

CHAPTER 609. REGULATIONS, FORMS AND ORDERS

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Cross References

This chapter cited in 10 Pa. Code § 206.010 (relating to registration by qualification).

§ 609.010. Use of prospective financial statements.

(a) Except as set forth in subsection (b), the use of prospective financial statements, including those contained in feasibility studies, is prohibited in connection with offerings registered under sections 205 and 206 of the act (70 P.S. §§ 1-205 and 1-206) or in offerings exempt from registration under section 202(a) or 203(d) of the act (70 P.S. §§ 1-202(a) and 1-203(d)), unless the prospective financial statements used or distributed comply with the act and this section.

(b) The use or distribution of prospective financial statements in connection with the following securities offerings is permissible if it complies with section 401 of the act (70 P.S. § 1-401):

- (1) Offers or sales of securities of reporting companies as the term is defined in section 102(q) of the act (70 P.S. § 1-102(q)).
- (2) Offers and sales of securities made under an exemption not set forth in subsection (b).
- (3) Offers and sales of securities made to experienced private placement investors.
- (4) Offers and sales of securities to an individual, and spouse when purchasing as joint tenants or as tenants by the entirety, if the minimum amount of securities to be purchased in the offering by the individual is \$500,000 or more and the purchase of the securities is for cash or an unconditional obligation to pay cash which obligation is to be discharged within 5 years from the date of sale of the securities.
- (5) Offers and sales of securities to a person 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 one of the following exists:

- (i) The person has purchased \$450,000 or more of the securities for cash or for an unconditional obligation to pay cash which obligation is to be discharged within 5 years from the date of sale of the securities, excluding a purchase of securities of a corporation in which the affiliates of the person directly or beneficially own more than 50% of the corporation's voting securities.
- (ii) The person is purchasing \$500,000 or more of the securities being offered for cash or an unconditional obligation to pay cash which obligation is to be discharged within 5 years from the date of sale of the securities being purchased.
- (6) Offers and sales of securities made to accredited investors as that term is defined in Rule 501(a) (17 CFR 230.501(a)) (relating to definitions and terms used in Regulation D) in Regulation D of the Securities Act of 1933 (15 U.S.C.A. §§ 77a—77aa).
- (c) Except as set forth in subsection (d), prospective financial statements used or distributed in connection with the securities offerings described in subsection (a) must comply with the following requirements:
 - (1) *Assumptions.* Assumptions include:
 - (i) Prospective financial statements must be based on reasonable assumptions and clearly set forth the assumptions made with respect to all material features of the presentation.
 - (ii) With respect to financial projections, the hypothetical assumptions used must be clearly identified and be consistent with the purpose of the presentation. With respect to multiple presentations there must be a preponderance of information to suitably support the amount presented being within the range of the hypothetical assumptions.
 - (2) *Preparation.* Preparation includes:
 - (i) Prospective financial statements shall either be prepared by an independent qualified person-preparer or reviewed by an independent qualified person reviewer. The preparer or reviewer may rely on another preparer or reviewer for the preparation or review of the underlying assumptions or other aspects of the prospective financial statement if the report complies with paragraph (3).
 - (ii) The Department will not recognize a person as a qualified independent reviewer or preparer unless that person can demonstrate adequate knowledge of the industry and the accounting principles and practices of the industry portrayed in the prospective financial statements.
 - (3) *Report.* The report must include:
 - (i) Prospective financial statements accompanied by a report of each preparer or reviewer of the following:
 - (A) The prospective financial statements.
 - (B) The underlying assumptions.
 - (C) Other material aspects of the prospective financial statements.

(ii) With respect to prospective financial statements, the preparer or reviewer's report:

(A) Must include a statement of the work performed, including a review of the assumptions.

(B) May not contain a disclaimer with respect to the reasonableness of the assumptions or the reasonableness of the prospective financial statements.

(C) May not contain language that suggests or implies that the preparer or reviewer vouches for the achievability of the prospective financial statements.

(iii) A report on the preparation or review of the financial projections explicitly describing the hypothetical assumptions on which the projection is based, for example, "assuming the granting of the requested loan to expand the Company's plant as described in the summary of significant assumption(s)."

(4) *Contents of reports with more than one preparer or reviewer.* Collectively, the reports described in paragraph (3) must include a statement of the work performed by each preparer or reviewer and the degree of responsibility each is taking.

(5) *Professional responsibility.* A preparer or reviewer of a prospective financial statement or of the underlying assumptions shall follow the requirements of § 401.020 (relating to professional responsibility).

(6) *Fair presentation.* Prospective financial statements must include material information necessary for a fair presentation including, if applicable:

(i) Sales or gross revenue by sources for each period presented.

(ii) Expenses by classifications for each period presented.

(iii) Provision for income taxes for each period presented.

(iv) Net income for each period presented.

(v) Primary and fully diluted earnings per share of common stock for each period presented.

(vi) A cash flow analysis or a statement of significant changes in financial position for each period presented, including the sources and uses of cash.

(vii) Balance sheets at the beginning and end of the entire period for which prospective financial statements are presented.

(viii) Forecasted or projected annual taxable income or loss with a discussion of the assumptions affecting tax benefits and, if appropriate, alternative forecasted or projected results based on alternative tax treatment.

(ix) Significant accounting principles and policies followed.

(7) *Minimum period.* Prospective financial statements shall cover a minimum period of 3 years. The period must be extended if appropriate to evaluate properly the investment consequences.

(8) *Explanatory notes.* Prospective financial statements must be accompanied by explanatory notes describing significant assumptions made and, if appropriate, referenced to tabular and numerical data and risk factors.

(9) *Conspicuous statement.* Prospective financial statements must be clearly distinguished from historical financial statements and contain a conspicuous statement indicating that it is based on assumptions of the future.

(d) The Department will consider prospective financial statements examined in accordance with the Statement of Standards for Attestation Engagements promulgated by the American Institute of Certified Public Accountants, Inc. (SSAE Statement) to comply with this section if a standard report on an examination prepared in accordance with the SSAE Statement is issued by an independent person.

(e) The primary responsibility for prospective financial statements used or distributed under this section rests with management.

Authority

The provisions of this § 609.010 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, 1-301, 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 § 609.010 adopted December 18, 1981, effective December 19, 1981, 11 Pa.B. 4310; amended November 4, 1983, effective November 5, 1983, 13 Pa.B. 3389; amended July 25, 1986, effective July 26, 1986, 16 Pa.B. 2721; amended June 26, 1987, June 27, 1987, 17 Pa.B. 2607; amended April 28, 1989, effective April 29, 1989, 19 Pa.B. 1848; amended December 8, 2006, effective December 9, 2006, 36 Pa.B. 7456; transferred and renumbered from 64 Pa. Code § 609.010, 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 (364839) to (364843).

Cross References

This section cited in 10 Pa. Code § 203.186 (relating to employee takeovers).

§ 609.011. Amendments to filings with Department.

A person wishing to amend or otherwise ensure that a previously filed application, notice, statement, report or any other document is current and accurate in all material respects shall file with the Department an amendment which meets all of the following conditions:

- (1) The amendment must identify the previously filed document being amended.
- (2) If amending a form promulgated by the Department, the amendment must identify the:
 - (i) Name of the form.
 - (ii) Date the form originally was filed with the Department.

- (iii) Items or schedules of the form which are being amended.

Authority

The provisions of this § 609.011 amended under sections 102(k), 202(h) and (i), 203(r), 204(a), 207(h), (i) and (k), 209(a), 606(a) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-102(k), 1-202(h) and (i), 1-203(r), 1-204(a), 1-207(h), (i) and (k), 1-209(a), 1-606(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 § 609.011 adopted October 11, 1974, effective October 12, 1974, 4 Pa.B. 2174; amended October 10, 1997, effective October 11, 1997, 27 Pa.B. 5255; transferred and renumbered from 64 Pa. Code § 609.011, 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 page (364843).

Cross References

This section cited in 10 Pa. Code § 203.041 (relating to limited offerings); 10 Pa. Code § 203.191 (relating to Rule 505 offerings); 10 Pa. Code § 203.201 (relating to accredited investor exemption); 10 Pa. Code § 205.021 (relating to registration by coordination); and 10 Pa. Code § 206.010 (relating to registration by qualification).

§ 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).

§ 609.031. Application.

(a) This chapter, and constructions and interpretations issued by the Department, set forth the minimum requirements for financial statements included, under the act, as part of the following:

(1) Registration Statements under section 206 of the act (70 P.S. § 1-206).

(2) Registration Statements under section 205 of the act (70 P.S. § 1-205) which are exempt under section 3(b) of the Securities Act of 1933 (15 U.S.C.A. § 77c(b)).

(3) Proxy materials under section 203(o) of the act (70 P.S. § 1-203(o)).

(4) Reports distributed to securityholders under section 606(a) of the act (70 P.S. § 1-606(a)).

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

(6) Exempt transactions under section 203(p) of the act.

(b) Offerings of securities registered under the Securities Act of 1933 (15 U.S.C.A. §§ 77a—77aa), or filings of proxy materials under the Securities Exchange Act of 1934 (15 U.S.C.A. §§ 78a—78qq) which meet the requirements of Reg. S-X, 17 CFR 210.8-01—210.8-03 (relating to preliminary notes to Article 8; annual financial statements; and interim financial statements), adopted by the Securities and Exchange Commission or broker-dealer reports filed under the Securities Exchange Act of 1934 under regulations adopted thereunder are exempted from this chapter, except if otherwise indicated.

(c) References to “registration” under the Securities Act of 1933 are to be construed strictly. By way of illustration the procedure of “notification” under the Regulation A (17 CFR 230.251—230.263) (relating to conditional small issues exemption) will not be recognized as “registration.”

Authority

The provisions of this § 609.031 issued under the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-101—1-704); amended under sections 202(g) and (i), 203(d), (i.1), (j) and (n)—(t), 204(a), 205(b), 207(g), (j.1) and (n), 209(b), 211(a) and (b), 504(d), 513, 603(a), 606(d) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-202(g) and (i), 1-203(d), (i.1), (j) and (n)—(t), 1-204(a), 1-205(b), 1-207(g), (j.1) and (n), 1-209(b), 1-211(a) and (b), 1-504(d), 1-513, 1-603(a), 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 § 609.031 adopted April 25, 1975, effective April 26, 1975, 5 Pa.B. 980; amended October 1, 1982, effective October 2, 1982, 12 Pa.B. 3500; amended December 30, 1999, effective January 1, 2000, 30 Pa.B. 18; transferred and renumbered from 64 Pa. Code § 609.031, 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 page (364845).

§ 609.032. [Reserved].

Authority

The provisions of this § 609.032 issued under the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-101—1-704); reserved 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 § 609.032 adopted April 25, 1975, effective April 26, 1975, 5 Pa.B. 980; amended October 1, 1982, effective October 2, 1982, 12 Pa.B. 3501; amended January 8, 1999, effective January 9, 1999, 29 Pa.B. 202; transferred and renumbered from 64 Pa. Code § 609.032, Decem-

ber 14, 2012, effective December 15, 2012, 42 Pa.B. 7533; reserved January 12, 2018, effective January 13, 2018, 48 Pa.B. 389. Immediately preceding text appears at serial pages (364845) to (364849).

§ 609.033. Accountants.

(a) *Qualification of accountants.*

(1) The Department will not recognize a person:

(i) As a certified public accountant who is not registered and in good standing under the laws of the place of the person's residence or principal office.

(ii) As a public accountant who is not in good standing and entitled to practice under the laws of the place of the individual's residence or principal office.

(2) The Department will not recognize a certified public accountant or public accountant as independent who is not in fact independent. For example, an accountant will be considered not independent with respect to a person, or any of its parents, its subsidiaries or other affiliates in which either of the following applies:

(i) During the period of the accountant's professional engagement to examine the financial statements being reported on or at the date of his report, the accountant or accountant's firm or a firm member had, or was committed to acquire, a direct financial interest or a material indirect financial interest.

(ii) During the period of the accountant's professional engagement to examine the financial statements being reported on, at the date of his report or during the period covered by the financial statements, the accountant or accountant's firm or a firm member was connected as a promoter, underwriter, voting trustee, director, officer or employee.

(3) A firm will be considered independent in regard to a particular person if a former officer or employee of the person is employed by the firm and the individual has completely disassociated himself from the person and its affiliates and does not participate in auditing financial statements of the person or its affiliates covering any period of the individual's employment by the person.

(4) In determining whether an accountant is in fact independent with respect to a particular registrant, the Department will give appropriate consideration to all relevant circumstances including evidence bearing on all relationships between the accountant and the registrant or any affiliate of the registrant, and will not confine itself to the relationships existing in connection with the filing of reports with the Department.

(b) *Accountant's reports.*

(1) *Auditor's report format.* The format of the auditor's report must be in accordance with the reporting standards established by generally accepted auditing standards including Statements on Auditing Standards promulgated by the Auditing Standards Board of the American Institute of Certified Public

Accountants or the auditing standards promulgated by the Public Company Accounting Oversight Board as required under law.

(2) *Accountant's review report format.* The format of the accountant's review report must be in accordance with the reporting standards established by Statements on Standards for Attestation Engagements promulgated by the American Institute of Certified Public Accountants.

(3) *Accountant's compilation report format.* The format of the accountant's compilation report must be in accordance with the reporting standards established by Statements on Standards for Attestation Engagements promulgated by the American Institute of Certified Public Accountants.

(4) *Certain accountant's reports.* Auditor's reports, accountant's review reports or accountant's compilation reports issued by public accountants are not permitted for reports required under § 609.034 (relating to financial statements).

Authority

The provisions of this § 609.033 issued under the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-101—1-704); 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 § 609.033 adopted April 25, 1975, effective April 26, 1975, 5 Pa.B. 980; amended October 1, 1982, effective October 2, 1982, 12 Pa.B. 3500; amended January 8, 1999, effective January 9, 1999, 29 Pa.B. 202; transferred and renumbered from 64 Pa. Code § 609.033, 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 (364849) to (364851).

§ 609.034. Financial statements.

(a) If an issuer proposes to register its securities for sale under section 205 or 206 of the act (70 P.S. §§ 1-205 and 1-206), and for which securities a registration statement has been filed with the Securities and Exchange Commission under section 5 of the Securities Act of 1933 (15 U.S.C.A. § 77e), the issuer shall:

(1) Comply with the financial statement requirements as set forth in the rules and regulations of the Securities and Exchange Commission (17 CFR 210.1-01—210.12-29) (relating to form and content of and requirements for financial statements, Securities Act of 1933, Securities Exchange Act of 1934, Investment Company Act of 1940, Investment Advisers Act of 1940, and Energy Policy and Conservation Act of 1975).

(2) Prepare the financial statements in accordance with generally accepted accounting principles.

(3) Present the financial statements in comparative form.

(b) Except as provided in subsection (d), an issuer shall file the financial statements listed in subsection (c) if one of the following conditions apply:

- (1) The issuer proposes to register its securities for sale under section 206 of the act.
 - (2) The issuer proposes to sell its securities under the exemption contained in Regulation A promulgated under section 3(b) of the Securities Act of 1933 (15 U.S.C.A. § 77c(b)) and proposes to register the securities under section 205 of the act.
 - (3) The issuer proposes to sell its securities under the exemption contained in section 203(p) of the act (70 P.S. § 1-203(p)).
 - (4) The issuer is required to file proxy materials under section 203(o) of the act.
- (c) If required under subsection (b), the issuer shall file the following financial statements, prepared in accordance with generally accepted accounting principles and presented in comparative form:
- (1) A balance sheet of the issuer, dated within 120 days of the date of filing with the Department and comply with either of the following requirements if the balance sheet is not audited:
 - (i) The issuer shall also file an audited balance sheet as of the issuer's last fiscal year.
 - (ii) The issuer shall also file an audited balance sheet as of the end of the issuer's next preceding fiscal year if the issuer's last fiscal year ended within 90 days of the date of filing.
 - (2) Statements of income, stockholders' equity and cash flows for each of 2 fiscal years or less, if the issuer and its predecessors have been in existence for less than 2 years preceding the date of the latest balance sheet filed, and for the period, if any, between the close of the latest of the fiscal years and the date of the latest balance sheet filed.
 - (i) These statements shall be audited up to the date of the latest audited balance sheet filed.
 - (ii) If changes in stockholders' equity accounts are set forth in a note to the financial statements, a separate statement of stockholders' equity does not need to be filed.
 - (3) Consolidated balance sheets, statements of income, stockholders' equity and cash flows complying with the audit requirements in paragraphs (1) and (2) must be filed for the issuer and its subsidiaries in accordance with this section.
 - (4) A balance sheet of the issuer before the reorganization, a column showing the changes to be effected in the reorganization, and a pro forma balance sheet after the reorganization if the issuer is about to undergo a reorganization which will effect substantial changes in its assets, liabilities or capital accounts.
 - (i) The issuer shall explain in a footnote the adjustments made.
 - (ii) If a reorganization has taken place at any time covered by the statements of income filed, the issuer shall explain in a footnote the effect of the reorganization.

(5) A description of the plan of succession, showing in columnar form, the balance sheets of the parties to the transaction, the changes effected or to be effected and the balance sheet of the issuer as a result of the transaction, and statements of income for each of the businesses for the periods covered by paragraph (2), to include a consolidating pro forma statement of income if the issuer has succeeded, or is about to succeed, to one or more businesses, by merger, consolidation or otherwise. This paragraph does not apply to the issuer's succession to the business of any totally-held subsidiary or to the acquisition of subsidiaries not constituting, in the aggregate, a significant subsidiary.

(6) Financial statements for the business as would be required if it were an issuer if the issuer has acquired any business (or the securities of any person giving the issuer control over the person) after the date of its latest balance sheet filed under paragraph (1), or if the issuer proposes to acquire those types of business or securities.

(i) The issuer shall also file pro forma statements of income in columnar form.

(ii) The acquisition of securities which will extend the issuer's control over another person is considered the acquisition of a business if the securities being registered under section 206 of the act are to be offered for the securities to be acquired, or if the purpose of the proxy statement is to effectuate the acquisition.

(iii) Financial statements do not need to be filed under this paragraph for any acquisition from a totally-held subsidiary.

(iv) Statements of businesses may be omitted if, considered in the aggregate as a single subsidiary, they would not constitute a significant subsidiary, except that the statements may not be omitted when the securities being registered under section 206 of the act are to be offered in exchange for the securities to be acquired, or if the purpose of the proxy statement is to effectuate the acquisition.

(7) The registration statement with summary statements for each of the 3 most recent fiscal years and for the period from the date of the end of the latest fiscal year to the date of the latest balance sheet filed if an issuer proposes to register its securities under section 206 of the act. The summary statements of income required in this paragraph are in addition to the financial statements required under paragraph (2).

(d) If an issuer proposes to register its equity securities for sale under section 206 of the act, which securities are exempt from registration under section 5 of the Securities Act of 1933 under an exemption contained in section 3(a)(11) of the Securities Act of 1933, or Regulation A or Rule 504 of Regulation D promulgated under section 3(b) of the Securities Act of 1933, the issuer shall file the financial statements required under subsection (c) except that the financial statements may be reviewed by an independent certified public accountant in accor-

dance with the standards established by the American Institute of Certified Public Accountants or the Canadian equivalent if:

- (1) The amount of the present offering does not exceed \$1 million.
- (2) The issuer previously has not sold securities through an offering involving the general solicitation of prospective investors by means of advertising, mass mailings, public meetings, “cold call” telephone solicitation or any other method directed toward the public.
- (3) The issuer previously has not been required under Federal, State, provincial or territorial securities laws to provide audited financial statements in connection with any sale of its securities.
- (4) The aggregate amount of all previous sales of securities by the issuer (exclusive of debt financing with banks and similar commercial lenders) does not exceed \$1 million.
- (e) The financial statements required under subsections (c) and (d) must be included in the prospectus or offering circular distributed to offerees in this Commonwealth.
- (f) For purposes of this subsection, the Department used the corporate form of financial statement title, but because financial statement title terminology may differ for other types of accounting entities, including nonprofit organizations, those entities shall include the analogous financial statements.
- (g) If consistent with the protection of investors, the Department may:
 - (1) Permit the omission of one or more of the financial statements required under this section or the filing in substitution of appropriate statements of comparable character.
 - (2) Require the filing of other financial statements in addition to, or in substitution for, the financial statements required under this section or when the financial statements are necessary for an adequate presentation of the financial condition of the issuer.
- (h) Subsections (b)(2) and (c) do not apply when an issuer offers or sells a security in an offering exempt from registration with the Securities and Exchange Commission under Tier 2 of Regulation A adopted under the Securities Act of 1933 (15 U.S.C.A. §§ 77a—77aa) in good faith reliance on section 203(u) of the act.

Authority

The provisions of this § 609.034 issued under the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-101—1-704); amended under sections 202(g) and (i), 203(d), (i.1), (j) and (n)—(t), 204(a), 205(b), 207(g), (j.1) and (n), 209(b), 211(a) and (b), 504(d), 513, 603(a), 606(d) and 609(a) of the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-202(g) and (i), 1-203(d), (i.1), (j) and (n)—(t), 1-204(a), 1-205(b), 1-207(g), (j.1) and (n), 1-209(b), 1-211(a) and (b), 1-504(d), 1-513, 1-603(a), 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 § 609.034 adopted April 25, 1975, effective April 26, 1975, 5 Pa.B. 980; amended October 1, 1982, effective October 2, 1982, 12 Pa.B. 3503; amended January 8, 1999, effective January 9, 1999, 29 Pa.B. 202; amended December 30, 1999, effective January 1, 2000, 30 Pa.B. 18; transferred and renumbered from 64 Pa. Code § 609.034, 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 (364851) to (364853).

Cross References

This section cited in 10 Pa. Code § 203.161 (relating to debt securities of nonprofit organizations); and 10 Pa. Code § 609.033 (relating to accountants).

§ 609.035. [Reserved].**Source**

The provisions of this § 609.035 adopted April 25, 1975, effective April 26, 1975, 5 Pa.B. 980; reserved October 1, 1982, effective October 2, 1982, 12 Pa.B. 3503; transferred and renumbered from 64 Pa. Code § 609.035, December 14, 2012, effective December 15, 2012, 42 Pa.B. 7533. Immediately preceding text appears at serial page (262500).

§ 609.036. Financial statements; annual reports.**(a) Distribution and auditing.**

(1) If an issuer is required under the act and this title to distribute financial information to securityholders, it must include all of the following financial statements:

(i) Balance sheets, statements of income, stockholders' equity and cash flows all in comparative form, for the issuer's last 2 fiscal years.

(ii) Consolidated financial statements of the issuer and its subsidiaries, or both, in comparative form, for the issuer's last 2 fiscal years.

(2) The financial statements shall be audited and prepared in conformity with generally accepted accounting principles applied consistently with past periods or noting any changes, except that the financial statements do not need to be audited if the issuer is permitted by this title or by the Department to distribute unaudited financial information to securityholders.

(b) *Form of financial statement.* For purposes of this section, the Department used the corporate form of financial statement title, but because financial statement title terminology may differ for other types of accounting entities, including nonprofit organizations, those entities shall include the analogous financial statements.

Authority

The provisions of this § 609.036 issued under the Pennsylvania Securities Act of 1972 (70 P.S. §§ 1-101—1-704); 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 § 609.036 adopted April 25, 1975, effective April 26, 1975, 5 Pa.B. 980; amended June 20, 1975, effective June 21, 1975, 5 Pa.B. 1593; amended October 1, 1982, effective October 2, 1982, 12 Pa.B. 3502; amended January 8, 1999, effective January 9, 1999, 29 Pa.B. 202; transferred and renumbered from 64 Pa. Code § 609.036, 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 (364854).

§ 609.037. Foreign financial statements.

(a) Under section 609(c) of the act (70 P.S. § 1-609(c)), financial statements and financial information prepared in accordance with Canadian generally accepted accounting principles, consistently applied, may be distributed to the public if a registration statement designated as Form F-7, F-8, F-9 or F-10 by the Securities and Exchange Commission has been filed with the Department under section 205 or 206 of the act (70 P.S. §§ 1-205 and 1-206) and all of the following apply:

- (1) The securities which are the subject of the registration statement designated as Form F-9 by the Securities and Exchange Commission are either non-convertible preferred stock or nonconvertible debt which are to be rated in one of the four highest rating categories by one or more Nationally recognized statistical rating organizations.
- (2) The securities which are the subject of a registration statement designated as Form F-7 by the Securities and Exchange Commission are offered for cash on the exercise of rights granted to existing securityholders.
- (3) The securities which are the subject of a registration statement designated as Form F-8 by the Securities and Exchange Commission are securities to be issued in an exchange offer.
- (4) The securities which are the subject of a registration statement designated as Form F-10 by the Securities and Exchange Commission are offered and sold pursuant to a prospectus in which the Securities and Exchange Commission has not required a reconciliation to United States generally accepted accounting principles with respect to the financial information presented therein.

(b) For purposes of this section, preferred stock and debt securities which are not convertible for at least 1 year from the date of effectiveness of the registration statement will be considered to meet the requirement of subsection (a)(1).

Authority

The provisions of this § 609.037 issued under section 609 of the Pennsylvania Securities Act of 1972 (70 P.S. § 1-609); 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 § 609.037 adopted July 6, 1990, effective July 28, 1990, 20 Pa.B. 3689 and 4089; transferred and renumbered from 64 Pa. Code § 609.037, 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 (364854) to (364855).

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