

Comments of the Independent Regulatory Review Commission



Department of Banking and Securities Regulation #3-54 (IRRC #3152)

Securities Regulations Omnibus Amendment

August 31, 2016

We submit for your consideration the following comments on the proposed rulemaking published in the July 2, 2016 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Banking and Securities (Department) to respond to all comments received from us or any other source.

1. Section 102.021. Definitions. – Clarity.

We have two concerns with this section. First, several definitions included in this section of the rulemaking include a reference to the definition as it is defined in the Pennsylvania Securities Act of 1972 (Act) (70 P.S. §§ 1-101 – 1-703.1). These definitions also include other language added by the Department to explain the full meaning of the terms being defined. In order for a person to understand the full meaning of the definition, that person must read the Act and the regulation together. Similarly, some definitions reference a federal rule “or successor rule.” For example, see the definitions for “accredited investor” and “branch office.” We believe the clarity of the rulemaking would be improved if the definitions included the language from the statutory or federal regulatory definitions instead of simply referencing those definitions.

Second, a commentator has identified terms that are used in the body of the regulation, but are not defined in this section of the rulemaking. We agree that clarity could be improved if definitions for the following terms were added to the rulemaking: auditor’s report; aggregate indebtedness; commission (as it relates to compensation); direct participation program; EFD; financial statements; national securities association; national securities exchange; national recognized statistical rating organization; PCAOB; and self-regulatory organization.

2. Section 302.070. Registration exemption for investment advisers to private funds. – Consistency with statutes.

Subsection (e)(2) states that the Department will consider a report filed when the report and fee required under Section 602.1 of the Act (70 P.S. § 1-602.1) are filed and accepted by the Investment Adviser Registration Depository on the Department’s behalf. We note that Section 602.1 of the Act references assessments, not fees. Is the citation to Section 602.1 of the Act

accurate? If it is, we recommend that the terminology in the regulation be aligned with the terminology of the Act.

3. Section 305.019. Dishonest and unethical practices. – Consistency with statutes.

A commentator has noted that Section 305(a)(ix) of the Act (70 P.S. § 1-305(a)(ix)) was amended in 2014 and suggested that Subsection (b) of the rulemaking be amended to reflect the statutory change. We agree with the commentator and, for consistency with the Act, suggest that the phrase, “within the previous 10 years” be added to the end of Subsection (b).

4. Chapter 701. Administrative provisions. – Clarity.

Four new sections are being added to Chapter 701. The sections relate to filing of registration forms, filing of exemption forms, electronic filing, and fees. We have two concerns. First, these sections do not provide specific requirements for the various types of filings. Instead, reference is made to General Instructions that are available on the Department’s website and a requirement to comply with those instructions. While this approach provides flexibility to the Department, it circumvents the regulatory review process because it does not provide an opportunity for interested parties to comment on the General Instructions. The General Instructions would be equivalent to a regulation. However, the Department would be able to amend the instructions at any time without initiating a new rulemaking. We recommend that the final-form rulemaking be amended to include specific details related to the subject matters noted above.

Second, § 701.010a(b) includes a reference to the term “Bureau.” This is an undefined term. We recommend that it either be defined or replaced with the defined term “Department.”