

RULES AND REGULATIONS

Title 64—SECURITIES

SECURITIES COMMISSION

[64 PA. CODE CHS. 202, 203, 301—304 AND 606]

National Securities Markets Improvement Act of 1996 Amendments

Statutory Authority

The Securities Commission (Commission), under the authority contained in sections 202(i), 203(r), 301(b), 302(f), 303(a), (c) and (d), 304(a), (d) and (e), 606(d) and 609(a) of the Pennsylvania Securities Act of 1972 (act) (70 P. S. §§ 1-202(i), 1-203(r), 1-301(b), 1-302(f), 1-303(a), (c) and (d), 1-304(a), (d) and (e), 1-606(d) and 1-609(a)) amends and adopts regulations concerning the subject matter of the act.

Publication of Notice of Proposed Rulemaking

Notice of proposed rulemaking appeared at 31 Pa.B. 4174 (August 4, 2001).

Public Comments

Section 606.031(c)(3)(i)(G) (relating to advertising literature). Although the Commission received no public comments during the 30-day public comment period, it did receive a verbal comment after the close of the public comment period concerning this provision. As proposed, this provision would require a highly specific legend to be placed on all advertisements for securities that had an effective registration statement with the Commission under section 206 of the act (70 P. S. § 1-206) which offering was being made under section 3(a)(4) or (11) of the Securities Act of 1933 (15 U.S.C.A. § 77c(a)(4) and (11)) or Rule 504 (17 CFR 230.504) adopted thereunder. Since Rule 504 and section 3(a)(4) of the Securities Act of 1933 offerings often are made in several states simultaneously, a specific legend requirement may run counter to the Mid-Atlantic Regional Review Protocol of which the Commission is a signatory. The proposal also creates a higher compliance requirement than what currently exists in § 606.031(e)(8). The Commission has no evidence that the existing legend requirement is inadequate and therefore adopted a provision which reflects the current legend requirement.

Comments of the Independent Regulatory Review Commission (IRRC)

Section 303.041 (relating to broker-dealer capital requirements). This new regulation provides that, when Commission representatives are conducting an examination under section 304(d) of the act of the offices of a broker-dealer or investment adviser registered with the Commission, the Commission representatives are to have physical access to all areas where files routinely are kept. By letter dated October 4, 2001, IRRC suggested, that for clarity, the Commission provide examples of the types of files that its representatives would be reviewing during the examination.

In response to IRRC's comments, the Commission, in adopting these final-form regulations, added subsection (b) which describes, without limitation, the types of files that would be subject to review during an examination. These files included all documents required to be kept by Chapter 304 (relating to postregistration provisions), rules of the United States Securities and Exchange

Commission or the National Association of Securities Dealers and any documents relating to these required records.

Persons Affected by the Final-Form Regulations

Nonprofit organizations are affected by the changes to regulations relating to pooled income funds and charitable gift annuities. Another regulation affects Canadian issuers who issue securities to persons covered by certain tax advantaged plans which transactions are effected by Canadian broker-dealers eligible to rely on an exemption from broker-dealer registration in § 302.065 (relating to Canadian broker-dealer exempt). Auctioneers licensed by the State Auctioneer Board are affected by the regulation exempting them from broker-dealer and agent registration. Broker-dealers and agents are affected by the amendments impacting on registration requirements, examination requirements, required books and records retention and net capital requirements. The final-form regulations on advertising affect issuers of securities which may publish an advertisement in this Commonwealth in connection with a securities offering.

Fiscal Impact

The final-form regulations impose no new compliance costs and reduce compliance costs by expanding exemptions, eliminating required filings with the Commission and reducing the amount of information which must be maintained by registrants.

Paperwork

The final-form regulations repeal Forms 302-F1, AU-1 and AU-2 required for auctioneers to claim an exemption from broker-dealer and agent registration for the occasional auctioning of securities. As previously indicated, paperwork will be reduced further by elimination of filing of currently mandated reports and information with the Commission and permitting storage of required records in electronic form.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 13, 2001, the Commission submitted a copy of proposed rulemaking published at 31 Pa.B. 4174 to IRRC and the Chairpersons of the House Committee on Commerce and Economic Development and the Senate Committee on Banking and Insurance for comment and review. In accordance with section 5(b) of the Regulatory Review Act, the Commission provided IRRC and the Committees with a copy of a detailed Regulatory Analysis form prepared in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available upon request.

By letter dated October 4, 2001, IRRC provided the Commission with its comments on the proposed rulemaking. The Commission's response to those comments is contained in this Preamble.

In preparing the final-form regulations, the Commission considered all comments received from the public and IRRC. The final-form regulations were submitted on October 30, 2001, to the House Committee on Commerce and Economic Development, the Senate Committee on Banking and Insurance and IRRC. Final-form regulations were deemed approved by the House Committee on Commerce and Economic Development and the Senate Committee on Banking and Insurance on November 20, 2001. IRRC met on December 6, 2001, and approved the final-form regulations.

Availability in Alternative Formats

The final-form regulations may be made available in alternative formats upon request. TDD users should use the AT&T Relay Center (800) 854-5984. To make arrangements for alternative formats, contact Joseph Shepherd, ADA Coordinator, at (717) 787-6828.

Contact Person

The contact person for an explanation of these final-form regulations is G. Philip Rutledge, Chief Counsel, Securities Commission, Eastgate Building, 1010 N. Seventh Street, 2nd Floor, Harrisburg, PA 17102-1410, (717) 783-5130.

Order

The Commission, acting under the authorizing statute, orders that:

(a) The regulations of the Commission, 64 Pa. Code Chapters 202, 203, 301, 302, 303, 304 and 606 are amended by amending §§ 202.093, 202.095, 301.020, 302.061, 302.064, 303.011, 303.013, 303.031, 303.041, 304.011, 304.021, 304.051 and 606.041; by deleting §§ 302.062 and 606.032—606.034; and adding § 203.202 to read as set forth at 31 Pa.B. 4174; and by adding § 304.041 and by amending § 606.031 to read as set forth in Annex A.

(b) The Secretary of the Commission shall submit this order, 31 Pa.B. 4174 and Annex A to the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Commission shall certify this order, 31 Pa.B. 4174 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

M. JOANNA CUMMINGS,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 31 Pa.B. 6998 (December 22, 2001).)

Fiscal Note: Fiscal Note 50-116 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 64. SECURITIES

PART I. SECURITIES COMMISSION

**Subpart C. REGISTRATION OF
BROKER-DEALERS, AGENTS, INVESTMENT
ADVISERS AND INVESTMENT ADVISER
REPRESENTATIVES AND NOTICE FILINGS BY
FEDERALLY COVERED ADVISERS**

CHAPTER 304. POSTREGISTRATION PROVISIONS

§ 304.041. Examinations of broker-dealers and investment advisers.

(a) In the conduct of an examination authorized under section 304(d) of the act (70 P. S. § 1-304(d)), every broker-dealer and investment adviser registered under the act shall honor all requests by representatives of the Commission to have physical access to all areas of the office which is the subject of the examination and, upon request, shall permit them to review and examine the files in the physical place where the files routinely are maintained. In complying with a request, a representative of the broker-dealer or investment adviser may accompany the representatives of the Commission.

(b) Files referred to in subsection (a) include, but are not limited to, books, ledgers, accounts, records, and electronic files required to be kept by broker-dealers and investment advisers in accordance with this chapter, rules of the United States Securities and Exchange Commission or rules of a National Securities Exchange or National securities association registered with the United States Securities and Exchange Commission, and any document reasonably related to these required records.

Subpart F. ADMINISTRATION

**CHAPTER 606. MISCELLANEOUS POWERS OF
COMMISSION**

§ 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 any advertisement concerning any security in this Commonwealth unless all of the following are met:

(1) The advertisement is either:

(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 prior to 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 Commission under section 205 or 206 of the act (70 P. S. § 1-205 or § 1-206) that has not yet become effective.

(1) In connection with a registration statement filed with the Commission 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 prior to 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 United States Securities and Exchange Commission (SEC).

(iii) A preliminary prospectus which is part of a registration statement that has been filed with the SEC under section 5 of the Securities Act of 1933 which complies with Rule 430 (17 CFR 230.430) (relating to prospectus for use prior to effective date) promulgated by the SEC.

(iv) A summary prospectus which is part of a registration statement that has been filed with the SEC under

section 5 of the Securities Act of 1933 which complies with Rule 431 (17 CFR 230.431) (relating to summary prospectus) promulgated by the SEC.

(2) In connection with an offering circular for the offer and sale of securities in this Commonwealth filed with the SEC 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 Commission 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 SEC prior to effectiveness of the offering circular under the act if the advertisement is filed with the Commission 10 days before publication in this Commonwealth and, prior to the expiration of the 10-day period, the Commission does not issue a letter disallowing its publication in this Commonwealth.

(3) In connection with a registration statement filed with the Commission 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 SEC 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 \$1,000,000) promulgated by the SEC under section 3(b) of the Securities Act of 1933, a person may publish an advertisement in this Commonwealth prior to 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 Securities Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to 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 prior to registration of the securities under the Pennsylvania Securities Act of 1972."

(ii) The advertisement is filed with the Commission 10 days before publication in this Commonwealth and, prior to the expiration of the 10-day period, the Commission does not issue a letter disallowing its publication in this Commonwealth.

(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 Commission 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 SEC under Regulation A (17 CFR 230.251—230.263) promulgated under section 3(b) of the Securities Act of 1933 and with the Commission under section 205 or 206 of the act and has been qualified by the SEC 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 Commission 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 SEC in reliance on section 3(a)(4) or 3(a)(11) of the Securities Act of 1933 and regulations promulgated thereunder or Rule 504 (17 CFR 230.504) promulgated by the SEC 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 Commission 5 days before publication in this Commonwealth and, prior to the expiration of the 5-day period, the Commission does not issue a letter disallowing publication in this Commonwealth.

(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 202(i).* 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)*. 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 thereof and which security represents less than a general obligation of the issuer, a legend adequately describing the limited nature of the obligation shall 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)*. 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 where the Commission, by rule or order, has prohibited use of advertisements as a condition of the availability of the exemption.

(e) *Exempt transactions*. 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.

(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 Commission, by rule or order, has prohibited use of advertisements as a condition of the availability of the exemption.

(f) *Excluded advertisements*. 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) The use of 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 SEC (17 CFR 230.135) (relating to notice of proposed registered offering).

(iii) Advertisements which comply with Rule 135c promulgated by the SEC (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).

(g) *Definitions*. For purposes of this chapter, the following terms have the following meanings:

Advertisement—The meaning in section 102(a) of the act (70 P. S. § 1-102(a)). The term “communication” as used in that definition 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. The term “publicly disseminated” as used in that definition means that the communication has been directed to or, in fact, communicated to more than 50 persons in this Commonwealth.

Publish—The meaning in section 102(p) of the act and includes any form of electronic communication, including Internet and e-mail.

(h) *SEC 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 Commission under section 205 or 206 of the act and with the SEC under section 5 of the Securities Act of 1933 (15 U.S.C.A. § 77e) may rely on the interpretive advice of the SEC in SEC Release No. 33-7856 (April 28, 2000) and subsequent advice given pursuant to that release. To the extent that the interpretive advice contradicts any requirement in subsection (a)(1) or (b)(1), the Commission will not take any enforcement action if the person complies with the interpretive advice.

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