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July 22, 2016

By Fax to 717.783.5122 and E-mail to ra-pabankreg@pa.gov

Office of Chief Counsel
Department of Banking and Securities
Attention: Public Comment on Regulation 3-54
17 N. Second Street, Suite 1300
Harrisburg, PA 17101-2290

RE: Proposed Rulemaking at 46 Pa.Bull. 3420
Regulation 3-54

Dear Sir:

At the outset, I want to express my appreciation for the outreach conducted by the Department of Banking and Securities (the "Department") by organizing a Securities Industry Advisory Committee consisting of practicing securities lawyers and securities industry professionals (the "Advisory Committee") to advise the Department on its review of the regulations which are the subject of the above-referenced proposed rulemaking.

I am privileged to have been asked to serve on the Advisory Committee and participate with Department staff in this very large but important project. However, I must emphasize that the comments contained herein reflect my own personal views and not those of the Advisory Committee, any member of the Advisory Committee, any partner or associate of Bybel Rutledge LLP or any past, current or future client of Bybel Rutledge LLP.

I very much appreciate the opportunity to comment on the proposed revisions to the regulations adopted under the Pennsylvania Securities Act of 1972, as amended (the "1972 Act") which were published at 46 Pa.Bull. 3420 on July 2, 2016 (the "Proposed Rules"). Perhaps, the most marked change in the Proposed Rules is the expansion of Proposed Rule 102.021 relating to definitions. Previously, the Pennsylvania Securities Commission ("PSC") had followed the format adopted by the U.S. Securities & Exchange Commission ("SEC") in its rulemaking by providing definitions specific to a particular rule within the rule itself (*eg* SEC Rule 205-3(d) under the Investment Advisers Act of 1940).

The rationale underlying this format was to spare the practitioner the need to cross-reference substantive regulatory provisions to an omnibus definitional section where a specific term may be defined differently solely for purposes of that rule. However, when the PSC was joined with the Department of Banking to create the Department, the PSC ceased to be an independent agency and future Department rulemaking would be subject to the format utilized for rules promulgated by executive agencies. Although as a practitioner I would prefer not having an omnibus definitional section, I understand that this is dictated by policies not within the Department's control.

Proposed Regulation 102.021

Pulling terms from all of the existing regulations into one section was a Herculean endeavor for Department staff for which they are to be commended. Nevertheless, there are additional terms which should be defined in Proposed Regulation 102.021 and several which should be modified.

Suggested Modifications to Proposed Definitions

Advertisement. It is suggested that (i) be modified as follows as (A) and (B) are elaborations of the terms included in the statutory definition of advertisement in Section 102(a) of the 1972 Act.

(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; and

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

Bank. It is suggested that, for clarity, (ii)(B) be revised as follows:

(ii) ***

(B) A bank-in-organization if the primary regulatory authority responsible for the administration of the banking laws under which the bank-in-organization has been formed has determined that a bank-in-organization is not a bank under those laws.

Beneficial Ownership. This term is used through the Proposed Rules and each iteration should be addressed in this definition. Also, the reference to Rule 505 offerings in (i)

should be deleted in favor of citing Section 203(s)(v) of the 1972 Act as Section 203(t)(v) has been cited similarly since the regulatory citation does not reference the term "beneficial ownership". It should be noted that current §304.012(c)(8) references "trustee for a beneficial trust under §102.021(a)" but there is no definition of "beneficial trust" in Proposed Rule 102.021. It is suggested that (i), (ii) and (iii) read as follows:

(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 203(t)(v) of the act, as defined in 17 CFR 240.13d—3 (relating to determination of beneficial owners).

(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).

<u>Bond.</u> It is suggested that (i) read as follows which tracks the language in current §202.092(d)(1):

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

<u>Client</u>. It is suggested that (iii) be added to address use of the term "client" in §404.011(f):

(iii) For purposes of §404.011 (relating to investment adviser brochure disclosure), 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.

<u>Compensation</u>. To track language relating to "compensation" in SEC IA Release 1092, which was a joint SEC/NASAA release, it is suggested that the definition be modified slightly to read:

> *<u>Compensation</u> -- Receipt, directly or indirectly, of any payment or consideration, whether or not in the form of cash, or any economic benefit.*

<u>CRD.</u> Thought might be given to adding "and any successor thereto" at the end of the definition.

FINRA. Thought might be given to adding "and any successor thereto" at the end of the definition.

IARD. Thought might be given to adding "and any successor thereto" at the end of the definition.

Independent Party. For clarity, it is suggested that the introductory phrase be modified as follows: "A person who meets all of the following:"

Principal place of business. This reference also appears in §203.187 (relating to small issuer exemption). Does the Department want to have a separate definition for §203.187 than the definition relating to a place of business of an investment adviser?

Pro Rata. It is suggested that (ii) be deleted as it does not appear to add very much in the context of a definition as opposed to the substantive regulation from whence the language originated.

Related parties. This definition includes a reference to "beneficial owners" in (i) but the definition of *beneficial owner* in Proposed Regulation 102.021 does not address use of the term "beneficial owner" in this definition.

Suggested Additional Definitions

Since the following terms are referenced in the Proposed Rules, it is suggested that these definitions be added to Proposed Rule 102.021, particularly the definitions of various licensing forms which are referenced extensively in Subpart C (§§301.020 – 305.061) and Subpart D (§§401.020 – 404.014).

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. (*see* reference to "auditor's report" in the proposed definition of *insolvent or insolvency.* This definition was taken from the PCAOB).

Aggregate indebtedness – As defined in 17 CFR 240.15c3-1 (relating to net capital requirements for brokers or dealers) under the Securities Exchange Act of 1934.

Commission – any form of compensation received by any person for effecting the sale of a security (It should be noted that the term "commission" is used extensively throughout the 1972 Act and the existing regulations).

Direct participation program -- A program which provides for flow-through tax consequences regardless of the structure of the legal entit(ies) or vehicle(s) for distribution including, but not limited to, oil and gas programs, real estate programs, 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 real estate investment trusts, tax qualified pension and profit sharing plans pursuant to Sections 401 and 403(a) of the Internal Revenue Code of 1986 and individual retirement plans under Section 408 of the Internal Revenue Code of 1986, tax sheltered annuities pursuant to the provisions of 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. (This term appears in §207.091 and the proposed definition is taken from FINRA Rule 2310).

EFD – Electronic Filing Depository operated by NASAA and any successor thereto.

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

Form ADV -- Uniform Application for Investment Adviser Registration and Report by Exempt Reporting Advisers and any successor form thereto.

Form ADV-W – Uniform Notice of Withdrawal from Registration as an Investment Adviser and any successor form thereto.

Form BD – Uniform Application for Broker-Dealer Registration and any successor form thereto.

Form BD-W – Uniform Request for Broker-Dealer Withdrawal and any successor form thereto.

Form D – Notice of Exempt Offering of Securities adopted by the Securities and Exchange Commission and any successor form thereto.

Form NF – Uniform Investment Company Notice Filing adopted by NASAA and any successor form thereto.

Form U-1 – Uniform Application to Register Securities adopted by NASAA and any successor form thereto.

Form U-4 – Uniform Application for Securities Industry Registration or Transfer and any successor form thereto.

Form U-5 – Uniform Termination Notice for Securities Industry Registration and any successor from thereto.

Form U-SB – Uniform Surety Bond Form adopted by NASAA and any successor form thereto.

Generally accepted accounting principles – A framework of accounting standards, rules and procedures established and administered by the American Institute of Certified Public Accountants and the Financial Accounting Standards Board as consistently applied in the United States. (This definition is suggested to underscore that references to generally accepted accounting principles in the regulations mean US GAAP).

Limited partnership – For purposes of §404.011 (relating to investment adviser brochure disclosure), includes a limited liability partnership or a limited liability limited partnership.

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 (This term is referenced in §303.011(h) and §304(b)).

National securities exchange – Any exchange as defined in section 3(a)(1) of the Securities Exchange Act of 1934 which is registered with the Securities and Exchange Commission under section 6 of the Securities Exchange Act of 1934. (this term is referenced extensively in Subpart C).

Nationally recognized statistical rating organization – As defined in section 3(a)(62) of the Securities Exchange Act of 1934 (this term is referenced in §205.021(c)(3))

PCAOB – Public Company Accounting Oversight Board and any successor thereto (This term is referenced in §609.033(b)).

Self-regulatory organization – as defined in section 3(a)(26) of the Securities Exchange Act of 1934 (This term is referenced in §601.030(a)(2)).

Series 7 – General Securities Representative Examination and any successor examination.

Series 24 – General Securities Principal Exam and any success examination.

Series 63 – Uniform State Securities Agent Law Examination and any successor examination.

Series 65 – Uniform Investment Adviser Law Examination and any successor examination.

Series 66 – Uniform Combined State Law Examination and any successor examination.

Proposed Rule 202.094

For clarity and symmetry with §203.183(a), it is suggested that subsection (3) be revised as follows:

(3) The issuer meets all of the following conditions:

Proposed Rule 203.041

For clarity and symmetry with §203.183(a), it is suggested that subsection (b) be revised as follows:

(b) The Department will not consider that the requirement of section 203(d)(i) of the act to be met unless the issuer meets all of the following:

Proposed Rule 203.161

For clarity and symmetry with §203.183(a), it is suggested that subsection (c)(4) be revised as follows:

(c)(4) Include whatever data may be necessary to establish all of the following:

Proposed Rule 203.184

Since it is suggested that the definition of "beneficial ownership" in Proposed Regulation 102.021 be amended to include the reference to that term in §203.184(b), it is recommended that subsection (b) be deleted and the remaining subsections re-formatted.

Proposed Rule 203.188

For clarity and symmetry with §203.183(a), it is suggested that subsection (a) be revised as follows:

(a) Under section 203(r) of the act, the Department finds that it is not in the public interest or necessary for the protection of investors to require registration of securities transactions under section 201 of the act if all of the following conditions are met:

Proposed Rule 203.201

It appears that a verb may be missing in subsection (b). It is suggested that subsection (b) read as follows:

(b) General solicitation. Use of general solicitation in a manner permitted by section 203(t) of the act will not be considered to be an advertisement subject to section 609(c) of the act but will be subject to the antifraud provisions in sections 401-410 of the act.

Proposed Rule 203.203

For clarity and symmetry with §203.183(a), it is suggested that the initial paragraph of this Proposed Rule be revised as follows:

> *Under section 203(r) of the act, the Department finds that it is not necessary or appropriate for the protection of investors to require registration under section 201 of the act for the offer or sale of a security in a transaction if all of the following requirements are met:*

Proposed Rule 207.072

Since subsection (c)(6) permits non-payment of interest on funds held in escrow for less than 90 days and otherwise requires interest to be paid on funds in escrow that are returned to subscribers, it is recommended that the term "interest bearing" be deleted from subsection (c)(1) which would read as follows:

> *(c)* ***
>
> *(1) The specified amount of proceeds shall be deposited in an escrow or trust account, the terms of which are consistent with this subsection, particularly paragraph (6).*

Proposed Rule 209.010

As it is suggested that "Form NF" be a defined term in §102.021 which includes any successor form, it is suggested that subsection (b)(2) read as follows:

> *(b)* ***
>
> *(2) An issuer which is an open-end or closed-end investment company, face amount certificate company or unit investment trust, as those persons are classified in the Investment Company Act of 1940, shall file with the Department an annual report on sales of securities in this Commonwealth on Form NF within the following time periods:*

Proposed Rule 210.010

To be consistent with the statutory language in section 210 of the 1972 and in symmetry with §210.010(a)(2), it is suggested that subsection (a)(1) be revised as follows:

> *(1) An issuer that has an effective registration statement under section 205 or 206 of the act and has an effective registration statement on file with the Securities and Exchange Commission for the same securities sold securities in this Commonwealth in excess of the aggregate amount registered for sale in this Commonwealth under section 205 or 206 of the act.*

Furthermore it is recommended that subsection (a)(2) be revised as follows since Section 18(b)(2) of the Securities Act of 1933, as amended (the "1933 Act") preempts application of the registration provisions of the 1972 Act.

(2) An open-end or closed-end investment company, face amount certificate company or unit investment trust, as those persons are classified in sections 1-21 of the Investment Company Act of 1940 which during the effective period of a notice filing with the Department sold securities in this Commonwealth in excess of the aggregate amount of securities set forth in such notice filing.

Proposed Rule 211.010

With respect to subsection (c), the reference to "effective as of September 1, 1996" should be deleted as Form D was revised in 2008 by the SEC with input from the states to include, among other things, a consent to service of process. Furthermore, this reference does not appear in Section 211(b) of the 1972 Act as amended by Act 52 of 2014. It further is suggested that "Form D" be added as a defined term in §102.021. Also, subsection (c)(1) should be revised to permit electronic filing through EFD if the Department would accept filings of Form D for Rule 506 offerings through EFD which could read as follows.

(c) ***

(1) Filed with EFD or the Department on Form D.

The proposed rule should be revised to address an interpretational issue concerning the notice filing required by Section 211(b.1)(ii) of the 1972 Act (relating to certain offerings made in good faith reliance on SEC Regulation Crowdfunding) as to how an issuer that may be required to make a notice filing should determine residency, particularly if there are joint purchasers of the security from more than one state. It is recommended that this issue be addressed as suggested by the American Bar Association Committee on State Securities Regulation in its June 23, 2016 comment letter to NASAA on the Proposed NASAA Model Rule and Uniform Notice Filing Form for Federal Crowdfunding Offerings. Below is suggested language for what would become subsection (d).

(d) 211 (b.1(1)(ii) notice. For purposes of the notice filing required under section 211(b.1)(1)(ii) of the act, the residency of a purchaser is the state set forth on the person's account maintained by a funding portal or broker-dealer through which the securities being sold in reliance on Regulation Crowdfunding (17 CFR 230.227.100 et seq.) adopted by the Securities and Exchange Commission have been purchased. In the event that more than one person is on the account and those persons have addresses on the account from different states, the state contained in the address of the first person appearing on the account controls for purposes of determining

whether the issuer is required to make a notice filing with the Department under this subsection.

The Department proposes new subsection (d) which would authorize the Department to issue an order requiring a notice filing to be made with the Department with respect to any covered security under Section 18(b)(3) of the 1933 Act (*ie* securities offered and sold to "qualified purchasers" as defined by the SEC) and payment of "fees prescribed to section 602(b.1) of the act." Section 18(b) of the 1933 Act preempts states from applying any securities registration or qualification requirements of their state securities laws to securities which have been denominated in Section 18(b) of the 1933 Act as "covered securities." Although Congress relaxed this preemption as to permit a state to require a notice filing with respect to certain "covered securities," this relaxation was permissive and meant only that states would be permitted to enact legislation or enforce existing legislation to require notice filings but not that they were legally obligated to do so.

To date, the SEC has adopted a definition of "qualified purchaser" in only two instances, both of which relate to SEC Regulation A which divides offerings made in reliance on that rule into two categories – Tier 1 offerings and Tier 2 offerings. All persons who receive an offer to purchase securities in either a Tier 1 or Tier 2 offering under SEC Regulation A are deemed to be "qualified purchasers" under Section 18(b)(3) of the 1933 Act. This, in effect, preempts states from regulating "testing the waters" communications with the public permitted by Rule 255 under Regulation A. Also, the SEC determined that sales of securities made to offerees in a Tier 2 offering under SEC Regulation A also are deemed to be "qualified purchasers" under Section 18(b)(3) of the 1933 Act.

As previously indicated, Congress did relax the preemption provisions of Section 18(b) of the 1933 Act to allow states the authority to require notice filings for certain covered securities, including transactions involving "qualified purchasers" under Section 18(b)(3) of the 1933 Act.

It should be noted that, in 2014, a self-executing securities registration exemption was added to the 1972 Act as Section 203(u) by Act 52 of 2014 which exempts offers and sales of securities made in good faith reliance on SEC Regulation A if the issuer files with the Department all documents which are required to be filed with the SEC at the time that it files these documents with the SEC.

Section 203(u) is, in effect, is a notice filing provision as the exemption is self-executing with no review or approval by the Department being contemplated or statutorily authorized. On the other hand, Section 211 of the 1972 Act is very specific as to the types of notices filings which are required to be made Department and does not include authorization for the Department to require a notice filing with respect to securities that are "covered securities" under Section

18(b)(3) of the 1933 Act.[1] Therefore, there does not appear to be any statutory basis in Section 211 of the 1972 Act for requiring a notice filing for securities that are "covered securities" pursuant to Section 18(b)(3) of the 1933 Act.

In addition, there does not appear to be any statutory provision in Section 602(b.1) of the 1972 Act to impose any notice filing fee, even for the notice filing provisions of Section 203(u). The only fees authorized with respect to notice filings relate to notice filings by mutual funds under Section 211(a) of the 1972 Act[2] and notice filings for SEC Rule 506 offerings under Section 211(b) thereof.[3]

For states that want to require a notice filing for Regulation A offerings, NASAA adopted a model notice filing rule which included a Uniform Notice for Regulation A – Tier 2 Offerings ("NASAA Regulation A Notice") and Item 7 of that form incorporates by reference all documents filed with the SEC. The model rule only requires a notice filing with respect to sales and not offers and then, only with respect to sales made in Tier 2 offerings as sales in Tier 1 offerings remain subject to state securities registration requirements in that purchasers in Tier 1 offerings are not deemed by the SEC to be "qualified purchasers" under Section 18(b)(3) of the 1933 Act.

As previously noted, Section 203(u) of the 1972 Act is, in essence, a notice filing requirement and, in light of the preemption provisions relating to certain offerees and purchasers in SEC Regulation A offerings, it is suggested that the Department, using its statutory powers under Section 204(a) of the 1972 Act, adopt a new rule thereunder as described below. I believe this approach accomplishes everything which proposed subsection (d) of Rule 211.010 was attempting to achieve but with a sound statutory basis.

Furthermore, if the Department did not want to be burdened by receiving separate documents filed under Section 203(u) for Tier 1 offerings, subsection (3) below gives the Department the option of using the NASAA Regulation A Notice (but marked for Tier 1 offerings) and taking advantage of that form's incorporation by reference provision of all filing made with the SEC. Since all Regulation A filings with the SEC are made through the electronic EDGAR system, the public and the Department have continuous access to all documents filed with the SEC with respect to any Regulation A offering.

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[1] Section 211(a) authorizes a notice filing for securities that are "covered securities" under Section 18(b)(2) of the 1933 Act (*ie* mutual funds) while Section 211(b) authorizes a notice filing for securities that are "covered securities under Section 18(b)(4)(E) of the 1933 Act (*ie* SEC Rule 506 offerings) and Section 211(c) authorizes a notice filing for certain crowdfunding offerings as permitted by Section 18(b)(4)(C) of the 1933 Act.

[2] Section 602(b.1)(iv) of the 1972 Act.

[3] Section 602(b.1)(vii) of the 1972 Act.

204.013. Waiver of Filing Requirements

Under section 204(a) of the act, the Department waives the filing provisions of section 203(u) of the act as follows:

(1) No filing with the Department is required under section 203(u) of the act with respect to the offer of any securities which meets the requirements of Rule 251(d)(1) and Rule 255 of Regulation A adopted by the Securities and Exchange Commission.

(2) In lieu of the documents required to be filed with the Department under section 203(u) of the act, an issuer undertaking an offering of securities which qualifies as a Tier 2 offering under Regulation A adopted by the Securities and Exchange Commission may file with the Department a copy of the Uniform Notice of Regulation A – Tier 2 Offering as adopted by NASAA or any successor form thereto prior to the sale of any security in such Tier 2 offering in this Commonwealth.

(3) In lieu of the documents required to be filed with the Department under section 203(u) of the act, an issuer undertaking an offer of securities which qualifies as a Tier 1 offering under Regulation A adopted by the Securities and Exchange Commission may file with the Department a copy of the Uniform Notice of Regulation A – Tier 2 Offering as adopted by NASAA or any successor form thereto but marked to show that it applies to a Tier 1 offering prior to the sale of any security in such Tier 1 offering in this Commonwealth.

Proposed Rule 302.061(b)

As the term "bank" already is a defined term in §102.021, it is suggested that the language ", as that term is defined in section 102(d) of the act," be deleted.

Proposed Rule 302.064(1)(ii)

As it is suggested that the term "National securities exchange" be a defined term in §102.021 which includes registration with the SEC, (ii) should be revised as follows:

(ii) A member of a National securities exchange.

Proposed Rule 302.070(e)(2)

Section 302(f) of the 1972 Act grants the Department authority to adopt a regulation to exempt a class of persons from registration as an investment adviser. It does not authorize the Department to impose a filing fee nor does Section 602.1 of the 1972 Act authorize the imposition of a filing fee for an investment adviser exempt from registration under Section 301 of the 1972 Act. Therefore, subsection (e)(2) should be revised as follows:

(e) ***

(ii) The Department will consider a report required by subsection (a)(2) to be filed with the Department when it is filed and accepted by IARD.

Also, it is recommended that the quotation marks appearing in subsection (h) be deleted as they serve no useful purpose.

Proposed Rule 303.011

As it is suggested that the term "Form BD" be a defined term in §102.021 which includes any successor form, subsection (a) should read as follows:

(a) An applicant for initial registration as a broker-dealer shall complete Form BD which shall be filed with CRD.

As it is suggested that the term "National securities exchange" and "National securities association" be defined terms in §102.021 which includes registration with the SEC, subsections (b), (c), (d) and (h) should read as follows:

(b) An applicant which is not a FINRA member firm or a member of a National securities exchange shall complete and file with the Department:

***

(c) An applicant which is not a FINRA member firm but is a member of a National securities exchange shall complete and file with CRD:

***

(d) An applicant which is a FINRA member firm shall file with CRD:

***

(h) An applicant described in subsections (c) and (d) shall provide to the Department within 5 days of receipt of a written or electronic request, a copy of any financial statement or financial information required under Securities and Exchange Commission rules or the rules of a National securities association or a National securities exchange of which the applicant is a member.

Proposed Rule 303.012

As it is suggested that the terms "Form ADV" and "IARD" be defined terms in §102.021, subsections (a) and (b) should read as follows:

(a) An applicant for initial registration as an investment adviser shall complete Form ADV.

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

***

With respect to subsection (c)(2), it is suggested that the word "standard" be deleted as it has been suggested that "audit report" be a defined term in §102.021.

With respect to subsection (c)(iii)(2) and subsection (f)(2), it is suggested that "in all material respects" be added at the end of each subparagraph (2).

Proposed Rule 303.013

As it is suggested that the term "Form U-4" be a defined term in §102.021 which includes any successor form, subsections (a) and (c) should read as follows. Also, since Form U-4 for issuer agents must be filed with the Department, subsection (d) should be revised as follows.

(a) An applicant for initial registration as an agent of a broker-dealer or issuer shall complete Form U-4.

***

(c) An applicant for registration of an agent of a broker-dealer which is a FINRA member firm shall file the following items with CRD:

***

(d) An agent and broker-dealer or issuer shall take necessary steps to ensure that material information contained in Form U-4 remains current and accurate. If a material statement made in Form U-4 becomes incorrect or inaccurate, the agent and broker-dealer shall file with CRD and, in the case of an issuer, the agent and the issuer shall file with the Department, an amendment on Form U-4 within 30 days of the occurrence of the event which requires the filing of the amendment.

Proposed Rule 303.014

As it is suggested that the term "Form ADV" and "IARD" be defined terms in §102.021, subsections (a) and (b) should read as follows:

(a) An applicant for initial registration as an investment adviser representative of an investment adviser or Federally covered adviser shall complete Form U-4.

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

***

Proposed Rule 303.015

As it is suggested that the term "Form ADV" and "IARD" be defined terms in §102.021, subsections (a), (b) and (c) should read as follows:

(a) Federally covered advisers required to file a notice under section 303(a)(iii) of the act (70 P.S. §1-303(a)(iii)) shall file Form ADV with IARD.

(b) Initial filing. Before the Federally covered adviser conducts advisory business in this Commonwealth, the Federally covered adviser shall file a completed Form ADV accompanied by the notice filing fee required under section 602(d.1) of the act (70 P.S. §1-602(d.1)) with IARD.

(c) Renewals. Every Federally covered adviser conducting advisory business in this Commonwealth annually shall pay the notice filing fee set forth in section 602(d.1) of the act (70 P.S. §1-602(d.1)) to IARD.

Proposed Rule 303.016

The word "advisor" in subsection (a) should be changed to "adviser" to reflect the statutory spelling of the term which otherwise is used throughout the 1972 Act and the Proposed Rules.

Proposed Rule 303.021

It is suggested that:

"CRD" should replace "the Department" at the end of subsection (a)(1) and (2).

"with IARD" should be added at the end of subsection (b)(1)(i).

"IARD" should replace "the Department" at the end of subsection (b)(2)(i).

"IARD" should replace "the Department" in subsection (c)(1).

Proposed Rule 303.031

As it is suggested that the term "Series 7 Examination," "Series 63 Examination" and "Series 66 Examination" which includes any successor examination be defined terms in §102.021, subsection (c) should read as follows:

(c) The applicant receives a passing grade on the Series 63 Examination or the Series 66 Examination and Series 7 Examination administered by FINRA within 2 years before the date of filing an application for registration. The Department considers the requirements of this subsection met if any of the following apply:

***

Proposed Rule 303.032

As it is suggested that the term "Series 65 Examination" which includes any successor examination be a defined term in §102.021, subsection (a)(1) should read as follows:

(a) ***

(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 Series 65 Examination.

Proposed Rule 303.041

As "net capital" is proposed to be defined in §102.021 and it is herein suggested that "aggregate indebtedness" also be a defined term in §102.021, it is suggested that the last sentence of subsection (a) be deleted as unnecessary.

Proposed Rule 303.042

For clarity and parallelism, it is suggested that the term "Holding" in subsection (a)(3)(i)(A) be changed to "Has."

For clarity and parallelism, it is suggested that the term "Serving" in subsection (a)(3)(ii) be changed to "Serves."

For clarity and parallelism, it is suggested that the words "Notifies the Department in writing" be deleted in favor of the word "Indicates" in subsection (a)(3)(i)((D) and (a)(3)(ii)(B)(III).

Proposed Rule 303.051

As it is suggested that "Form U-SB" which includes any successor form be a defined term in §102.021, it is suggested that subsection (a)(1) read as follows:

(a) ***

(1) A surety bond shall be filed with the Department on Form U-SB.

Proposed Rule 304.012

As "net worth" and "financial statements" are proposed as defined terms in §102.021, it is suggested that subsection (a)(6)(i) and (ii) should be deleted as unnecessary definitions for purposes of this regulation.

With respect to subsection (a)(7)(iii)(B), it is proposed to delete Arabic numeral "10" and replace it with "ten" where elsewhere throughout the Proposed Rules, the opposite has been the case (*ie* replace written numbers with Arabic numerals).

Proposed Rule 304.021

As it is suggested that the term "National securities exchange" and "National securities association" be defined terms in §102.021 which includes registration with the SEC, subsection (c) should read as follows:

> *(c) A broker-dealer registered under the act and registered as a broker or dealer with the Securities and Exchange Commission shall provide the Department, within 5 days of a written or electronic request, a copy of any financial statement, financial report or other financial information required under Securities and Exchange Commission rules or rules of a National securities association or National securities exchange of which the applicant is a member.*

Proposed Rule 304.022

It is suggested that "in all material respects" be added to the end of subsection (b)(2).

Proposed Rule 304.041

As it is suggested that the term "National securities exchange" and "National securities association" be defined terms in §102.021 which includes registration with the SEC, subsection (b) should read as follows:

> *(b) Files referred to in subsection (a) include books, ledgers, account records and electronic files required to be kept by broker-dealers and investment advisers in accordance with this chapter, the rules of the Securities and Exchange Commission and rules of a National securities exchange or national securities association and any document reasonably related to these required records.*

Proposed Rule 304.051

Since, at first reading, subsection (a) appears to prohibit any commissions or compensation, it is suggested that, for clarity, the rule be revised as follows:

> *(a) A broker-dealer registered under the act may charge or receive commissions or other compensation in connection with the purchase or sale of a security if the commission or compensation meets all of the following:*
>
> *(1) Is fair and reasonable.*
> *(2) Is determined on an equitable basis.*

(3) Is adequately disclosed to each customer in writing at or before final confirmation.

(b) Compensation which complies with FINRA rules will be considered fair and reasonable and, unless otherwise required by those rules, a FINRA member firm or an associated person of a FINRA member firm need not comply with subsection (a)(3).

Proposed Rule 304.071

First, it should be made clear that the requirements of this proposed rule apply only to investment advisers which are registered with the Department and not those which are excluded from the definition of investment adviser or are exempt from registration (*eg* private fund advisers exempt under §302.070).

Second, it suggested that the Department may wish to expand this regulation to include broker-dealers. Although most, if not all, broker-dealers registered with the Department are FINRA member firms and must comply with FINRA Rule 4370 (relating to business continuity plans), there is a possibility that certain broker-dealers may be registered with the Department, either now or in the future, that are not required to be a FINRA member firm (*eg* intrastate brokers or dealers under Section 15(a)(1) of the Securities Exchange Act of 1934).

Proposed Rule 305.011

As it is suggested that the term "National securities exchange" be a defined term in §102.021 which includes registration with the SEC, subsection (a)(1)((ii)(C) should read as follows:

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

Proposed Rule 305.019

Act 52 of 2014, effective August 11, 2014, revised Section 305(a)(ix) and limited the basis for denying, suspending, conditioning or revoking a registration on the basis of activities that constitute dishonest or unethical practices in the securities business or taking unfair advantage of a client to those activities that occurred within the previous 10 years.

To be consistent with the change made to Section 305(a)(ix) of the 1972 Act by Act 52 of 2014, "within the previous 10 years" should be added to the end of subsection (b).

In subsection (c)(3)(xx) the second reference to "United States" should be deleted to parallel the first similar change in that subparagraph.

Proposed Rule 305.061

As "Form ADV," "Form ADV-W," "Form BD-W," "CRD" and "IARD" are suggested as defined terms which includes any successor form or organization in §102.021, it is suggested that subsections (a)(1) and (2), (b) and (e) should read as follows:

(a) ***

(1) Become a Federally covered adviser subject to exclusive registration with the Securities and Exchange Commission, the investment adviser shall file an amendment to Form ADV with IARD.

(2) Stopped transacting business in this Commonwealth as an investment adviser, the investment adviser shall file Form ADV-W with IARD.

(b) Broker-dealer. To withdraw from registration as a broker-dealer, the broker-dealer shall file a completed Form BD-W with CRD.

***

(e) Federally covered adviser. To withdraw a notice filing, a Federally covered adviser shall file an amendment to Form ADV with IARD.

Proposed Rule 404.011

As "IARD" is suggested as a defined term which includes any successor organization in §102.021, it is suggested that subsection (i)(3) read as follows:

(3) Promptly file an amended Part 2 of Form ADV with IARD.

Proposed Rule 504.060

With respect to subsection (b)(3)(i) and (ii), (c)(2) and (d), should the words "five" and "ten" be expressed by Arabic numerals as is pervasive throughout the Proposed Rulemaking?

Proposed Rule 603.011

Does CRD accept any filings by mail? If not, subsection (f) should read as follows:

(f) Required documents shall be filed in the following manner:

(1) Broker-dealer. Form BD and Form BD-W and any required amendments thereto shall be filed with CRD accompanied by any fee imposed by section 602(d.1) of the act and any compliance assessment imposed under section 602.1(a) of the act.

(2) *Agent. Form U-4 with respect to initial registration, renewal and transfer of an agent and Form U-5 with respect to withdrawal from registration as an agent and any required amendments thereto shall be filed with CRD except for issuer agents which shall be filed with the Department accompanied by any fee imposed by section 602(d.1) of the act and any compliance assessment imposed by section 602.1(a) of the act.*

Subsection (g) should be deleted.

Proposed Rule 603.031

It is suggested that subsection (c)(2) be revised as follows to incorporate by reference the types of persons who may be granted access to financial statements that have been declared confidential:

(c) ***

(2) Financial statements which are considered confidential under paragraph (1) are available for official use by persons described in §601.030(a) (relating to access to confidential information).

It is suggested that the term "registered" be deleted from subsection (c)(3) in that it has been suggested herein that "National securities exchange" and "National securities association" be defined terms in §102.021 which includes their registration with the SEC.

As it has been suggested herein that "Form U-4," "Form BD," Form ADV," "IARD" and "CRD" be defined terms in §102.021 which includes any successor form and any successor organization, it is suggested that subsection (f) read as follows:

(f) ***

(1) The Social Security number and date of birth of an individual registered or applying for registration as an agent or an investment adviser representative that appears on Form U-4 filed with CRD or with the Department in the case of an issuer agent under §303.013 or IARD under §303.014 (relating to agent registration procedures; and investment adviser registration procedures).

(2) The Social Security number and date of birth of an individual registered or applying for registration as an investment adviser or filing a notice as a Federally covered adviser that appears on Form ADV filed with IARD under §303.012 or §303.015 (relating to investment adviser registration procedures; and notice filing for Federally covered advisers).

(3) *The Social Security number and date of birth of an individual who is a principal of a person registered or applying for registration as a broker-dealer or investment adviser or filing a notice as a Federally covered adviser that appears on Form BD filed with CRD or Form ADV filed with IARD.*

Chapter 604

General

Although the Proposed Rules would delete the entire Chapter 604, the Department states that it would retain the provisions set forth in §§604.010, 604.016, 604.020 and 604.023 but place them on its web site versus continued publication in the Pennsylvania Code. The publication of statements of policy in Chapter 604 pre-dated the development of web sites by many governmental departments and was the best medium available at that time to provide access to these policy statements to securities lawyers and securities industry professionals, particularly those resident outside of Pennsylvania.

Although it could be argued that today's researchers and internet search engines may seek out the Department's web site as its first choice when searching for regulatory guidance, there is an argument to be made to keep Department statements of policy housed in the same place as the regulations to which they relate.

§604.018

The Department proposes to delete §604.018 because the language is no longer relevant since the merger of the PSC and the Department of Banking in 2012. My recollection as former PSC chief counsel is that the genesis of this language was a request by then Senator Michael Fisher (now Judge Fisher of the U.S. Circuit Court of Appeals for the Third Circuit) when the Pennsylvania Senate was considering a request by the PSC to amend the 1972 Act to grant it authority, for the first time, to impose civil monetary penalties for violations of the 1972 Act. The concern expressed by then Senator Fisher was that SEC, FINRA and the PSC would "pile on" fines for the same alleged violative conduct. Hence, the PSC adopted the statement of policy in §604.018 that it would not add monetary penalties where FINRA or the SEC had taken action against the person for the same conduct being investigated by the PSC.

I would not concur that this statement of policy is no longer relevant. Although the adjudicatory body is now the Banking and Securities Commission ("BSC") it is Department lawyers who argue for the imposition of monetary penalties and they should be guided by the provisions of §604.018 in fashioning settlements through consent orders, issuing orders to show cause and in presenting arguments before a hearing officer or the BSC. Therefore, I would recommend that the Department retain this policy as general guidance to Department staff.

§604.022

In proposing that §604.022 be deleted, the Department asserts that Sections 302 and 404 of the Department of Banking and Securities Code addresses these provisions. However, it should be noted that the definition of "licensee" for purposes of that statute excludes persons licensed or registered under the 1972 Act.

Proposed Rule 605.020

Securities which are registered with the SEC and offered and sold by issuers described in subsection (a)(2) are not subject to registration under the 1972 Act as they are covered securities under Section 18(b)(2) of the 1933 Act and only subject to a notice filing with the Department under Section 211(a) of the 1972 Act. Therefore, subsection (a)(2) should read as follows:

(a) ***

(2) The securities to be held or purchased are those of an open-end or closed-end investment company, face amount certificate company or unit investment trust, as those terms are defined in section 2 of the Investment Company Act of 1940 which issuer is registered or has filed a registration statement under the Investment Company Act of 1940.

Proposed Rule 606.031

I strongly urge the Department to disregard the application of any style manual which gave rise to the proposed change to subsection (a)(3) and retain the original wording. The words of this subsection, which parallel Sections 401(b), 501(a) and 501(b) of the 1972 Act, are considered by securities industry professionals and securities lawyers to be a "term of art" within federal and state securities regulation for which an enormous amount of case law has developed.

With respect to subsection (f)(2)(v), it appears that the references are incorrect if they are intended to refer to offerings under Rule 506 of SEC Regulation D and offerings made under SEC Regulation Crowdfunding. Therefore, it is suggested that subsection (f)(2)(v) read as follows:

(f) ***

(v) Advertisements in connection with the offer or sale of a Federally covered security described in section 18(b)(4)(C) and (E) of the Securities Act of 1933 where the issuer engaged in an offering in good faith reliance on Rule 506(c) of Regulation D or Regulation Crowdfunding.

Proposed Rule 609.010

It does not appear that the reference to subsection (e) in subsection (c) makes any regulatory sense and should be deleted.

Proposed Rule 609.031

For clarity, it is suggested that subsection (a)(5) read as follows:

(a) ***

(4) Financial reports of broker-dealers or investment advisers required by Subpart C (relating to registration of broker-dealers, agents, investment advisers, and investment adviser representatives and notice filings by federally covered advisers)

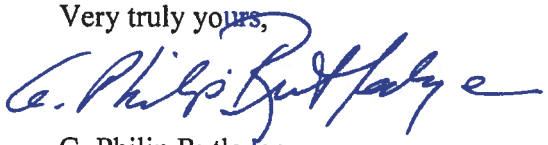
Proposed Rule 609.034

Proposed Rule 609.034(b)(2) and (d) contain references to financial statement requirements with respect to an offering made in reliance on SEC Regulation A which offering is registered under Section 205 of the 1972 Act or Section 206 of the 1972 Act. Due to the availability of the statutory exemption in Section 203(u) of the 1972 Act for offerings made in reliance on SEC Regulation A, it is suggested that subsection (h) be added as set forth below to make it clear that the financial statement requirements referenced in subsection (b) and (d) relating to offerings made in reliance on SEC Regulation A do not apply if the issuer is relying on the exemption provided by Section 203(u).

(h) The provisions of subsection (b)(2) and (c) do not apply where an issuer offers or sells a security in an offering exempt from registration with the Securities and Exchange Commission under Regulation A adopted under the Securities Act of 1933 in good faith reliance on section 203(u) of the act.

Please do not hesitate to contact me if you have any questions concerning any of the comments set forth herein.

Very truly yours,



G. Philip Rutledge