of the subsidiary which would be required to be filed if the subsidiary were a registrant and the most recent annual consolidated financial statements of the registrant being filed.

(i) The parent's and its other subsidiaries' investments in and advances to, or their proportionate share based on their equity interests of the total assets of, the subsidiary exceed 10% of the total assets of the parent and its consolidated subsidiaries.

(ii) The parent's and its other subsidiaries' proportionate share based on their equity interests of the total sales and revenues, after intercompany eliminations, of the subsidiary exceeds 10% of the total sales and revenues of the parent and its consolidated subsidiaries.

(iii) The parent's and its other subsidiaries' equity in the income before income taxes and extraordinary items of the subsidiary exceeds 10% of the income of the parent and its consolidated subsidiaries. If the income of the parent and its consolidated subsidiaries is at least 10% lower than the average of the income for the last 5

fiscal years, the average income may be substituted in the determination.

*Solicitor*—A person or entity who receives direct or indirect compensation for soliciting a client for, or referring a client to, an investment adviser.

*Sponsor*—An investment adviser that is compensated under a wrap fee program for either of the following:

(i) Administering, organizing or sponsoring the program.

(ii) Selecting or providing advice to clients regarding the selection of other investment advisers in the program.

*Standby commission*—The commission payable to a broker-dealer registered under the act for its firm commitment to purchase securities offered to existing securityholders which are not purchased by the securityholders.

*Subsidiary of a specified person*—An affiliate controlled by the person directly or indirectly through one or more intermediaries.

*Supervised person*—As defined in section 202(a)(25) of the Investment Advisers Act of 1940.

*Tangible book value of a company's common shares*—The excess of total assets over total liabilities as determined by generally accepted accounting principles of the company reduced by the following:

(i) Liquidating value, including any premium of excess over par or stated value, payable on involuntary liquidation, of any capital obligations, preferred shares or shares having a seniority in rank, or any degree of preference or priority over the issue of common shares for which book value is being computed, including accrued and unpaid dividends to the extent entitled to recognition and preference in the event of liquidation.

(ii) An amount equal to any appraisal capital from revaluation of properties or any similar account title to the extent that the appraisal increase has not been fully depreciated in the accounts.

(iii) Deferred charges including debt issue costs.

(iv) Prepaid expenses except as to items properly classified as current assets under generally accepted accounting principles.

(v) All other intangible assets including goodwill, patents, copyrights, franchises, distribution rights, intellectual property rights, leasehold improvements, licensing agreements, noncompete covenants, customer lists, trade names, trademarks and organization costs.

*Tangible net worth*—Net worth less the amount of all items of goodwill, preoperating, deferred or development expenses, patents, trademarks, licenses or other similar accounts.

*Totally-held subsidiary*—A subsidiary:

(i) Whose parent or the parent's other totally-held subsidiaries, or both, owns substantially all of the subsidiary's outstanding equity securities.

(ii) Not indebted to any person other than its parent or the parent's other totally-held subsidiaries, or both, in an amount which is material in relation to the particular subsidiary, excluding indebtedness:

(A) Incurred in the ordinary course of business which is not overdue and which matures within 1 year from the date of its creation, whether evidenced by securities or not.

(B) Secured by its parent by guarantee, pledge, assignment or otherwise.

*Trade or professional association—*

(i) For purposes of section 202(e) of the act, an association of persons having some common business or professional interest, the purpose of which is to promote, on behalf of the association's members generally, the common interest and not to engage in a regular business or profession of a kind ordinarily carried on for profit.

(ii) The term includes an association where the activities of the association are specifically directed to the improvement, on behalf of the association's members generally, of business or professional conditions of one or more lines of business or professions as distinguished from the performance of particular services for individuals or entities.

(iii) The term does not include an association whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining.

*Trustee for the bondholders*—The person designated in the trust indenture, mortgage, deed of trust or similar agreement to act as trustee for the bonds.

*Venture capital fund*—A private fund meeting the definition of "venture capital fund" in Securities and Exchange Commission Rule 203(l)-1 (17 CFR 275.203(l)-1).

*Voting shares*—The sum of either of the following:

(i) All rights, other than as affected by events of default, to vote for election of directors of an incorporated person.

(ii) All interests in an unincorporated person.

*Wholly-owned subsidiary*—A subsidiary substantially all of whose outstanding voting shares are owned by its parent or the parent's other wholly-owned subsidiaries, or both.

*Wrap fee program*—A program under which a client is charged a specified fee or fees not based directly on transactions in a client's account for investment advisory services (which may include portfolio management or advice concerning the selection of other investment advisers) and execution of client transactions.

(b) Words and terms not otherwise defined in this part have the meanings specified in the act.

**Authority**

The provisions of this § 102.021 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

## Source

The provisions of this § 102.021 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

## Cross References

This section cited in 10 Pa. Code § 204.010 (relating to increasing the number of purchasers and offerees); and 10 Pa. Code § 304.012 (relating to investment adviser required records).

## § 302.070. Registration exemption for investment advisers to private funds.

(a) *Exemption for private fund advisers*. Subject to the additional requirements of subsection (b), a private fund adviser is exempt from the registration requirements of section 301(c) of the act (70 P.S. § 1-301(c)) if the private fund adviser satisfies the following conditions:

(1) The private fund adviser and any of its advisory affiliates are not subject to a disqualification as described in Rule 262 of Securities and Exchange Commission Regulation A (17 CFR 230.262) (relating to disqualification provisions).

(2) The private fund adviser files with the Department each report and amendment that an exempt reporting adviser is required to file with the Securities and Exchange Commission under Securities and Exchange Commission Rule 204-4 (17 CFR 275.204-4) (relating to reporting by exempt reporting advisers).

(b) *Additional requirements for private fund advisers to certain 3(c)(1) funds.* To qualify for the exemption described in subsection (a), a private fund adviser who advises at least one 3(c)(1) fund that is not a venture capital fund shall also:

(1) Advise only those 3(c)(1) funds, other than venture capital funds, whose outstanding securities other than short-term paper are beneficially owned entirely by persons who would each meet the definition of "qualified client" in Securities and Exchange Commission Rule 205-3 (17 CFR 275.205-3) (relating to exemption from the compensation prohibition of section 205(a)(1) for investment advisers) at the time the securities are purchased from the issuer.

(2) Disclose, at the time of purchase, the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund:

(i) Services, if any, to be provided to individual beneficial owners.

(ii) Duties, if any, the investment adviser owes to the beneficial owners.

(iii) Any other material information affecting the rights or responsibilities of the beneficial owners.

(3) Obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund and deliver a copy of the audited financial statements to each beneficial owner of the fund.

(c) *Federally covered investment advisers*. If a private fund adviser is registered with the Securities and Exchange Commission, the adviser is not eligible for this exemption and shall comply with the State notice filing requirements applicable to Federally covered investment advisers in section 303(a)(iii) of the act (70 P.S. § 1-303(a)(iii)).

(d) *Investment adviser representatives*. A person is exempt from the registration requirements of section 301(c) of the act if the person:

(1) Is employed by or associated with an investment adviser that is exempt from registration in this Commonwealth under this section.

(2) Does not otherwise act as an investment adviser representative.

(e) *Electronic filing*.

(1) A private fund adviser shall file the report filings described in subsection (a)(2) electronically through the IARD.

(2) The Department will consider a report filed when the report is filed and accepted by the IARD on the Department's behalf.

(f) *Transition*. If an investment adviser becomes ineligible for the exemption provided in this section, the investment adviser shall comply with all applicable laws and rules requiring registration or notice filing within 90 days from the date the investment adviser's eligibility for this exemption ceases.

(g) *Grandfathering for investment advisers to 3(c)(1) funds with nonqualified clients*. An investment adviser to a 3(c)(1) fund, other than a venture capital fund, that has one or more beneficial owners who are not qualified clients as described in subsection (b)(1) is eligible for the exemption contained in subsection (a) if all of the following conditions are satisfied:

(1) The subject fund existed before January 13, 2018.

(2) The subject fund ceases to accept beneficial owners who are not qualified clients, as described in subsection (b)(1), as of January 13, 2018.

(3) The investment adviser discloses in writing the information described in subsection (b)(2) to all beneficial owners of the fund.

(4) The investment adviser delivers audited financial statements as required under subsection (b)(3) as of January 13, 2018.

(h) *Scope*. This section does not supersede an applicable exclusion from the definition of investment adviser or exemption from registration for an investment adviser in the act.

**Authority**

The provisions of this § 302.070 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 302.070 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

**Cross References**

This section cited in 10 Pa. Code § 102.021 (relating to definitions).

## § 302.071. Registration exemption for solicitors.

A solicitor does not need to register as an investment adviser or investment adviser representative if the solicitor:

(1) Is in compliance with all requirements of § 404.012 (relating to cash payment for client solicitation).

(2) Provides impersonal investment advisory services.

(3) Is not subject to any order, judgment or decree described in section 305(a)(ii)—(vi) of the act (70 P.S. § 1-305(a)(ii)—(vi)).

### Authority

The provisions of this § 302.071 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

### Source

The provisions of this § 302.071 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

### Cross References

This section cited in 10 Pa. Code § 404.012 (relating to cash payment for client solicitation).

## § 303.012. Investment adviser registration procedure.

(a) An applicant for initial registration as an investment adviser shall complete a Uniform Application for Investment Adviser Registration (Form ADV), or a successor form.

(b) The applicant shall complete and file with the Department or with IARD:

(1) Form ADV.

(2) The filing fee required under section 602(d.1) of the act (70 P.S. § 1-602(d.1)).

(3) The compliance assessment in section 602.1(a)(4) of the act (70 P.S. § 1-602.1(a)(4)).

(4) Any exhibits required under this section.

(c) Except as set forth in subsection (j), an applicant having custody of client funds or securities or requiring payment of advisory fees 6 months or more in advance and in excess of $1,200 per client shall file all of the following:

(1) An audited balance sheet of the applicant prepared in accordance with generally accepted accounting principles which is as of the end of the applicant's most recent fiscal year.

(2) An audit report containing an unqualified opinion of an independent certified public accountant within which the accountant shall submit, as a supplementary opinion, comments based on the audit as to the:

(i) Material inadequacies found to exist in the accounting system.

(ii) Internal accounting controls.

(iii) Procedures for safeguarding securities and funds with an indication of corrective action taken or proposed.

(3) A subsequent balance sheet, if the balance sheet required under paragraph (1) is of a date more than 45 days before the filing date of the application:

(i) The subsequent balance sheet must be:

(A) Prepared in accordance with generally accepted accounting principles.

(B) Dated as of a date within 45 days of the filing date of the application.

(ii) The subsequent balance sheet may be unaudited and prepared by management of the applicant.

(d) The balance sheet required under subsection (c) does not need to be filed if the investment adviser has custody of client funds or securities solely as a result of either of the following:

(1) The investment adviser receives fees directly deducted from clients' funds or securities in compliance with § 303.042(a)(3)(i) (relating to investment adviser capital requirements).

(2) The investment adviser serves as a general partner, manager of a limited liability company or occupies a similar status or performs a similar function which gives the investment adviser or its supervised person legal ownership or access to client funds or securities, if the investment adviser is in compliance with § 303.042(a)(3)(ii).

(e) Except as set forth in subsection (j), an applicant that has discretionary authority over client funds or securities, but not custody, shall file all of the following:

(1) A balance sheet prepared in accordance with generally accepted accounting principles which is as of the end of the applicant's most recent fiscal year.

(2) A subsequent balance sheet prepared in accordance with generally accepted accounting principles and dated within 45 days of the filing date if the balance sheet required under paragraph (1) is dated more than 45 days before the filing date of the application.

(f) The balance sheets required under subsection (e)(1) and (2):

(1) May be unaudited and prepared by management of the applicant.

(2) Must contain a representation by the applicant that the balance sheet is true and accurate.

(g) Except as set forth in subsection (j), an applicant whose proposed activities do not come within subsection (c) or (e) does not need to file a statement of financial condition.

(h) As part of the requirements relating to the statements of financial condition set forth in subsections (c) and (e), the Department may require the following:

(1) A list of the securities reflected in the statement of financial condition of the applicant valued at the market.

(2) A description of material contractual commitments of the applicant not otherwise reflected in the statement of financial condition.

(3) An affirmative statement by the applicant that its liabilities which have not been incurred in the course of business as an investment adviser are not greater than the applicant's assets not used in its investment adviser business if the applicant is a sole proprietor, whose statement of financial condition includes only those assets and liabilities used in the applicant's investment adviser business.

(i) An investment adviser registered under the act shall take steps necessary to ensure that material information contained in its Form ADV and exhibits remains current and accurate. If a material statement made in Form ADV and exhibits becomes incorrect or inaccurate the investment adviser shall file with the Department an amendment on Form ADV within 30 days of the occurrence of the event which requires the filing of the amendment.

(j) An applicant that maintains its principal place of business in a state other than this Commonwealth does not need to comply with subsections (c) and (e) if the applicant:

(1) Is registered as an investment adviser in the state in which it maintains its principal place of business.

(2) Is in compliance with the financial reporting requirements of the state in which it maintains its principal place of business.

(3) Has not taken custody of the assets of any client residing in this Commonwealth at any time during the preceding 12-month period.

## Authority

The provisions of this § 303.012 amended under sections 303(a)—(e), 304(b) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(a)—(e), 1-304(b) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

## Source

The provisions of this § 303.012 adopted March 29, 1974, effective March 30, 1974, 4 Pa.B. 582; amended December 27, 1985, effective December 28, 1985, 15 Pa.B. 4585; amended January 17, 1992, effective January 18, 1992, 22 Pa.B. 278; amended January 28, 1994, effective January 29, 1994, 24 Pa.B. 653; amended September 8, 1995, effective September 9, 1995, 25 Pa. B. 3722; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; amended April 15, 2005, effective April 16, 2005, 35 Pa.B. 2307; transferred and renumbered from 64 Pa. Code § 303.012, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364737) to (364739).

## Cross References

This section cited in 10 Pa. Code § 304.022 (relating to investment adviser required financial reports); and 10 Pa. Code § 603.031 (relating to public inspection of records).

## § 303.014. Investment adviser representative registration procedures.

(a) An applicant for initial registration as an investment adviser representative of an investment adviser or Federally covered adviser shall complete a Uniform Application for Securities Industry Registration or Transfer Form (Form U-4), or a successor form.

(b) The investment adviser representative and the investment adviser or Federally covered adviser shall complete and file with the Department or with IARD:

(1) Form U-4 and exhibits.

(2) The filing fee required under section 602(d.1) of the act (70 P.S. § 1-602(d.1)).

(3) The compliance assessment required under section 602.1(a)(1) of the act (70 P.S. § 1-602.1(a)(1)).

(4) The results evidencing passage of the examinations required under § 303.032 (relating to examination requirements for investment advisers and investment adviser representatives).

(c) An investment adviser representative and an investment adviser or Federally covered adviser shall take necessary steps to ensure that material information contained in Form U-4 remains current and accurate. If a material statement made in the Form U-4 becomes incorrect or incomplete, the investment adviser representative and the investment adviser or Federally covered adviser shall file with the Department an amendment to Form U-4 within 30 days of the occurrence of the event which requires the filing of the amendment.

### Authority

The provisions of this § 303.014 issued under section 303(a)(i) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-303(a)(i)); amended under sections 303(a)—(e) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(a)—(e) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

### Source

The provisions of this § 303.014 adopted January 17, 1992, effective January 18, 1992, 22 Pa.B. 281; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 303.014, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial page (364740).

### Cross References

This section cited in 10 Pa. Code § 603.031 (relating to public inspection of records).

## § 303.021. Registration and notice filing procedures for successors to a broker-dealer, investment adviser or Federally covered adviser.

(a) If a broker-dealer is formed or proposed to be formed to succeed to, and continue the business of, a broker-dealer registered under section 301 of the act (70 P.S. § 1-301) and as a broker or dealer under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C.A. § 77o(b)) (successor broker-dealer), and the decision is for either of the following reasons:

(1) Based solely on a change in the predecessor's date or state of incorporation, form of organization or composition of a partnership, the successor broker-dealer shall comply with the requirements of Rule 15b1-3(a) promulgated under the Securities Exchange Act of 1934 (15 U.S.C.A. § § 78a—78qq), except that the successor broker-dealer shall file the amendments to Form BD with the Department.

(2) For reasons other than a change in the predecessor's date or state of incorporation, form of organization or composition of a partnership, the successor broker-dealer shall comply with the requirements of Rule 15b1-3(b) promulgated under the Securities Exchange Act of 1934, except that the successor shall file Form BD with the Department.

(b) If an investment adviser is formed or proposed to be formed to succeed to, and continue the business of, an investment adviser registered under section 301 of the act (successor investment adviser), and the decision is for either of the following reasons:

(1) Based solely on a change in the predecessor's date or state of incorporation, form of organization or composition of a partnership, the successor investment adviser shall:

(i) File an initial application for registration by amending Form ADV of the predecessor.

(ii) Succeed to the unexpired part of the predecessor's term of registration under section 303(b) of the act (70 P.S. § 1-303(b)).

(2) For reasons other than a change in the predecessor's date or state of incorporation, form of organization or composition of a partnership, the successor investment adviser shall:

(i) File Form ADV with the Department.

(ii) Succeed to the unexpired part of the predecessor's term of registration, after registration under section 303(b) of the act.

(c) If a Federally covered adviser is formed or proposed to be formed to succeed to, and continue the business of, a registered investment adviser or of another Federally covered adviser, the successor Federally covered adviser shall:

(1) File with the Department either Form ADV or an amendment to Form ADV as required under Securities and Exchange Commission Release No. IA-1357 (December 28, 1992) and under section 303(b) of the act.

(2) Succeed to the unexpired part of the predecessor's notice period.

**Authority**

The provisions of this § 303.021 issued under sections 303(b) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(b) and 1-609(a)); amended under sections 303(a)—(e) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(a)—(e) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 303.021 adopted January 17, 1992, effective January 18, 1992, 22 Pa.B. 283; amended September 25, 1992, effective September 26, 1992, 22 Pa.B. 4782; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 303.021, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364741) to (364742).

## § 303.016. Considered as abandoned.

(a) *General rule.* The Department may consider as abandoned an application for registration as a broker-dealer, agent, investment adviser or investment adviser representative which has been on file with the Department for a minimum of 6 consecutive months if the applicant failed to do any of the following:

(1) Respond within 60 days after written notice sent by first class mail to the applicant's last known address in the Department's files warning the applicant that the application will be considered abandoned.

(2) Respond to any request for additional information required under the act.

(3) Complete the showing required for action on the application.

(b) *Voluntary withdrawal.* An applicant may, with the consent of the Department, withdraw an application at any time.

(c) *No refund of fee.* On abandonment or voluntary withdrawal, there will not be a refund for any filing fee paid before the date of the abandonment or withdrawal.

**Authority**

The provisions of this § 303.016 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 303.016 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

## § 303.032. Examination requirements for investment advisers and investment adviser representatives.

(a) *Examination requirements.* To be registered as an investment adviser or investment adviser representative under the act, an individual shall meet one of the following examination requirements:

(1) The individual, on or after January 1, 2000, and within 2 years immediately before the date of filing an application with the Department, received a passing grade on The Uniform Investment Adviser Law Examination (Series 65), or successor examination.

(2) The individual, on or after January 1, 2000, and within 2 years immediately before the date of filing an application with the Department, received a passing grade on the:

(i) General Securities Representative Examination (Series 7) administered by FINRA.

(ii) Uniform Combined State Law Examination (Series 66) or successor examinations.

(3) The individual, on or after January 1, 2000:

(i) Received a passing grade on either the Series 65 examination or passing grades on both the Series 7 and Series 66 examinations.

(ii) Has not had a lapse in registration as an investment adviser or investment adviser representative in any state other than this Commonwealth for a period exceeding 2 years immediately before the date of filing an application with the Department.

(b) *Grandfathering.*

(1) Compliance with subsection (a) is waived if the individual meets the following conditions:

(i) The individual, before January 1, 2000, received a passing grade on the Series 2, 7, 8 or 24 examination for registered representatives or supervisors administered by FINRA and the Series 65 or Series 66 examinations.

(ii) The individual has not had a lapse in employment as an investment adviser, investment adviser representative, or principal or agent of a broker-dealer for any consecutive period exceeding 2 years immediately preceding the date of filing an application with the Department.

(2) Compliance with subsection (a) is waived if the individual meets the following conditions:

(i) The individual, before January 1, 2000, was registered as an investment adviser or investment adviser representative in any state requiring the licensing, registration or qualification of investment advisers or investment adviser representatives.

(ii) The individual has not had a lapse in registration as an investment adviser or investment adviser representative in another state for any consecutive period exceeding 2 years immediately preceding the date of filing an application with the Department.

(c) *Waivers of exam requirements.* Compliance with subsection (a) is waived if:

(1) The individual meets the following conditions:

(i) The individual does not have a disciplinary history which requires an affirmative response to Items 23A—E or Item 23H of The Uniform Application for Securities Industry Registration or Transfer (Form U-4) or successor items thereto.

(ii) The individual has been awarded any of the following designations which, at the time of filing of the application with the Department, is current and in good standing:

(A) Certified Financial Planner (CFP) awarded by the Certified Financial Planner Board of Standards, Inc.

(B) Chartered Financial Consultant (ChFC) or Master of Science and Financial Services (MSFS) awarded by the American College, Bryn Mawr, Pennsylvania.

(C) Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts.

(D) Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants.

(E) Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.

(2) The individual is licensed as a certified public accountant, is currently in good standing and does not have a disciplinary history that requires an affirmative response to Items 14A—E or Item 14H of Form U-4 or successor items thereto, and has notified the Department that the individual is eligible for a waiver of the examination requirement imposed by subsection (a).

(3) The individual is licensed as an attorney, is currently in good standing and does not have a disciplinary history that requires an affirmative response to Items 14A—E or Item 14H of Form U-4 or successor items thereto, and has notified the Department that the individual is eligible for a waiver of the examination requirement imposed by subsection (a).

(4) The individual has received a waiver from the Department regarding compliance with subsection (a).

**Authority**

The provisions of this § 303.032 amended under sections 303(a)—(e), 304(b) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(a)—(e), 1-304(b) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 303.032 adopted March 29, 1974, effective March 30, 1974, 4 Pa. B. 582; corrected July 3, 1987, 17 Pa.B. 2822; amended January 17, 1992, effective January 18, 1992, 22 Pa.B. 285; amended September 8, 1995, effective September 9, 1995, 25 Pa. B. 3722; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; amended April 15, 2005, effective April 16, 2005, 35 Pa.B. 2307; transferred and renumbered from 64 Pa. Code § 303.032, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364744) to (364746).

## § 303.042. Investment adviser capital requirements.

(a) *Net worth requirements*.

(1) An investment adviser registered under section 301 of the act (70 P.S. § 1-301) with its principal place of business in a state other than this Commonwealth shall meet all of the following net worth requirements:

(i) The same as imposed by that state if the investment adviser is:

(A) Currently licensed as an investment adviser in the state in which it maintains its principal place of business.

(B) In compliance with that state's net worth requirements.

(ii) If the investment adviser currently is not licensed as an investment adviser in the state in which it maintains its principal place of business, the net worth required under this section is the same as if the investment adviser had its principal place of business in this Commonwealth.

(2) Except as provided in subsection (d), an investment adviser registered as a broker-dealer under section 301 of the act that has its principal place of business in this Commonwealth shall maintain a minimum net capital required under Rule 15c3-1 (17 CFR 240.15c3-1) (relating to net capital requirements for brokers or dealers).

(3) An investment adviser registered under section 301 of the act that has its principal place of business in this Commonwealth and has custody of client funds or securities shall maintain a minimum net worth of $35,000 unless the investment adviser has custody solely as the result of one of the following:

(i) Has the authority to make withdrawals from client accounts maintained by a qualified custodian to pay its advisory fee and the investment adviser:

(A) Possesses written authorization from the client to deduct advisory fees from an account held by a qualified custodian.

(B) Sends the qualified custodian written notice of the amount of the fee to be deducted from the client's account.

(C) Sends the client a written invoice itemizing the fee, including any formulae used to calculate the fee, the time period covered by the fee and the amount of assets under management on which the fee was based.

(D) Notifies the Department in writing on Form ADV that the investment adviser intends to use the safeguards provided in clauses (A)—(C).

(ii) Serves as a general partner, manager of a limited liability company or a person occupying a similar status or performing a similar function which gives the investment adviser or its supervised person legal ownership or access to client funds or securities and the following conditions are met:

(A) The pooled investment vehicle is subject to audit at least annually and distributes its audited financial statements which have been prepared by an independent certified public accountant in accordance with generally accepted accounting principles to all limited partners, members or beneficial owners within 120 days of the end of its fiscal year.

(B) The investment adviser:

(I) Hires an independent party to review all fees, expenses and capital withdrawals from the accounts included in the pooled investment vehicle before forwarding them to the qualified custodian with the independent party's approval for payment.

(II) Sends written invoices or receipts to the independent party describing:

(-a-) The amount of the fees, including any formulae used to calculate the fees, the time period covered by the fees and the amount of assets under management on which the fees were based.

(-b-) The expenses or capital withdrawals for the independent party to verify that payment of the fees, expenses or capital withdrawals is in accordance with the documents governing the operation of the pooled investment vehicle and any statutory requirements applicable thereto.

(III) Notifies the Department in writing on Form ADV that the investment adviser intends to employ the use of the audit safeguards in subclauses (I) and (II).

(4) An investment adviser that has its principal place of business in this Commonwealth and has discretionary authority over client funds or securities but does not have custody of client funds or securities shall maintain a minimum net worth of $10,000, unless the investment adviser places trade orders with a broker-dealer under a third-party trading agreement and the following conditions are met:

(i) The investment adviser executes a separate investment adviser contract exclusively with its clients that acknowledges that a third-party agreement will be executed to allow the investment adviser to effect securities transactions for the client in the client's broker-dealer account.

(ii) The investment adviser contract specifically states that the client does not grant discretionary authority to the investment adviser and the investment adviser, in fact, does not exercise discretion with respect to the account.

(iii) The investment adviser, the client and the broker-dealer execute a third-party trading agreement which specifically limits the investment adviser's authority in the client's broker-dealer account to the placement of trade orders and deduction of investment adviser fees.

(5) An investment adviser that has its principal place of business in this Commonwealth and accepts prepayment of advisory fees of more than 6 months in advance and more than $1,200 per client shall maintain a positive net worth.

(b) *Notice to the Department.*

(1) As a condition of the right to continue to transact business in this Commonwealth, an investment adviser registered under the act shall notify the Department by the close of business on the next business day if the investment adviser's total net worth is less than the minimum required net worth.

(2) Within 24 hours after transmitting the notice, the investment adviser shall file a report of its financial condition including all of the following:

(i) A proof of money balances of ledger accounts in the form of a trial balance.

(ii) A computation of net worth.

(iii) An analysis of clients' securities and funds which are not segregated.

(iv) A computation of the aggregate amount of clients' ledger debit balances.

(v) A computation of the aggregate amount of clients' ledger credit balances.

(vi) A statement as to the number of client accounts.

(c) *Appraisals.* For investment advisers registered or required to be registered under the act, the Department may require that a current appraisal be submitted to establish the worth of an asset being calculated under the net worth formulation.

(d) *Exception.* The requirements of subsection (a)(2) do not apply to an investment adviser that has its principal place of business in this Commonwealth and is registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 (15 U.S.C.A. § 77o) if the broker-dealer is one of the following:

(1) Subject to, and in compliance with, Rule 15c3-1.

(2) A member of a National securities exchange whose members are exempt from Rule 15c3-1 under subsection (b)(2) and the broker-dealer is in compliance with all rules and practices of the exchange imposing requirements with respect to financial responsibility and the segregation of funds or securities carried for the account of customers.

**Authority**

The provisions of this § 303.042 issued under the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-101—1-704); amended under sections 303(a)—(e) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(a)—(e) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 303.042 adopted March 29, 1974, effective March 30, 1974, 4 Pa. B. 582; amended June 18, 1982, effective June 19, 1982, 12 Pa.B. 1873; amended June 26, 1987, effective June 27, 1987, 17 Pa.B. 2604; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; amended April 15, 2005, effective April 16, 2005, 35 Pa.B. 2307; transferred and renumbered from 64 Pa. Code § 303.042, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364747) to (364751).

**Cross References**

This section cited in 10 Pa. Code § 303.012 (relating to investment adviser registration procedures); 10 Pa. Code § 303.051 (relating to surety bonds); 10 Pa. Code § 304.012 (relating to investment adviser required records); 10 Pa. Code § 304.022 (relating to investment adviser required financial reports); and 10 Pa. Code § 404.014 (relating to custody requirements for investment advisers).

## § 303.051. Surety bonds.

(a) A surety bond shall be:

(1) Filed with the Department on Uniform Surety Bond Form (Form U-SB) or successor form.

(2) Subject to the claims of all clients regardless of the client's state of residence.

(3) Issued by a person licensed to issue surety bonds in this Commonwealth.

(b) An investment adviser that has its principal place of business in a state other than this Commonwealth shall comply with subsection (a) unless the investment adviser is:

(1) Registered as an investment adviser in that state.

(2) In compliance with the applicable net worth and bonding requirements of the state in which it maintains its principal place of business.

(c) An investment adviser that has its principal place of business in this Commonwealth and does not meet the minimum net worth requirements of § 303.042 (relating to investment adviser capital requirements) shall, if required by the Department, have and maintain a surety bond in the amount of the net worth deficiency rounded up to the nearest $5,000.

(d) A broker-dealer registered under the act but not registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C.A. § § 78a—78qq) shall, as required by the Department, be permitted to have and maintain for the registration period a surety bond in the amount of the net capital deficiency rounded up to the nearest $5,000.

(e) On request of the Department, a broker-dealer or investment adviser shall provide evidence of the existence of a surety bond.

**Authority**

The provisions of this § 303.051 issued under act of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-101—1-704); amended under sections 203(d), (o) and (p), 205, 206, 301, 303, 504, 603(a) and 609 of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-203(d), (o) and (p), 1-205, 1-206, 1-303, 1-504, 1-603(a) and 1-609); sections 4 and 9(b) of the Takeover Disclosure Law (70 P.S. § § 74 and 79(b)); and section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C).

**Source**

The provisions of this § 303.051 amended December 17, 1982, effective December 18, 1982, 12 Pa.B. 4288; amended April 28, 1989, effective April 29, 1989, 19 Pa.B. 1945; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; amended December 8, 2006, effective December 9, 2006, 36 Pa.B. 7456; transferred and renumbered from 64 Pa. Code § 303.051, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364751) to (364752).

**Cross References**

This section cited in 10 Pa. Code § 303.041 (relating to broker-dealer capital requirements).

## § 304.012. Investment adviser required records.

(a) Except as provided in subsection (j), every investment adviser registered under the act shall make and keep true, accurate and current all of the following books, ledgers and records:

(1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.

(2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

(3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of the order or instruction. The memorandum must:

(i) Show the terms and conditions of the order, instruction, modification or cancellation.

(ii) Identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order.

(iii) Show the account for which entered, the date of entry and the bank, broker-dealer by or through whom executed, if appropriate.

(iv) Designate orders entered under the exercise of discretionary power.

(4) Check books, bank statements, canceled checks and cash reconciliations of the investment adviser.

(5) Bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business as an investment adviser.

(6) Trial balances, financial statements, net worth computation and internal audit working papers relating to the investment adviser's business as an investment adviser.

(7) Originals of written communications received and copies of written communications sent by the investment adviser relating to one or more of the following:

(i) A recommendation made or proposed to be made and any advice given or proposed to be given.

(ii) A receipt, disbursement or delivery of funds or securities.

(iii) The placing or execution of an order to purchase or sell any security, except that an investment adviser:

(A) Is not required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser.

(B) With respect to a notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service sent by the investment adviser to more than ten persons (including transmission by electronic means), the following apply:

(I) The investment adviser is not required to keep a record of the names and addresses of the persons to whom it was sent.

(II) If the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular or advertisement a memorandum describing the list and its source.

(8) A list or other record of all accounts which list identifies the accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client.

(9) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser.

(10) A copy in writing of each agreement entered into by the investment adviser with a client, and all other written agreements otherwise relating to the investment adviser's business as an investment adviser.

(11) A file containing:

(i) A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons connected with the investment adviser.

(ii) A memorandum of the investment adviser indicating the reasons for the recommendation if the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media recommends the purchase or sale of a specific security and does not state the reasons for the recommendation.

(12) Records of transactions as follows:

(i) A record of every transaction in a security in which the investment adviser or investment adviser representative of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership except:

(A) Transactions effected in any account over which the investment adviser or an investment adviser representative of the investment adviser does not have direct or indirect influence or control.

(B) Transactions in securities which are direct obligations of the United States. The record must state:

(I) The title and amount of the security involved, and the date and nature of the transaction (that is, purchase, sale or other acquisition or disposition).

(II) The price at which it was effected.

(III) The name of the broker-dealer or bank with or through whom the transaction was effected.

(ii) The record may also contain a statement declaring that the reporting or recording of any transaction will not be construed as an admission that the investment adviser or investment adviser representative has any direct or indirect beneficial ownership in the security.

(iii) A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(iv) An investment adviser shall implement adequate procedures and use reasonable diligence to obtain promptly reports of all transactions required to be recorded.

(13) Records of transactions by investment advisers primarily engaged in a business other than advising clients as follows:

(i) Notwithstanding paragraph (12), if the investment adviser is primarily engaged in a business or businesses other than advising investment advisory clients, a record shall be maintained of every transaction in a security in which the investment adviser or any investment adviser representative of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except transactions:

(A) Effected in an account over which the investment adviser or an investment adviser representative of the investment adviser does not have direct or indirect influence or control.

(B) In securities which are direct obligations of the United States. The record must state:

(I) The title and amount of the security involved.

(II) The date and nature of the transaction (that is, purchase, sale, or other acquisition or disposition).

(III) The price at which it was effected, and the name of the broker-dealer or bank with or through whom the transaction was effected.

(ii) The record may also contain a statement declaring that the reporting or recording of any transaction will not be construed as an admission that the investment adviser or investment adviser representative has any direct or indirect beneficial ownership in the security.

(iii) An investment adviser shall implement adequate procedures and use reasonable diligence to promptly obtain reports of all transactions required to be recorded.

(14) A copy of the written statement and the amendment or revision, given or sent to a client or prospective client of the investment adviser under § 404.011 (relating to investment adviser brochure disclosure), and a record of the dates that the written statement, and the amendment or revision, was given, or offered to be given, to a client or prospective client who subsequently becomes a client.

(15) If the adviser obtained a client by means of a solicitor to whom the adviser paid a cash fee:

(i) Evidence of a written agreement to which the adviser is a party related to the payment of the fee.

(ii) A signed and dated acknowledgment of receipt from the client evidencing the client's receipt of the investment adviser's disclosure statement and a written disclosure statement of the solicitor.

(iii) A copy of the solicitor's written disclosure statement if required under § 404.012 (relating to cash payment for client solicitation).

(16) Accounts, books, internal working papers, and any other records or documents to form the basis for, or demonstrate the calculation of, the performance or rate of return of all managed accounts or securities

recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication:

(i) Includes electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons connected with the investment adviser.

(ii) Except that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts will be considered to satisfy the requirements of this paragraph.

(17) A file containing a copy of the written communications received or sent regarding any litigation involving the investment adviser or an investment adviser representative or employee, and regarding the written customer or client complaint.

(18) Written information about an investment advisory client that is the basis for making a recommendation or providing investment advice to the client.

(19) Written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

(20) A file containing a copy of the documents, other than notices of general dissemination, that were filed with or received from a state or Federal agency or self-regulatory organization and that pertains to the registrant or its investment adviser representatives as that term is defined in § 102.021(a) (relating to definitions), which file may include all applications, amendments, renewal filings and correspondence.

(21) A copy, with original signatures of the investment adviser's appropriate signatory and the investment adviser representative, of the initial Form U-4 and the amendment to Disclosure Reporting Pages (DRPs U-4) shall be retained by the investment adviser filing on behalf of the investment adviser representative and made available for inspection on regulatory request.

(22) A ledger or other listing of all securities or funds held or obtained in this manner if the adviser has inadvertently held or obtained a client's securities or funds and returned them to the client within 3 business days or has forwarded third-party checks within 24 hours under the definition of "custody" in § 102.021(a), which ledger or other listing includes all of the following information:

(i) The issuer.

(ii) The type of security and series.

(iii) The date of issue.

(iv) The denomination, interest rate and maturity date for debt instruments.

(v) The certificate number, including alphabetical prefix or suffix.

(vi) The name in which the security is registered.

(vii) The date given to the adviser.

(viii) The date sent to client or sender.

(ix) The form of delivery to client or sender, or copy of the form of delivery to client or sender.

(x) The mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return.

(23) Written acknowledgements of receipts obtained from clients under § 404.012(b)(5) and copies of the disclosure documents provided to clients by solicitors under § 404.012(b)(4).

(24) Written procedures relating to the business and continuity plan required under § 304.071 (relating to business continuity and succession planning).

(b) For purposes of subsection (a)(12) and (13):

(1) A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(2) An investment adviser is "primarily engaged in a business or businesses other than advising investment advisory clients" when, for each of its most recent 3 fiscal years or for the time since organization, whichever is less, the investment adviser derived, on an unconsolidated basis, more than 50% of the following from other business or businesses:

(i) Total sales and revenues.

(ii) Income, or loss, before income taxes and extraordinary items.

(3) An investment adviser shall implement adequate procedures and use reasonable diligence to promptly obtain reports of all transactions required to be recorded.

(c) If an investment adviser subject to subsection (a) has custody, the records required to be made and kept under subsection (a) also include all of the following:

(1) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts.

(2) A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.

(3) A copy of confirmations of all transactions effected by or for the account of any client.

(4) A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.

(5) A copy of documents executed by the client, including a limited power of attorney, under which the adviser is authorized or permitted to withdraw a client's funds or securities maintained with a custodian on the adviser's instruction to the qualified custodian.

(6) A copy of each of the client's quarterly account statements, as generated and delivered by the qualified custodian. If the adviser also generates a statement that is delivered to the client, the adviser shall also maintain copies of the statements along with the date the statements were sent to the clients.

(7) If an investment adviser has custody because it advises a pooled investment vehicle and is relying on the exception from the minimum net worth requirement in § 303.042(a)(3)(ii) (relating to investment adviser capital requirements), the adviser shall also keep:

(i) True, accurate and current account statements.

(ii) Documentation of the date of the audit.

(iii) A copy of the audited financial statements.

(iv) Evidence of the mailing of the audited financial to all limited partners, members or other beneficial owners within 120 days of the end of its fiscal year.

(8) Records relating to the adviser's appointment as trustee and the identities of the beneficial owners of the trust if an investment adviser acts as trustee for a beneficial trust under § 102.021(a).

(d) An investment adviser subject to subsection (a) that gives investment supervisory or management service to a client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

(1) A separate record for each client showing the securities purchased and sold, and the date, amount and price of each purchase and sale.

(2) For each security in which any client has a current position, information from which the investment adviser can promptly furnish the name of each client, and the current amount or interest of the client.

(e) Books or records required under this section may be maintained by the investment adviser so that the identity of a client to whom the investment adviser gives investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

(f) An investment adviser subject to subsection (a) shall maintain all of the following:

(1) Books and records required to be made under subsections (a), (b) and (c)(1) (except for books and records required to be made under subsection (a)(11) and (16)) in an easily accessible place for at least 5 years from the end of the fiscal year during which the last entry was made on record, the first 2 years being in the principal office of the investment adviser.

(2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, in the principal office of the investment adviser for at least 3 years after termination of the enterprise.

(3) Books and records required to be made under subsection (a)(11) and (16) in an easily accessible place for at least 5 years, the first 2 years being in the principal office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media.

(4) Notwithstanding other record preservation requirements of this section, the following records or copies at the business location of the investment adviser from which the customer or client is being provided or has been provided with investment advisory services:

(i) Records required to be preserved under subsections (a)(3), (7)—(10), (14), (15), (17)—(19) and (22)—(24), (b) and (c).

(ii) Records or copies required under subsection (a)(11) and (16) which records or related records identify the name of the investment adviser representative providing investment advice from that business location, or which identify the business location's physical address, mailing address, e-mail address or telephone number.

(g) An investment adviser subject to subsection (a), before ceasing to do business as an investment adviser, shall:

(1) Arrange and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section.

(2) Notify the Department in writing of the exact address where the books and records will be maintained during the period.

(h) Record storage requirements are as follows:

(1) Records required to be maintained and preserved for the required time by this section shall:

(i) Be able to be immediately produced or reproduced.

(ii) Be maintained and preserved in at least one of the following manners:

(A) Paper or hard copy form, as those records are kept in their original form.

(B) Micrographic media, including microfilm, microfiche or any similar medium.

(C) Electronic storage media, including any digital storage medium or system that meets the terms of this section.

(2) The investment adviser shall:

(i) Arrange and index the records in a way that permits easy location, access and retrieval of any particular record.

(ii) Provide promptly any of the following which the Department by its examiners or other representatives may request:

(A) A legible, true and complete copy of the record in the medium and format in which it is stored.

(B) A legible, true and complete printout of the record.

(C) A means to access, view and print the records.

(iii) Store separately from the original a copy of the record for the time required for preservation of the original record.

(3) For records created or maintained on electronic storage media, the investment advisor shall establish and maintain procedures to:

(i) Maintain and preserve the records to reasonably safeguard them from loss, alteration or destruction.

(ii) Limit access to the records to properly authorized personnel and the Department, including its examiners and other representatives.

(iii) Reasonably ensure that any reproduction of a nonelectronic original record on electronic storage media is complete, true and legible when retrieved.

(i) A book or other record made, kept, maintained and preserved in compliance with Rules 17a-3 (17 CFR 240.17a-3) (relating to records to be made by certain exchange members, brokers and dealers) and 17a-4 (17 CFR 240.17a-4) (relating to records to be preserved by certain exchange members, brokers and dealers) under the Securities Exchange Act of 1934 (15 U.S.C.A. § § 78a—78qq), which is substantially the same as the book or other record required to be made, kept, maintained and preserved under this section, is considered to be made, kept, maintained and preserved in compliance with this section.

(j) The requirements of this section do not apply to an investment adviser registered under section 301 of the act (70 P.S. § 1-301) that meets all of the following conditions:

(1) Has its principal place of business in a state other than this Commonwealth.

(2) Is licensed as an investment adviser in the state where it has its principal place of business.

(3) Is in compliance with the recordkeeping requirements of the state in which it has its principal place of business.

**Authority**

The provisions of this § 304.012 amended under sections 304(a), (b) and (e) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-304(a), (b) and (e) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 304.012 adopted March 29, 1974, effective March 30, 1974, 4 Pa. B. 582; amended January 17, 1992, effective January 18, 1992, 22 Pa.B. 289; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 304.012, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364754) to (364763).

**Notes of Decisions**

*Sufficiency*

Although the investigator testified that she believed the licensee had not kept required monthly trial balances, she failed to provide the requisite specific, factual basis for her testimony. Therefore, the evidence did not support the Commission's finding of a violation. *Kalin v. Securities Commission*, 805 A.2d 1258 (Pa. Cmwlth. 2002).

Where the investigator testified that the licensee failed to maintain required records, and the licensee so admitted, but that he was unaware of his duty to do so, the Commission's finding of violation was supported by substantial evidence. *Kalin v. Securities Commission*, 805 A.2d 1258 (Pa. Cmwlth. 2002).

**Cross References**

This section cited in 10 Pa. Code § 102.021 (relating to definitions).

## § 304.022. Investment adviser required financial reports.

(a) An investment adviser registered under section 301 of the act (70 P.S. § 1-301) that has custody of client funds or securities or requires prepayment of advisory fees 6 months or more in advance and in excess of $1,200 per client shall file with the Department an audited balance sheet as of the end of its fiscal year with the following conditions:

(1) The balance sheet shall be prepared in accordance with generally accepted accounting principles and contain an unqualified opinion of an independent certified public accountant.

(2) The accountant shall submit, as a supplementary opinion, comments based on the audit as to material inadequacies found to exist in the accounting system, the internal accounting controls and procedures for safeguarding securities and funds, and shall indicate corrective action taken or proposed.

(b) An investment adviser registered under section 301 of the act that has discretionary authority over client funds or securities, but not custody, shall file with the Department a balance sheet as of the end of its fiscal year with the following conditions:

(1) The balance sheet is not required to be audited but shall be prepared in accordance with generally accepted accounting principles.

(2) The balance sheet must contain a representation by the investment adviser that it is true and accurate.

(c) A sole proprietor registered under section 301 of the act required to file an affirmative statement under § 303.012(c)(3) (relating to investment adviser registration procedure) shall file with the Department an affirmative statement as of the end of its fiscal year.

(d) Except as provided in subsections (e) and (f), investment advisers required to file the reports of financial condition set forth in subsections (a)—(c) shall file the reports with the Department within 120 days of the investment adviser's fiscal year end.

(e) The requirements of subsection (d) do not apply to an investment adviser registered under section 301 of the act whose principal place of business is in a state other than this Commonwealth if the investment adviser:

(1) Is registered in the state in which it maintains its principal place of business.

(2) Is in compliance with the financial reporting requirements of the state in which it maintains its principal place of business.

(3) Has not taken custody of assets of any client residing in this Commonwealth at any time during the preceding 12-month period.

(f) The requirements of subsection (d) do not apply to an investment adviser registered under section 301 of the act who:

(1) Has custody of client funds or securities solely as a result of activities set forth in § 303.042(a)(3) (relating to investment adviser capital requirements).

(2) Is in compliance with the requirements set forth in § 303.042(a)(3).

## Authority

The provisions of this § 304.022 amended under sections 303(a) and (c), 304(b) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-303(a) and (c), 1-304(a), (b) and (e) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

## Source

The provisions of this § 304.022 amended June 26, 1987, effective June 27, 1987, 17 Pa.B. 2606; amended January 17, 1992, effective January 18, 1992, 22 Pa.B. 291; amended September 8, 1995, effective September 9, 1995, 25 Pa. B. 3722; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; amended April 15, 2005, effective April 16, 2005, 35 Pa.B. 2307; transferred and renumbered from 64 Pa. Code § 304.022, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364764) to (364765).

## Cross References

This section cited in 10 Pa. Code § 603.031 (relating to public inspection records).

## § 304.052. Investment adviser compensation.

No investment adviser registered under the act may charge or receive commissions or other compensation in connection with the giving of investment advice unless the compensation is fair and reasonable and is determined on an equitable basis.

**Authority**

The provisions of this § 304.052 amended under sections 304(a), (b) and (e) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P. S. § § 1-304(a), (b) and (e) and 1-609(a)).

**Source**

The provisions of this § 304.052 adopted March 29, 1974, effective March 30, 1974, 4 Pa.B. 582; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 304.052, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533. Immediately preceding text appears at serial pages (315092) to (315093).

## § 304.071. Business continuity and succession planning.

(a) An investment adviser registered or required to be registered with the Department shall establish, implement and maintain written procedures relating to a business continuity and succession plan.

(b) The investment adviser shall base the business continuity and succession plan on the facts and circumstances of the investment adviser's business model including the size of the firm, type of services provided and the number of locations of the investment adviser.

(c) The business continuity and succession plan must provide for at least the following:

(1) Protection, backup and recovery of books and records.

(2) Alternate means of communicating notice to customers, key personnel, employees, vendors, regulators and service providers, including third-party custodians, about issues such as:

(i) A significant business interruption.

(ii) The death or unavailability of key personnel.

(iii) Other disruptions or cessation of business activities.

(3) Office relocation if a temporary or permanent loss of a principal place of business occurs.

(4) Assignment of duties to a qualified responsible person if the death or unavailability of key personnel occurs.

(5) Otherwise minimizing service disruptions and client harm that could result from a sudden significant business interruption.

**Authority**

The provisions of this § 304.071 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C), section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)) and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 304.071 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

**Cross References**

This section cited in 10 Pa. Code § 304.012 (relating to investment adviser required records).

## § 305.011. Supervision of agents, investment adviser representatives and employees.

(a) Every broker-dealer and investment adviser registered under section 301 of the act (70 P.S. § 1-301) shall exercise diligent supervision over the securities activities and securities related activities of its agents, investment adviser representatives and employees by:

(1) Establishing and maintaining written procedures and a system for applying and enforcing those written procedures which are reasonably designed to:

(i) Achieve compliance with the act and this title.

(ii) Detect and prevent any violations of statutes, rules, regulations or orders described in any of the following:

(A) Section 305(a)(v) and (ix) of the act (70 P.S. § 1-305(a)(v) and (ix)).

(B) The Conduct Rules of FINRA.

(C) An applicable fair practice or ethical standard promulgated by the Securities and Exchange Commission or by a National securities exchange.

(2) Accepting final responsibility for proper supervision.

(b) Every issuer who employs agents registered under section 301 of the act shall be subject to the supervision requirements of subsection (a) with respect to those agents.

(c) As evidence of compliance with the supervisory obligations imposed by this section, a broker-dealer or investment adviser shall:

(1) Implement written procedures, a copy of which shall be kept in each location at which the broker-dealer or investment adviser conducts business.

(2) Establish, maintain and enforce those written procedures designed to achieve compliance with the act and this title and to detect and prevent violations described in subsection (a).

(d) The written procedures required under subsection (c), at a minimum, must address all of the following:

(1) The supervision of every agent, investment adviser representative, employee and supervisor by a designated qualified supervisor.

(2) The methods to be used to determine that all supervisory personnel are qualified by virtue of character, experience and training to carry out their assigned responsibilities.

(3) The methods to be used to determine the good character, business repute, qualifications and experience of any person before making application for registration of that person with the Department and hiring that person.

(4) The review and written approval by the designated supervisor of the opening of each new customer account.

(5) The frequent examination of customer accounts to detect and prevent violations, irregularities or abuses.

(6) The prompt review and written approval of the handling of customer complaints.

(7) The prompt review and written approval by the designated supervisor of all securities transactions and all correspondence pertaining to the solicitation or execution of all securities transactions.

(8) The review and written approval by the designated supervisor of the delegation by a customer of discretionary authority with respect to the customer's account and frequent examination of discretionary accounts to prevent violations, irregularities or abuses.

(9) The participation of each agent and investment adviser representative either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by the broker-dealer or investment adviser at which compliance matters relevant to the activities of the agents and investment adviser representatives are discussed. Written records shall be maintained reflecting the interview or meeting.

(10) The periodic inspection of each location in this Commonwealth from which business is conducted to ensure that the written procedures and systems are enforced.

(e) The periodic inspections referenced in subsection (d)(10) shall occur according to the following time frames:

(1) At least annually for an office of supervisory jurisdiction of a broker-dealer.

(2) In accordance with an inspection cycle established in the broker-dealer's written supervisory procedures for branch offices and nonbranch locations of a broker-dealer.

(i) In establishing an inspection cycle, the broker-dealer and investment adviser shall give consideration to the nature and complexity of the securities activities for which the location is responsible, the volume of business done and the number of agents or investment adviser representatives assigned to the location.

(ii) The obligation of diligent supervision required under this section may require that one or more locations of a broker-dealer or investment adviser in this Commonwealth receive more inspections or be on a periodic inspection cycle different than other locations of the broker-dealer or investment adviser in this Commonwealth and that inspections be unannounced.

(f) It is the responsibility of the broker-dealer or investment adviser to ensure through inspections of each location in this Commonwealth that the written procedures and systems are enforced and the supervisory obligations imposed by this section are being honored.

(g) Written records shall be maintained reflecting each inspection conducted.

(h) In acquitting their obligations under this section, registrants are to consult FINRA Notice to Members 98-38 (May 1998) and Securities and Exchange Commission Release No. 34-38174 (January 15, 1997).

(i) In accordance with FINRA Notice to Members 98-38, unannounced visits may be appropriate if there are indicators of misconduct including any of the following:

(1) Significant customer complaints.

(2) Personnel with disciplinary records.

(3) Excessive trade corrections, extensions, liquidations or variable contract replacements.

(j) Records required under this section:

(1) Shall be maintained for 5 years.

(2) Shall be maintained in an easily accessible place for the first 2 years.

(3) May be retained and preserved on microfilm, computer disks or tapes, or other electronic medium if adequate facilities are maintained for examination of facsimiles.

(k) To the extent that this section imposes any recordkeeping requirement on an investment adviser registered under section 301 of the act, the recordkeeping requirement does not apply if the investment adviser meets the following conditions:

(1) Has its principal place of business in a state other than this Commonwealth.

(2) Is licensed as an investment adviser in the state where it has its principal place of business.

(3) Is in compliance with the recordkeeping requirements of the state in which it has its principal place of business.

**Authority**

The provisions of this § 305.011 amended under sections 305(a) and (f) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-305(a) and (f) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 305.011 adopted March 29, 1974, effective March 30, 1974, 4 Pa.B. 582; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; amended July 11, 2003, effective July 12, 2003, 33 Pa.B. 3365; transferred and renumbered from 64 Pa. Code § 305.011, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364769) to (364771).

**Notes of Decisions**

*Standard of Care*

The required supervision under this section over agents and employees of broker dealers and of investment advisers does not create a new cause of action nor establish a standard of care for investment brokers; even if considered relevant to establish a standard of care, the duty to supervise would not extend to employee activities unknown to the employer and beyond the employee's scope of employment. *Cover v. Cushing Capital Corp.*, 497 A.2d 249 (Pa. Super. 1985).

## § 305.019. Dishonest and unethical practices.

(a) Every person registered under section 301 of the act (70 P.S. § 1-301) is a fiduciary and shall:

(1) Act primarily for the benefit of its customers.

(2) Observe high standards of commercial honor and just and equitable principals of trade in the conduct of their business.

(b) Under section 305(a)(ix) of the act (70 P.S. § 1-305(a)(ix)), the Department may deny, suspend, condition or revoke a broker-dealer, agent, investment adviser or investment adviser representative registration or censure a broker-dealer, agent, investment adviser or investment adviser representative registrant if the registrant or applicant, or in the case of any broker-dealer or investment adviser, any affiliate, has engaged in dishonest or unethical practices in the securities business or has taken unfair advantage of a customer within the previous 10 years.

(c) The Department, for purposes of section 305(a)(ix) of the act, will consider actions such as those in paragraphs (1)—(3) to constitute dishonest or unethical practices in the securities business or taking unfair advantage of a customer.

(1) *Broker-dealers.* Includes the following actions:

(i) Engaging in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers or in the payment on request of free credit balances reflecting completed transactions of any of its customers.

(ii) Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.

(iii) Recommending to a customer the purchase, sale or exchange of a security without reasonable grounds to believe that the transaction or recommendation is suitable for the customer based on reasonable inquiry concerning the customer's investment objectives, financial situation and needs and other relevant information known by the broker-dealer.

(iv) Executing a transaction on behalf of a customer without authorization to do so.

(v) Exercising discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price, or both, for the execution of orders.

(vi) Executing a transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account.

(vii) Failing to segregate customers' free securities or securities held in safekeeping.

(viii) Hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by rules of the Securities and Exchange Commission.

(ix) Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

(x) Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include information set forth in the final prospectus.

(xi) Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of moneys due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping or custody of securities and other services related to its securities business.

(xii) Offering to buy from or sell to a person at a stated price unless the broker-dealer is prepared to purchase or sell at a price and under the conditions that are stated at the time of the offer to buy or sell.

(xiii) Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless the broker-dealer knows or has reasonable grounds to believe that a market for the security exists other than that made, created or controlled by the broker-dealer, or by a person for whom the broker-dealer is acting or with whom is associated in the distribution, or a person controlled by, controlling or under common control with the broker-dealer.

(xiv) Effecting a transaction in, or inducing the purchase or sale of, a security by means of a manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include:

(A) Effecting a transaction in a security which involves no change in the beneficial ownership.

(B) Entering an order for the purchase or sale of a security with the knowledge that an order of substantially the same size, at substantially the same time and substantially the same price, for the sale of the security, has been or will be entered by or for the same or different parties to create a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security. This subsection does not prohibit a broker-dealer from entering bona fide agency cross transactions for its customers.

(C) Effecting, along or with one or more other persons, a series of transactions in a security creating actual or apparent active trading in the security or raising or depressing the price of the security, to induce the purchase or sale of the security by others.

(xv) Guaranteeing a customer against loss in a securities account of the customer carried by the broker-dealer or in a securities transaction effected by the broker-dealer with or for the customer.

(xvi) Publishing or circulating, or causing to be published or circulated, a notice, circular, advertisement, newspaper article, investment service or communication of any kind which purports to report a transaction as a purchase or sale of a security unless the broker-dealer believes that the transaction was a bona fide purchase or sale of the security; or which purports to quote the bid price or asked price for a security, unless the broker-dealer believes that the quotation represents a bona fide bid for, or offer of, the security.

(xvii) Using advertising or sales presentation in a fashion as to be deceptive or misleading. An example of this practice would be a distribution of nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in a brochure, flyer or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of a prospectus or disclosure.

(xviii) Failing to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of a security before entering into a contract with or for a customer for the purchase or sale of the security, the existence of the control to the customer, and if the disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

(xix) Failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member or from a member participating in the distribution as an underwriter or selling group member.

(xx) Failing or refusing to furnish a customer, on reasonable request, information to which he is entitled, or to respond to a formal written request or complaint.

(xxi) Failing to comply with an applicable fair practice or ethical standard promulgated by the Securities and Exchange Commission or by a self-regulatory organization approved by the Securities and Exchange Commission.

(xxii) Failing to comply with investor suitability standards imposed as a condition of the registration of securities under section 205 or 206 of the act (70 P.S. § § 1-205 and 1-206) in connection with the offer, sale or purchase of a security in this Commonwealth.

(2) *Agents.* Includes the following actions:

(i) Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer.

(ii) Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are authorized in writing by the broker-dealer before execution of the transaction.

(iii) Establishing or maintaining an account containing fictitious information to execute transactions which would otherwise be prohibited.

(iv) Sharing directly or indirectly in profits or losses in the account of a customer without the written authorization of the customer and the broker-dealer which the agent represents.

(v) Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with a person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control.

(vi) Engaging in conduct specified in paragraph (1)(ii)—(vi), (ix), (x), (xiv)—(xvii), (xxi) and (xxii).

(3) *Investment advisers and investment adviser representatives.* Includes the following actions:

(i) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of a security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser or investment adviser representative.

(ii) Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within 10 business days after the date of the first transaction placed under oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

(iii) Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account.

(iv) Placing an order to purchase or sell a security for the account of a client without authority to do so.

(v) Placing an order to purchase or sell a security for the account of a client on instruction of a third party without first having obtained a written third-party trading authorization from the client.

(vi) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser or a financial institution engaged in the business of loaning funds.

(vii) Loaning money to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.

(viii) Misrepresenting to an advisory client, or prospective advisory client, the qualifications of the investment adviser, investment adviser representative or an employee of the investment adviser or misrepresenting the nature of the advisory services being offered or fees to be charged for the service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

(ix) Providing a report or recommendation to an advisory client prepared by someone other than the investment adviser or investment adviser representative without disclosing that fact. This prohibition does not apply to a situation when the investment adviser or investment adviser representative uses published research reports or statistical analyses to give advice or when an investment adviser or investment adviser representative orders the report in the normal course of providing advice.

(x) Charging a client an unreasonable advisory fee.

(xi) Failing to disclose to a client in writing, before advice is given, a material conflict of interest relating to the investment adviser, the investment adviser representative or an employee of the investment adviser which could reasonably be expected to impair the giving of unbiased and objective advice including:

(A) A compensation arrangement connected with advisory services to a client which is in addition to compensation from the client for the services.

(B) An advisory fee charged to a client for giving advice when a commission for executing securities transactions under the advice will be received by the investment adviser, the investment adviser representative or an employee or affiliated person of the investment adviser.

(xii) Guaranteeing a client that a specific result will be achieved, either a gain or no loss, with advice which will be given.

(xiii) Publishing, circulating or distributing an advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940 (15 U.S.C.A. § § 80b-1—80b-21).

(xiv) Disclosing the identity, investments or other financial information of a client unless required under law to do so, or unless consented to by the client.

(xv) Taking an action, directly or indirectly, with respect to those securities or funds in which a client has a beneficial interest, when the investment adviser has custody or possession of the securities or funds when the adviser's action is subject to, and does not comply with, the requirements of § 404.014 (relating to custody requirements for investment advisers).

(xvi) Entering into, extending or renewing an investment advisory contract unless the contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of a prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser and that no assignment of the contract shall be made by the investment adviser without the consent of the other party to the contract.

(xvii) Failing to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of section 204A of the Investment Advisers Act of 1940 (15 U.S.C.A. § 80b-4a) and the rules and regulations of the Securities and Exchange Commission promulgated thereunder.

(xviii) Entering into, extending, or renewing any advisory contract contrary to the provisions of section 205 of the Investment Advisers Act of 1940 (15 U.S.C.A. § 80b-5) and the rules and regulations of the Securities and Exchange Commission promulgated thereunder. This applies to all investment advisers and investment adviser representatives registered under section 301 of the act notwithstanding whether the investment adviser is exempt from registration with the Securities and Exchange Commission under section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C.A. § 80b-3(b)).

(xix) Indicating, in an advisory contract, any condition, stipulation or provision binding any person to waive compliance with any provision of the act.

(xx) Engaging in any act, practice or course of business which is fraudulent, deceptive or manipulative or contrary to the provisions of section 206(4) of the Investment Advisers Act of 1940 (15 U.S.C.A. § 80b-6(4)) and the rules and regulations of the Securities and Exchange Commission promulgated thereunder. This applies to all investment advisers and investment adviser representatives registered under section 301 of the act notwithstanding whether the investment adviser is exempt from registration with the Securities and Exchange Commission under section 203(b) of the Investment Advisers Act of 1940.

(xxi) Engaging in conduct or committing any act, directly, indirectly or through or by another person, which would be unlawful for the person to do directly under the act or any rule, regulation or order issued thereunder.

(d) In addition to the conduct described in paragraphs (1)—(3), the Department may deny, suspend, condition or revoke a registration or application for registration of a broker-dealer, agent, investment adviser or investment adviser representative for conduct inconsistent with the standards in subsection (a), including any of the following:

(1) Forgery.

(2) Embezzlement.

(3) Nondisclosure, incomplete disclosure or misstatement of material facts.

(4) Manipulative or deceptive practices.

(5) Taking unfair advantage of a customer or former customer in any aspect of a tender offer.

(e) This section does not apply to Federally covered advisers unless the conduct otherwise is actionable under section 401(a) or (c) or 404 of the act (70 P.S. § § 1-401(a) and (c) and 1-404).

## Authority

The provisions of this § 305.019 issued under sections 305(a) and (f) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-305(a) and (f) and 1-609(a)); amended under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

## Source

The provisions of this § 305.019 adopted March 9, 1990, effective March 10, 1990, 20 Pa.B. 1408; amended January 17, 1992, effective January 18, 1992, 22 Pa.B. 292; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 305.019, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364772) to (364778).

## Notes of Decisions

*Construction with Federal Law*

A statutory fiduciary under state law and this regulation is only considered a fiduciary for purposes of the bankruptcy code, 11 U.S.C.A. § 523, if the statute: (1) defines the trust res; (2) identifies the trustee's fund management duties and authority; and (3) imposes obligations on the fiduciary prior to the alleged wrongdoing. In this case, the debtor was clearly not a statutory fiduciary for purposes of section 523. The Pennsylvania statutes and regulations did not define the trust res, and in fact precluded registered agents such as the debtor from ''acting as a custodian for money. . . .'' Thus, the Bankruptcy Court correctly concluded that although the debtor was a statutory fiduciary under Pennsylvania law, the same was not true with respect to section 523(a)(4). *In re Librandi*, 183 Bankr. 379 (M. D. Pa. 1975).

## Cross References

This section cited in 10 Pa. Code § 102.021 (relating to definitions).

## § 305.020. Use of senior specific certifications and professional designations.

(a) *General rule*. The use of a senior specific certification or designation by a person in connection with the offer, sale or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in a way as to mislead any person is a dishonest and unethical practice in the securities business within the meaning of section 305(a)(ix) of the act (70 P.S. § 1-305(a)(ix)).

(b) *Prohibitions*. The prohibited use of senior specific certification or professional designation includes the use of:

(1) A certification or professional designation by a person who has not actually earned or is otherwise ineligible to use the certification or designation.

(2) A nonexistent or self-conferred certification or professional designation.

(3) A certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the person using the certification or professional designation does not have.

(4) A certification or professional designation that was obtained from a designating or certifying organization to which any of the following applies:

(i) Is primarily engaged in the business of instruction in sales or marketing, or both.

(ii) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants.

(iii) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct.

(iv) Does not have reasonable continuing education requirements for its designees or certificants to maintain the designation or certificate.

(c) *Rebuttable presumption*. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subsection (b)(4) when the organization has been accredited by any of the following:

(1) The American National Standards Institute.

(2) The National Commission for Certifying Agencies.

(3) An organization that is on the United States Department of Education's "Accrediting Agencies Recognized for Title IV Purposes" list and the designation or credential issued therefrom does not primarily apply to sales or marketing, or both.

(d) *Factors to be considered*. In determining whether a combination of words, or an acronym standing for a combination of words, constitutes a certification or professional designation indicating or implying that a person

has special certification or training in advising or servicing senior citizens or retirees, the Department will consider the following factors:

(1) Use of one or more words such as “senior,” “retirement,” “elder” or like words, combined with one or more words such as “certified,” “registered,” “chartered,” “adviser,” “specialist,” “consultant,” “planner” or like words, in the name of the certification or professional designation.

(2) How those words are combined.

(e) *Exception*. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or Federal financial services regulatory agency, including an agency that regulates broker-dealers, investment advisers or investment companies as defined under the Investment Company Act of 1940 (15 U.S.C.A. § § 80a-1—80a-64), when that job title does either of the following:

(1) Indicates seniority or standing within the organization.

(2) Specifies an individual’s area of specialization within the organization.

(f) *No limitation on Department enforcement*. This section does not limit the Department’s authority to enforce existing provisions of law.

**Authority**

The provisions of this § 305.020 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 305.020 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

## § 305.061. Withdrawal of registration or notice filing.

(a) *Investment adviser*. To withdraw from registration as an investment adviser registered under section 301 of the act (70 P.S. § 1-301) because the investment adviser has:

(1) Become a Federally covered adviser subject to exclusive registration with the Securities and Exchange Commission, the investment adviser shall file an amendment to the uniform application for investment adviser registration (Form ADV) or successor form thereto with the Department or with IARD.

(2) Stopped transacting business in this Commonwealth as an investment adviser, the investment adviser shall file a notice of withdrawal from registration as an investment adviser form (Form ADV-W) or a successor form with the Department or with IARD.

(b) *Broker-dealer*. To withdraw from registration as a broker-dealer, the broker-dealer shall file a completed Uniform Request for Withdrawal from Registration as a Broker-Dealer Form (Form BDW) or a successor form with the Department.

(c) *Investment adviser representative*. To withdraw from registration as investment adviser representative, the investment adviser or Federally covered adviser for whom the investment adviser representative was employed shall file the Uniform Termination Notice for Securities/Futures Industry Registration (Form U-5) or a successor form with the Department or with IARD within 30 days from the date of termination.

(d) *Agent of a broker-dealer or an issuer*. To withdraw from registration as an agent of a broker-dealer or an issuer, the broker-dealer or issuer shall file Form U-5 or successor form with the Department within 30 days from the date of termination.

(e) *Federally covered adviser*. To withdraw a notice filing, a Federally covered adviser shall file a notice with the Department or with IARD.

**Authority**

The provisions of this § 305.061 issued under the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-101—1-704); amended under sections 305(a) and (f) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-305(a) and (f) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 305.061 adopted July 26, 1974, effective July 27, 1974, 4 Pa.B. 1533; amended April 4, 1975, effective April 5, 1975, 5 Pa.B. 722; amended May 27, 1977, effective May 28, 1977, 7 Pa.B. 1438; amended through June 28, 1985, effective June 29, 1985, 15 Pa.B. 2394; amended January 17, 1992, effective January 18, 1992, 22 Pa.B. 293; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 305.061, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364778) to (364779).

## § 404.010. Advertisements by investment advisers and investment adviser representatives.

(a) The Department will consider the direct or indirect publication, circulation or distribution of an advertisement by an investment adviser or investment adviser representative to be a fraudulent, deceptive or manipulative act, practice or course of conduct within the meaning of section 404 of the act (70 P.S. § 1-404) if the advertisement:

(1) Refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or investment adviser representative concerning any advice, analysis, report or other service given to the customer by the investment adviser or investment adviser representative.

(2) Refers, directly or indirectly, to past specific recommendations of the investment adviser or investment adviser representative which were or would have been profitable to any person except that an advertisement setting forth or offering to furnish a list of all recommendations made by the investment adviser or investment adviser representative for the 12-month period immediately preceding the date of the publication of the advertisement is not prohibited if the advertisement:

(i) Includes the name of each security recommended, the date and nature of each recommendation including whether to buy sell or hold, the market price at the time, the price at which the recommendation was to be acted on, and the current market price of each security.

(ii) Contains the following cautionary legend prominently displayed on the first page in print or type as large as the largest print or type used in the body or text stating: "IT SHOULD NOT BE ASSUMED THAT RECOMMENDATIONS MADE IN THE FUTURE WILL BE PROFITABLE OR WILL EQUAL THE PERFORMANCE OF THE SECURITIES IN THIS LIST."

(3) Represents, directly or indirectly, that any graph, chart, formula or other device being offered:

(i) Can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them.

(ii) Will assist any person in making decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations and the difficulties with respect to its use.

(4) Contains any statement that any report, analysis or other service will be furnished free or without charge, unless the report, analysis or other service actually is or will be furnished absolutely without condition or obligation.

(5) Contains any untrue statement of a material fact, or which is otherwise false or misleading in any material respect, including the failure to disclose compensation, including free or discounted securities, received directly or indirectly in connection with making a recommendation concerning a specific security.

(6) Recommends the purchase or sale of any security unless the investment adviser or investment adviser representative simultaneously offers to furnish to any person on request a tabular presentation of:

(i) The total number of shares or other units of the security held by the investment adviser or investment adviser representative for its own account or for the account of officers, directors, trustees, partners or affiliates of the investment adviser or for discretionary accounts of the investment adviser or investment adviser representative maintained for clients.

(ii) The price or price range at which the securities listed in subparagraph (i) were purchased.

(iii) The date or range of dates during which the securities listed in response to subparagraph (i) were purchased.

(b) This section does not apply to Federally covered advisers unless the conduct otherwise is actionable under section 401(a) or (c) of the act (70 P.S. § 1-401(a) and (c)) or section 404 of the act.

**Authority**

The provisions of this § 404.010 amended under sections 404(a) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-404(a) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 404.010 adopted March 29, 1974, effective March 30, 1974, 4 Pa.B. 582; amended September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 404.010, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364785) to (364787).

**Cross References**

This section cited in 10 Pa. Code § 102.021 (relating to definitions).

## § 404.011. Investment adviser brochure disclosure.

(a) An investment adviser's failure to provide an advisory client or prospective advisory client with the disclosure required under this section shall constitute a fraudulent, deceptive or manipulative act, practice or course of business, within the meaning of section 404 of the act (70 P.S. § 1-404).

(b) An investment adviser registered under section 301 of the act (70 P.S. § 1-301) shall offer and deliver to each client and prospective client a current firm brochure and one or more supplements as required under this section which must contain the information required under Part 2 of Form ADV (17 CFR 279.1) (relating to Form ADV, for application for registration of investment adviser and for amendments to such registration statement).

(c) An investment adviser shall deliver to each client and prospective client all of the following:

(1) A current firm brochure.

(2) The current brochure supplements for each investment adviser representative who will provide advisory services to a client.

(d) The firm brochure and one or more supplements required under this section shall be delivered in compliance with one of the following:

(1) Not less than 48 hours before entering into any investment advisory contract with the client or prospective client.

(2) At the time of entering into a contract, if the advisory client has a right to end the contract without penalty within 5 business days after entering into the contract.

(e) An investment adviser shall:

(1) Deliver or offer in writing to deliver to each of its clients the current brochure and any current brochure supplements required under subsection (b) without charge at least once a year.

(2) Send to a client that accepts a written offer the current brochure and supplements within 7 days after the investment adviser is notified of the acceptance.

(f) If, as an investment adviser, the adviser is the general partner of a limited partnership, the manager of a limited liability company, or the trustee of a trust, then for purposes of this section the investment adviser shall treat each of the partnership's limited partners, the company's members or the trust's beneficial owners as a client. For the purposes of this section, a limited liability partnership or limited liability limited partnership is a "limited partnership."

(g) If an investment adviser gives substantially different types of investment advisory services to different clients, the investment adviser may do the following:

(1) Provide the clients with different brochures, so long as each client receives all applicable information about services and fees.

(2) Omit from the brochure delivered to a client any information required under Part 2A of Form ADV if the information applies only to a type of investment advisory service or fee which is not given or charged, or proposed to be given or charged, to that client or prospective client.

(h) Except as provided in paragraph (1), if the investment adviser is a sponsor of a wrap fee program, the brochure required to be delivered by subsection (b) to a client or prospective client of the wrap fee program must be a wrap fee brochure containing all the information required under Form ADV.

(1) The investment adviser does not have to offer or deliver a wrap fee brochure if another sponsor of the wrap fee program offers or delivers to the client or prospective client of the wrap fee program a wrap fee program brochure containing all the information specified in Part 2A, Appendix 1 to Form ADV.

(2) A wrap fee brochure does not take the place of any brochure supplements that the investment adviser is required to deliver under this section.

(3) Additional information in a wrap fee brochure must be limited to information applicable to wrap fee programs that the investment adviser sponsors.

(i) In accordance with Part 2 of Form ADV, if information contained in the brochure or brochure supplement becomes materially inaccurate, the investment adviser shall:

(1) Amend its brochure and any brochure supplement.

(2) Deliver the amendments to clients promptly.

(3) Promptly file the amendments with the Department or with IARD.

(j) Delivering a brochure or supplement in compliance with this section does not relieve the investment adviser of any other disclosure obligations which the investment adviser may have to its clients or prospective clients under the act or this title.

(k) The delivery requirement set forth in subsection (d) does not apply to the extension or renewal of an investment advisory contract without material changes of the contract which is in effect immediately prior to the extension or renewal.

**Authority**

The provisions of this § 404.011 issued under sections 404(a) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-404(a) and 1-609(a)); amended under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 404.011 adopted September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 404.011, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364787) to (364789).

**Cross References**

This section cited in 10 Pa. Code § 102.021 (relating to definitions); 10 Pa. Code § 304.012 (relating to investment adviser required records); and 10 Pa. Code § 404.012 (relating to cash payment for client solicitation).

## § 404.012. Cash payment for client solicitation.

(a) An investment adviser's failure to comply with the requirements of this section concerning cash payments for client solicitation constitutes a fraudulent, deceptive or manipulative act, practice or course of business, within the meaning of section 404 of the act (70 P.S. § 1-404).

(b) An investment adviser may not pay a cash fee or other economic benefit, directly or indirectly, to a solicitor with respect to solicitation activities unless:

(1) The investment adviser is registered under the act.

(2) The solicitor is registered as an investment adviser representative or is exempt from registration under § 302.071 (relating to registration exemption for solicitors) or qualifies for another exemption under the act.

(3) The cash fee or other economic benefit is paid under a written agreement to which the investment adviser is a party.

(4) The written agreement required under paragraph (3):

(i) Describes the solicitation activities to be engaged in by the solicitor on behalf of the investment adviser and the compensation to be received therefor.

(ii) Contains an undertaking by the solicitor to perform its duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the act and the rules thereunder.

(iii) Requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the prospective client with a current copy of the following:

(A) The investment adviser's written disclosure statement required under § 404.011 (relating to investment adviser brochure disclosure).

(B) A separate written disclosure document which contains all of the following:

(I) The name of the solicitor.

(II) The name of the investment adviser.

(III) The nature of the relationship, including any affiliation, between the solicitor and the investment adviser.

(IV) A statement that the solicitor will be compensated for the solicitation services by the investment adviser.

(V) The terms of the compensation arrangement, including a description of the compensation paid or to be paid to the solicitor.

(VI) The amount, if any, for the cost of obtaining his account the prospective client will be charged in addition to the advisory fee, and the differential, if any, among clients with respect to the amount or level of the advisory fees charged by the investment adviser if the differential is attributable to the existence of any

arrangement under which the investment adviser has agreed to compensate the solicitor for soliciting prospective clients for, or referring prospective clients to, the investment adviser.

(5) The investment adviser receives from the prospective client before, or at the time of, entering into any written or oral investment advisory contract with the prospective client, a signed and dated acknowledgment of receipt of the investment adviser's written disclosure statement required under § 404.011 and the solicitor's written disclosure document required under paragraph (4)(iii)(B).

(c) For purposes of subsection (b)(5), this section does not apply to an investment adviser as follows:

(1) If the cash fee is paid to a solicitor with respect to solicitation activities for the provision of impersonal investment advisory services only.

(2) If the cash fee is paid to a solicitor who is either of the following:

(i) A partner, officer, director or employee of the investment adviser.

(ii) A partner, officer, director or employee of a person which controls, is controlled by, or is under common control with the investment adviser if the status of the solicitor as a partner, officer, director or employee of the investment adviser or other person, is disclosed to the client at the time of the solicitation or referral.

(d) This section does not relieve a person of a fiduciary or other obligation to which the person may be subject under the law.

**Authority**

The provisions of this § 404.012 issued under sections 404(a) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-404(a) and 1-609(a)); amended under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 404.012 adopted September 1, 2000, effective September 2, 2000, 30 Pa.B. 4551; transferred and renumbered from 64 Pa. Code § 404.012, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364789) to (364791).

**Cross References**

This section cited in 10 Pa. Code § 102.021 (relating to definitions); 10 Pa. Code § 302.071 (relating to registration exemption for solicitors); and 10 Pa. Code § 304.012 (relating to investment adviser required records).

## § 404.014. Custody requirements for investment advisers.

(a) *Safekeeping required*. It is unlawful and considered to be a fraudulent, deceptive or manipulative act, practice or course of business, within the meaning of section 404 of the act (70 P.S. § 1-404), for an investment adviser, registered or required to be registered under section 301 of the act (70 P.S. § 1-301), to have custody of client funds or securities unless:

(1) The investment adviser notifies the Department promptly in writing on Form ADV that the investment adviser has or may have custody.

(2) A qualified custodian maintains those funds and securities in one of the following:

(i) A separate account for each client under that client's name.

(ii) Accounts that contain only the investment adviser's clients' funds and securities under the investment adviser's name as agent or trustee for the clients or, in the case of a pooled investment vehicle that the investment adviser manages, in the name of the pooled investment vehicle.

(3) The investment adviser meets the following conditions:

(i) If the investment adviser opens an account with a qualified custodian on its client's behalf, under the client's name, under the name of the investment adviser as agent or under the name of a pooled investment vehicle, the investment adviser shall notify the client in writing of the qualified custodian's name, address and how the funds or securities are maintained, promptly when the account is opened and following any changes to this information.

(ii) If the investment adviser sends account statements to a client to which the investment adviser is required to provide the notice in subparagraph (i), the investment adviser shall include in the notification provided to that client and in any subsequent account statement the investment adviser sends that client a statement urging the client to compare the account statements from the custodian with those from the investment adviser.

(4) The investment adviser meets the following conditions:

(i) The investment adviser has a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each client for which it maintains funds or securities and the account statement:

(A) Identifies the amount of funds in the account.

(B) Identifies the amount of each security in the account at the end of the period.

(C) Sets forth all transactions in the account during that period.

(ii) If the investment adviser or a related person is a general partner of a limited partnership (or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle), the account statements required under paragraph (3) shall be sent to each limited partner (or member or other beneficial owner).

(5) The investment adviser meets the following conditions:

(i) The client funds and securities of which the investment adviser has custody are verified by actual examination at least once during each calendar year, by an independent certified public accountant, under a written agreement between the investment adviser and the independent certified public accountant, at a time that is chosen by the independent certified public accountant without previous notice or announcement to the investment adviser and that is irregular from year to year.

(ii) The written agreement provides for the first examination to occur within 6 months of becoming subject to this paragraph, except that, if the investment adviser maintains client funds or securities under this section as a qualified custodian, the agreement must provide for the first examination to occur no later than 6 months after obtaining the internal control report.

(iii) The written agreement must require the independent certified public accountant to:

(A) File a certificate on Form ADV-E with the Department within 120 days of the time chosen by the independent certified public accountant in this paragraph, stating that it has examined the funds and securities and describing the nature and extent of the examination.

(B) Notify the Department within 1 business day of the finding, by means of a facsimile transmission or e-mail, followed by first class mail, directed to the attention of the Department on finding any material discrepancies during the course of the examination.

(C) File Form ADV-E within 4 business days of the resignation or dismissal from, or other termination of, the engagement or removing itself or being removed from consideration for being reappointed, accompanied by a statement that includes:

(I) The date of resignation, dismissal, removal or other termination, and the name, address and contact information of the independent certified public accountant.

(II) An explanation of any problems relating to examination scope or procedure that contributed to resignation, dismissal, removal or other termination.

(6) If the investment adviser has custody because a related person maintains client funds or securities under this section as a qualified custodian in connection with advisory services the investment adviser provides to clients, the investment adviser shall obtain, or receive from its related person, within 6 months of becoming subject to this paragraph and thereafter no less frequently than once each calendar year a written internal control report prepared by an independent certified public accountant that performs the independent verification required under paragraph (5) that complies with the following:

(i) The internal control report must include an opinion of an independent certified public accountant as to whether controls have been placed in operation as of a specific date, and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including the safeguarding of funds and securities held by either the investment adviser or a related person on behalf of the investment adviser's clients, during the year.

(ii) The independent certified public accountant shall verify that the funds and securities are reconciled to a custodian other than the investment adviser or the investment adviser's related person.

(7) A client may designate an independent representative to receive, on his behalf, notices and account statements as required under paragraphs (3) and (4).

(b) *Exceptions*.

(1) *Shares of mutual funds*. With respect to shares of an open-end company as defined in section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C.A. § 80a-5(a)(1)) (mutual fund), the investment adviser may use the mutual fund's transfer agent instead of a qualified custodian to comply with subsection (a).

(2) *Certain privately offered securities*.

(i) The investment adviser does not need to comply with subsection (a)(2) with respect to securities that are:

(A) Acquired from the issuer in a transaction or chain of transactions not involving any public offering.

(B) Uncertificated and ownership is recorded only on the books of the issuer or its transfer agent in the name of the client.

(C) Transferable only with previous consent of the issuer or holders of the outstanding securities of the issuer.

(ii) Notwithstanding subparagraph (i), the provisions of this paragraph are available with respect to securities held for the account of a pooled investment vehicle only if the pooled investment vehicle is audited, and the audited financial statements are distributed, in accordance with § 303.042(a)(3)(ii) (relating to investment adviser capital requirements) and the investment adviser notifies the Department in writing on Form ADV that the investment adviser intends to provide audited financial statements, as described in this subparagraph.

(3) *Fee deduction*. Notwithstanding subsection (a)(5), an investment adviser does not need to obtain an independent verification of client funds and securities maintained by a qualified custodian if the investment adviser is in compliance with § 303.042(a)(3)(i).

(4) *Limited partnerships subject to annual audit*. An investment adviser does not need to comply with subsection (a)(3) and (4) and will be considered to have complied with subsection (a)(5) with respect to the account of a pooled investment vehicle that is subject to audit and is in compliance with § 303.042(a)(3)(ii).

(5) *Registered investment companies*. The investment adviser does not need to comply with this section with respect to the account of an investment company registered under the Investment Company Act of 1940 (15 U.S.C.A. § § 80a-1—80a-64).

(c) *Delivery to related persons*. Sending an account statement under subsection (a)(4) or distributing audited financial statements under subsection (b)(4) does not satisfy the requirements of this section if the account statements or financial statements are sent solely to limited partners (or members or other beneficial owners) that themselves are limited partnerships (or limited liability companies, or another type of pooled investment vehicle) and are related persons of the investment adviser.

(d) *Department authority*. An investment adviser who cannot comply with one or more of the specific provisions in this section may request that the Department waive the specific provisions if the investment adviser can establish that undue hardship would be placed on the investment adviser and that investment adviser can establish sufficient alternative safeguards.

**Authority**

The provisions of this § 404.014 issued under section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

## Source

The provisions of this § 404.014 adopted January 12, 2018, effective January 13, 2018, 48 Pa.B. 389.

## Cross References

This section cited in 10 Pa. Code § 102.021 (relating to definitions); and 10 Pa. Code § 305.019 (relating to dishonest and unethical practices).

## § 606.031. Advertising literature.

(a) *Advertisements*. Except as permitted by section 606(c) of the act (70 P.S. § 1-606(c)), a person may not publish an advertisement concerning a security in this Commonwealth unless all of the following are met:

(1) The advertisement is either of the following:

(i) Permitted by this section and complies with any requirements imposed by this section.

(ii) Specifically excluded from application of this section by subsection (f).

(2) The character and composition of the statements and graphics contained in the advertisement do not exaggerate the investment opportunity, overemphasize any aspect of the offering, minimize the risks of the enterprise or predict revenues, profits or payment of dividends, including financial projections or forecasts.

(3) The advertisement does not contain any statement that is false or misleading in any material respect or omits to make any material statement necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

(b) *Registered offerings: permitted advertisements after filing but before effectiveness*. The following apply with respect to publication of advertisements in this Commonwealth in connection with an offering of securities in this Commonwealth for which a registration statement has been filed with the Department under section 205 or 206 of the act (70 P.S. § § 1-205 and 1-206) that has not yet become effective.

(1) In connection with a registration statement filed with the Department under section 205 or 206 of the act for the sale of securities in this Commonwealth which also are the subject of a registration statement filed under section 5 of the Securities Act of 1933 (15 U.S.C.A. § 77e), a person may publish any of the following in this Commonwealth before effectiveness of the registration statement under the act:

(i) Advertisements which comply with section 2(a)(10)(b) of the Securities Act of 1933 (15 U.S.C.A. § 77b(a)(10)(b)).

(ii) Advertisements which comply with Rule 134 (17 CFR 230.134) (relating to communications not deemed a prospectus) promulgated by the Securities and Exchange Commission.

(iii) A preliminary prospectus which is part of a registration statement that has been filed with the Securities and Exchange Commission under section 5 of the Securities Act of 1933 and complies with Rule 430 (17 CFR 230.430) (relating to prospectus for use prior to effective date) promulgated by the Securities and Exchange Commission.

(iv) A summary prospectus which is part of a registration statement that has been filed with the Securities and Exchange Commission under section 5 of the Securities Act of 1933 and complies with Rule 431 (17 CFR 230.431) (relating to summary prospectuses) promulgated by the Securities and Exchange Commission.

(2) In connection with an offering circular for the offer and sale of securities in this Commonwealth filed with the Securities and Exchange Commission under Regulation A (17 CFR 230.251—230.263) (relating to conditional small issues exemption), promulgated under section 3(b) of the Securities Act of 1933 (15 U.S.C.A. § 77c(b)) and with the Department under section 205 or 206 of the act, a person may publish an advertisement in this Commonwealth that complies with Rule 251(d)(1)(ii)(C) (17 CFR 230.251(d)(1)(ii)(C)) (relating to

scope of exemption) promulgated by the Securities and Exchange Commission before effectiveness of the offering circular under the act if all of the following conditions are met:

(i) The advertisement is filed with the Department 10 days before publication in this Commonwealth.

(ii) The Department does not issue a letter disallowing its publication in this Commonwealth before the expiration of the 10-day period.

(3) In connection with a registration statement filed with the Department under section 206 of the act for the offer and sale of securities in this Commonwealth for which no registration statement has been filed with the Securities and Exchange Commission in reliance on section 3(a)(4) or (11) of the Securities Act of 1933 and regulations promulgated thereunder or Rule 504 (17 CFR 230.504) (relating to exemption for limited offerings and sales of securities not exceeding $5,000,000) promulgated by the Securities and Exchange Commission under section 3(b) of the Securities Act of 1933, a person may publish an advertisement in this Commonwealth before effectiveness of the registration statement under the act if all of the following are met:

(i) The advertisement contains no more than the following:

(A) The name and address of the issuer of the security.

(B) The title of the security, the number of securities being offered, the total dollar amount of securities being offered, yield and the per unit offering price to the public.

(C) A brief, generic description of the issuer's business.

(D) A statement, if applicable, that completion of the offering is subject to receipt of subscriptions meeting a stated minimum offering amount.

(E) A statement providing the name and address of the underwriter or where a prospectus may be obtained.

(F) A statement in the following form: "A registration statement has been filed with the Pennsylvania Department of Banking and Securities but has not yet become effective. These securities may not be sold nor may offers to buy be accepted before the time the registration statement becomes effective. This advertisement does not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in the Commonwealth of Pennsylvania before registration of the securities under the Pennsylvania Securities Act of 1972."

(ii) The advertisement is filed with the Department 10 days before publication in this Commonwealth.

(iii) The Department does not issue a letter disallowing its publication in this Commonwealth before the expiration of the 10-day period.

(c) *Registered offerings: permitted advertisements after effectiveness*. The following apply with respect to publication of advertisements in this Commonwealth in connection with an offering of securities in this Commonwealth for which a registration statement has become effective under section 205 or 206 of the act.

(1) In connection with a registration statement filed with the Department under section 205 or 206 of the act for the offer and sale of securities in this Commonwealth which also are the subject of a registration statement

filed under section 5 of the Securities Act of 1933 which has become effective, a person may publish an advertisement in this Commonwealth if it is preceded or accompanied by a copy of the final prospectus.

(2) In connection with an offering circular for the offer and sale of securities in this Commonwealth that has been filed with the Securities and Exchange Commission under Regulation A (17 CFR 230.251—230.263) promulgated under section 3(b) of the Securities Act of 1933 and with the Department under section 205 or 206 of the act and has been qualified by the Securities and Exchange Commission under Regulation A and has become effective under section 205 or 206 of the act, a person may publish an advertisement in this Commonwealth if the advertisement is accompanied or preceded by a copy of the final offering circular.

(3) In connection with a registration statement filed with the Department under section 206 of the act for the offer and sale of securities in this Commonwealth for which no registration statement has been filed with the Securities and Exchange Commission in reliance on section 3(a)(4) or (11) of the Securities Act of 1933 and regulations promulgated thereunder or Rule 504 (17 CFR 230.504) promulgated by the Securities and Exchange Commission under section 3(b) of the Securities Act of 1933 that has become effective under the act, a person may publish in this Commonwealth an advertisement if all of the following are met:

(i) The advertisement contains no more than the following:

(A) The name and address of the issuer of the security.

(B) The title of the security, the number of securities being offered, the total dollar amount of securities being offered, yield and the per unit offering price to the public.

(C) A brief, generic description of the issuer's business.

(D) A statement, if applicable, that completion of the offering is subject to receipt of subscriptions meeting a stated minimum offering amount.

(E) A statement, if applicable, that funds accompanying the subscription agreement are subject to escrow and the terms of the escrow.

(F) The name and address where the final prospectus may be obtained if delivery of the final prospectus does not precede or accompany the advertisement.

(G) A statement in the following form: "This advertisement does not constitute an offer to sell nor a solicitation of an offer to buy any of the securities. The offering is made only by the prospectus."

(ii) The advertisement is filed with the Department 5 days before publication in this Commonwealth.

(iii) The Department does not issue a letter disallowing publication in this Commonwealth before the expiration of the 5-day period.

(4) A person may not publish an advertisement in this Commonwealth in connection with the offer and sale of any security registered under section 205 or 206 of the act at any time after the expiration of the effective period of the registration statement relating to that security as determined by section 207 of the act (70 P.S. § 1-207).

(d) *Exempt securities*. The following apply:

(1) *Exempt securities other than sections 202(a) and (i) of the act*. Except as provided in paragraphs (2) and (3), a person may publish an advertisement in this Commonwealth in connection with the offer or sale of a security in this Commonwealth which is exempt under section 202 of the act (70 P.S. § 1-202).

(2) *Section 202(a) of the act*. In connection with the offer or sale of any security in this Commonwealth made in reliance on section 202(a) of the act which is issued by the Commonwealth, any political subdivision, or any agency or corporate or instrumentality of the Commonwealth and which security represents less than a general obligation of the issuer, a legend adequately describing the limited nature of the obligation must appear prominently in bold face type of at least 12 points in size on the face page of any preliminary offering statement, official offering statement or advertisement published in this Commonwealth.

(3) *Section 202(i) of the act*. A person may publish an advertisement in this Commonwealth in connection with the offer or sale of a security in this Commonwealth which is exempt under section 202(i) of the act except if the Department, by rule or order, has prohibited use of advertisements as a condition of the availability of the exemption.

(e) *Exempt transactions*. All of the following apply:

(1) *Advertisements permitted*. Except as provided in paragraph (2), a person may publish any advertisement in this Commonwealth in connection with a securities transaction in this Commonwealth which is exempt from registration under section 203 of the act (70 P.S. § 1-203).

(2) *Advertisements prohibited*. A person may not publish any advertisement in this Commonwealth in connection with the following securities transactions which are effected in this Commonwealth:

(i) A sale of a security made in reliance on section 203(d) of the act.

(ii) An offer of a security made in reliance on section 203(e) of the act which results in a sale under section 203(d) of the act.

(iii) An offer or sale of a security made in reliance on section 203(j) of the act.

(iv) An offer or sale of a security made in reliance on section 203(s) of the act.

(v) An offer or sale of a security made in reliance on § 203.187 (relating to small issuer exemption).

(vi) An offer or sale of a security made in reliance on § 203.189 (relating to isolated transaction exemption).

(vii) An offer or sale of a security which is exempt under section 203(r) of the act when the Department, by rule or order, has prohibited use of advertisements as a condition of the availability of the exemption.

(f) *Excluded advertisements*. All of the following apply:

(1) This section does not apply to advertisements described in paragraph (2) if all of the following are met:

(i) The character and composition of the statements and graphics contained in the advertisement do not exaggerate the investment opportunity, overemphasize any aspect of the offering, minimize the risks of the enterprise or predict revenues, profits or payment of dividends, including financial projections or forecasts.

(ii) The advertisement does not contain any statement that is false or misleading in any material respect or omits to make any material statement necessary to make the statements made, in the light of the circumstances under which they are made, not misleading.

(2) The following advertisements are excluded from the provisions of this section if the requirements of paragraph (1) have been met:

(i) General solicitation in connection with the offer or sale of a security in reliance on section 203(t) of the act.

(ii) Advertisements which comply with Rule 135 promulgated by the Securities and Exchange Commission (17 CFR 230.135) (relating to notice of proposed registered offerings).

(iii) Advertisements which comply with Rule 135c promulgated by the Securities and Exchange Commission (17 CFR 230.135c) (relating to notice of certain proposed unregistered offerings).

(iv) Advertisements in connection with an offer of a security in reliance on § 203.190 (relating to certain Internet offers exempt) which comply with the legend requirement of § 203.190(a)(1).

(v) Advertisements in connection with the offer or sale of Federally covered securities under section 18(b)(4)(C) and (E) of the Securities Act of 1933 (15 U.S.C.A. § 77r(b)(4)(C) and (E)) when the issuer relies upon and is in compliance with Rule 506(c) of Regulation D (17 CFR 230.506) (relating to exemption for limited offers and sales without regard to dollar amount of offering) or regulation crowdfunding.

(g) *Securities and Exchange Commission interpretive advice on use of electronic media*. A person who uses electronic media to publish an advertisement in this Commonwealth in connection with a security which is the subject of a registration statement filed with the Department under section 205 or 206 of the act and with the Securities and Exchange Commission under section 5 of the Securities Act of 1933 may rely on the interpretive advice of the Securities and Exchange Commission in Release No. 33-7856 (April 28, 2000) and subsequent advice given under that release. To the extent that the interpretive advice contradicts any requirement in subsection (a)(1) or (b)(1), the Department will not take any enforcement action if the person complies with the interpretive advice.

**Authority**

The provisions of this § 606.031 amended under sections 606(d) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § § 1-606(d) and 1-609(a)); section 202.C of the Department of Banking and Securities Code (71 P.S. § 733-202.C); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

**Source**

The provisions of this § 606.031 adopted June 14, 1974, effective June 15, 1974, 4 Pa.B. 1227; amended April 4, 1975, effective April 5, 1975, 5 Pa.B. 722; amended November 21, 1980, effective November 22, 1980, 10 Pa.B. 4430; amended December 28, 2001, effective December 29, 2001, 31 Pa.B. 7032; transferred and renumbered from 64 Pa. Code § 606.031, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364828) to (364833).

**Cross References**

This section cited in 10 Pa. Code § 202.093 (relating to charitable contributions to pooled income funds exempt); 10 Pa. Code § 202.095 (relating to charitable gift annuities); and 10 Pa. Code § 203.201 (relating to accredited investor exemption).

## § 609.012. Computing the number of offerees, purchasers and clients.

(a) Under section 609(a) of the act (70 P.S. § 1-609(a)), the Department, to provide a consistent method of computing the number of offerees, purchasers and clients under relevant provisions of the act and regulations promulgated thereunder, has determined that all of the following apply:

(1) A person who is offered or purchases securities or becomes a client is counted as a separate offeree, purchaser or client, unless the person is otherwise specifically excluded under this section.

(2) If more than one person, related by blood or marriage, are offerees, purchasers or clients, the persons are counted as one offeree, purchaser or client if they either:

(i) Reside in the same household.

(ii) Are under 18 years of age.

(3) An entity is counted as one person, and a direct or beneficial owner of equity interests or equity securities in the entity is not counted as an offeree, purchaser or client, unless one of the following applies:

(i) With respect to computing offerees and purchasers, the entity was organized to specifically acquire the securities being offered or purchased.

(ii) With respect to computing clients, if the services provided by the person effecting transactions in securities for the account of the entity or providing investment advice to the entity are based on the investment decisions of the direct or beneficial owners rather than on the investment objectives of the entity.

(4) Notwithstanding the provisions of paragraph (3)(i):

(i) In the case of a trust, if the settlor and the beneficiaries are related by blood or marriage, the trust and the trustee, when acting on behalf of the trust or simultaneously on his own behalf, is counted only as one offeree, purchaser or client.

(ii) Multiple trusts are counted as one offeree, purchaser or client if all of the beneficiaries are related by blood or marriage.

(5) Notwithstanding the provisions of paragraph (3)(i) in an entity in which all owners of equity interests or equity securities, excluding contingent interests and director's qualifying shares, are persons related by blood or marriage residing in the same household, the following apply:

(i) The entity is counted as one person.

(ii) The owners of the interests or securities in the entity are not counted as offerees, purchasers and clients.

(b) This section does not apply if a section of the act or a regulation promulgated thereunder sets forth another method of computing offerees, purchasers or clients.

**Authority**

The provisions of this § 609.012 issued under section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); amended under section 202.C of the Department of Banking and Securities Code (71 P.S. §

733-202.C); section 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609(a)); and section 9(b) of the Takeover Disclosure Law (70 P.S. § 79(b)).

## Source

The provisions of this § 609.012 adopted March 27, 1987, effective March 28, 1987, 17 Pa.B. 1304; transferred and renumbered from 64 Pa. Code § 609.012, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; amended January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364843) to (364844).

## Cross References

This section cited in 10 Pa. Code § 102.021 (relating to definitions); 10 Pa. Code § 203.187 (relating to small issuer exemption); and 10 Pa. Code § 203.189 (relating to isolated exemption).