

**CHAPTER 609. REGULATIONS, FORMS AND ORDERS**

Sec.

- 609.010. Use of prospective financial statements.
- 609.011. Amendment to filings with Commission.
- 609.012. Computing the number of offerees, purchasers and clients.
- 609.031. Application.
- 609.032. Definitions.
- 609.033. Accountants.
- 609.034. Financial statements.
- 609.035. [Reserved].
- 609.036. Financial statements; annual reports.
- 609.037. Foreign financial statements.

**§ 609.010. Use of prospective financial statements.**

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

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

*Financial forecast*—A prospective financial statement that presents, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations and changes in financial position. A financial forecast is based on the responsible party's assumptions reflecting conditions it expects to exist and the course of action it expects to take.

*Financial projection*—A prospective financial statement that presents, to the best of the responsible party's knowledge and belief, given one or more hypothetical assumptions, an entity's expected financial position, results of operations and changes in financial position. A financial projection is sometimes prepared to present one or more hypothetical courses of action for evaluation, as in response to questions such as "What would happen if . . . ?" A financial projection is based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken, given one or more hypothetical assumptions.

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

*Independent*—A person—regardless of whether the person is a Certified Public Accountant—may not be considered independent if the person is not independent under Rule 101 of the Code of Professional Ethics of the American Institute of Certified Public Accountants, Inc. or under the interpretations adopted thereunder.

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

(b) Except as set forth in subsection (c), the use of prospective financial statements, including those contained in feasibility studies, are prohibited in con-

nection 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) or 1-203(d)), unless the prospective financial statements utilized or distributed comply with the act and this section.

(c) 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 as that term is defined in § 204.010(d)(1) (relating to increasing number of purchasers and offerees).

(4) Offers and sales of securities to an individual—and spouse when purchasing as joint tenants or as tenants by the entireties—where 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 for the purpose of purchasing, 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—77z-3).

(d) Except as set forth in subsections (e) and (f), prospective financial statements utilized or distributed in connection with the securities offerings described in subsection (b) shall comply with the following requirements:

(1) *Assumptions.* Assumptions include:

(i) Prospective financial statements shall be based upon reasonable assumptions and shall 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 shall be clearly identified and shall be consistent with the purpose of the presentation. With respect to multiple presentations there shall 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 Commission will not recognize a person as a qualified independent reviewer or preparer unless that person can demonstrate that the person has adequate knowledge of the industry and the accounting principles and practices of the industry portrayed in the prospective financial statements.

(3) *Report.* Report shall include:

(i) Prospective financial statements shall be 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 shall include a statement of the work performed—which shall include a review of the assumptions. The report may not contain a disclaimer with respect to the reasonableness of the assumptions or the reasonableness of the prospective financial statements. The report 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 should explicitly describe the hypothetical assumptions on which the projection is based, for example, “assuming the granting of the requested loan for the purpose of expanding 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) shall 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 be mindful of § 401.020 (relating to professional responsibility).

(6) *Fair presentation.* Prospective financial statements shall include material information necessary for a fair presentation including, by way of illustration, 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 ordinarily cover a minimum period of 3 years. The period shall be extended where appropriate to evaluate properly the investment consequences.

(8) *Explanatory notes.* Prospective financial statements shall 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 shall be clearly distinguished from historical financial statements and shall contain a conspicuous statement indicating that it is based on assumptions of the future.

(e) Prospective financial statements examined in accordance with the *Statement of Standards for Accountants' Services on Prospective Financial Information* promulgated by the American Institute of Certified Public Accountants, Inc. (AICPA Statement) shall be deemed to comply with this section where a standard report on an examination prepared in accordance with the AICPA Statement, is issued by an independent person.

(f) The primary responsibility for prospective financial statements utilized 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); and the Takeover Disclosure Law (70 P. S. § 74).

**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. Immediately preceding text appears at serial pages (317669) to (317672) and (268879).

**Cross References**

This section cited in 64 Pa. Code § 203.186 (relating to employe takeovers).

**§ 609.011. Amendments to filings with Commission.**

Whenever an application, notice, statement, report or any other document (Document) has been filed with the Commission and the person who filed the Document wishes to amend or otherwise ensure that the Document is current and accurate in all material respects, the person shall make a filing with the Commission constituting the amendment which also shall identify the Document being amended including, with respect to an amendment to a form promulgated by the Commission, the name of the form, the date the form originally was filed with the Commission and the 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), 2-202(h) and (i), 2-203(r), 2-204(a), 2-207(h), (i) and (k), 2-209(a), 6-606(a) and 6-609(a)).

**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. Immediately preceding text appears at serial pages (148433) to (148436).

**Cross References**

This section cited in 64 Pa. Code § 203.041 (relating to limited offerings); 64 Pa. Code § 203.191 (relating to SEC Rule 505 offerings); 64 Pa. Code § 203.201 (relating to accredited investor exemption); 64 Pa. Code § 205.021 (relating to registration by coordination); and 64 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 Commission, for the purpose of providing 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 the following apply:

(1) A person who is offered or purchases securities or becomes a client shall count as a separate offeree, purchaser or client, unless the person is otherwise specifically excluded under this section.

- (2) Where more than one person, related by blood or marriage, are offerees, purchasers or clients, the persons shall be counted as one offeree, purchaser or client if they either:
- (i) Reside in the same household.
  - (ii) Are under the age of 18.
- (3) As used in this section, the term “entity” means a corporation, partnership, association, joint stock company, trust, estate or unincorporated association.
- (4) An entity shall be counted as one person, and a direct or beneficial owner of equity interests or equity securities in the entity shall not be 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 for the specific purpose of acquiring the securities being offered or purchased.
  - (ii) With respect to computing clients, where 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 upon the investment decisions of the direct or beneficial owners rather than upon the investment objectives of the entity.
- (5) Notwithstanding the provisions of paragraph (4)(i), in the case of a trust where 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—shall count only as one offeree, purchaser or client. Multiple trusts shall be counted as one offeree, purchaser or client if all of the beneficiaries are related by blood or marriage.
- (6) Notwithstanding the provisions of paragraph (4)(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 entity shall be counted as one person and the owners of the interests or securities in the entity shall not be 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)).

#### **Source**

The provisions of this § 609.012 adopted March 27, 1987, effective March 28, 1987, 17 Pa.B. 1304.

#### **609-6**

**Cross References**

This section cited in 64 Pa. Code § 203.187 (relating to small issuer exemption); and 64 Pa. Code § 203.189 (relating to isolated exemption).

**§ 609.031. Application.**

(a) This chapter, together with the constructions and interpretations hereof as the Commission may issue from time to time, sets 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) (70 P. S. § 1-606(a)).
- (5) Broker-Dealer and Investment Adviser Financial Reports.
- (6) Exempt transactions under section 203(p) of the act (70 P. S. § 1-203(p)).

(b) Offerings of securities registered under the Securities Act of 1933 (15 U.S.C.A. §§ 77a—77z-3), or filings of proxy materials under the Securities Exchange Act of 1934 (15 U.S.C.A. §§ 78a—78mm) which meet the requirements of Reg. S-X, 17 CFR 210.8-01—210.8-03 (1974), adopted by the United States Securities and Exchange Commission (“S-X”) or broker-dealer reports filed under the Securities Exchange Act of 1934 under regulations adopted thereunder shall be exempted from this chapter, except where 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” of that act 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)).

**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. Immediately preceding text appears at serial pages (234946) and (252171).

**Cross References**

This section cited in 64 Pa. Code § 606.034 (relating to advertising of securities issued or guaranteed by banks or credit unions).

**§ 609.032. Definitions.**

(a) Unless the context otherwise requires, or unless specific language otherwise controls, the following terms apply any time financial information is required to be filed under the act or under this title:

*Accountant's report*—A document in which an independent certified public accountant indicates the scope of the audit the accountant has made and sets forth the accountant's opinion regarding the financial statements taken as a whole, or an assertion to the effect that an overall opinion cannot be expressed. When an overall opinion cannot be expressed, the reasons therefor shall be stated.

*Amount*—When used in regard to securities, the principal amount if relating to evidence of indebtedness, the number of shares if relating to shares and the number of units if relating to any other kind of security.

*Audit*—Audited and reported upon with an opinion expressed by an independent certified public accountant.

*Audit or examination*—An audit of the statements by a certified public accountant in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon.

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

*Comparative financial statements*—Financial statements in which data for 2 or more years are presented in adjacent columnar form.

*Date of filing*—The date on which the financial statements or any material amendment thereto are received in the Harrisburg office of the Commission.

*Development stage company*—A company devoting substantially all of its efforts to establishing a new business with either of the following conditions existing: planned principal operations have not commenced, or planned principal operations have commenced but there has been no significant revenue therefrom.

*Equity security*—Any stock or similar security (including interests in a limited liability company); or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right.

*Fifty-percent, owned person*—In relation to a specified person, a person approximately 50% of whose outstanding voting shares is owned by the specified person either directly or indirectly through one or more intermediaries.

*Fiscal year*—The annual accounting period, or if no closing date has been adopted, the calendar year ending on December 31.

*Going concern disclosure*—The disclosure of substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year contained in the auditor’s report based upon the criteria contained in the Statement on Auditing Standard 59 promulgated by the American Institute of Certified Public Accountants.

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

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

*Material*—When used to qualify a requirement for the furnishing of information as to any subject, means or refers to the magnitude of an omission or misstatement of information that, in the light of surrounding circumstances, makes it probable that the judgement of an average prudent investor would have been changed or influenced by the omission or misstatement.

*Note or footnote*—When used in regard to financial statements, a clear and concise disclosure of information, including information necessary to make any item or entry contained in a financial statement not misleading, cross referenced specifically, if practicable, to an item or entry in a financial statement. A note shall be prepared in conformity with generally accepted accounting principles and practices.

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

*Principal holder of equity securities*—When used in respect of a registrant or other person named in a particular statement or report, a holder of record or a known beneficial owner of more than 10% of any class of equity securities of the registrant or other person, respectively, as of the date of the related balance sheet filed.

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

*Related parties*—The registrant; its affiliates; principal owners, management, and members of their immediate families; entities for which investments are accounted for by the equity method; and any other party with which the reporting entity may deal when one party has the ability to significantly influence the management or operating policies of the other to the extent that one of the transacting parties might be prevented from fully pursuing its own separate interests. Related parties also exist when another entity has the ability to significantly influence the management or operating policies of the transacting parties or when another entity has an ownership interest in one of the transacting parties and the ability to significantly influence the other to the extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests. For purposes of this definition, “principal owner”

means the owners of record or known beneficial owners of more than 10% of the voting interests of the reporting entity, and “management” means a person having responsibility for achieving the objectives of the organization and the concomitant authority to establish the policies and to make the decisions by which the objectives are to be pursued.

*Review*—A review of the statements by a certified public accountant in accordance with the Statements on Standards for Accounting and Review Services promulgated by the American Institute of Certified Public Accountants, and on the basis of that review, the accountant is not aware of any material modifications that should be made to the financial statements for the financial statements to be in conformity with generally accepted accounting principles, except for those modifications, if any, described in the review report.

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

*Share*—A share of stock in a corporation or unit of interest in an unincorporated person.

*Significant subsidiary*—A subsidiary, or a subsidiary and its subsidiaries, which meet any of the conditions described in this definition based on the most recent annual financial statements, including consolidated financial statements, of the subsidiary which would be required to be filed if the subsidiary were a registrant and the most recent annual consolidated financial statements of the registrant being filed:

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

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

(iii) The parent’s and its other subsidiaries’ equity in the income before income taxes and extraordinary items of the subsidiary exceeds 10% of the income of the parent and its consolidated subsidiaries; however, if the income of the parent and its consolidated subsidiaries is at least 10% lower than the average of the income for the last five fiscal years, the average income may be substituted in the determination.

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

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

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

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

(iii) Deferred charges including debt issue costs.

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

(v) All other assets of an intangible nature including, but not limited to, goodwill, patents, copyrights, franchises, distribution rights, intellectual property rights, leasehold improvements, licensing agreements, noncompete covenants, customer lists, trade names, trademarks and organization costs.

*Totally-held subsidiary*—A subsidiary substantially all of whose outstanding equity securities are owned by its parent or the parent's other totally-held subsidiaries or both, and which is not indebted to any person other than its parent or the parent's other totally-held subsidiaries or both, in an amount which is material in relation to the particular subsidiary, excepting indebtedness incurred in the ordinary course of business which is not overdue and which matures within one year from the date of its creation, whether evidenced by securities or not, and excluding indebtedness of a subsidiary which is secured by its parent by guarantee, pledge, assignment or otherwise.

*Voting shares*—The sum of all rights, other than as affected by events of default, to vote for election of directors or the sum of all interests in an unincorporated person.

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

#### Authority

The provisions of this § 609.032 issued under the Pennsylvania Securities Act of 1972 (70 P. S. §§ 1-101—1-704).

#### 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. Immediately preceding text appears at serial pages (234947) to (234951).

**Cross References**

This section cited in 64 Pa. Code § 202.092 (relating to guaranties of debt securities exempt).

**§ 609.033. Accountants.**

(a) Qualifications of accountants shall be in accordance with the following:

(1) The Commission will not recognize any person as a certified public accountant who is not registered and in good standing as such under the laws of the place of such person's residence or principal office. The Commission will not recognize any person as a public accountant who is not in good standing and entitled to practice as such under the laws of the place of his residence or principal office.

(2) The Commission will not recognize any 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 any person, or any of its parents, its subsidiaries or other affiliates in which, during the period of his professional engagement to examine the financial statements being reported on or at the date of his report, he or his firm or a member thereof had, or was committed to acquire, any direct financial interest or any material indirect financial interest; or with which, during the period of his 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, he or his firm or a member thereof was connected as a promoter, underwriter, voting trustee, director, officer or employee, except that a firm will not be deemed not independent in regard to a particular person if a former officer or employe of such person is employed by the firm and such 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 his employment by the person. For the purposes of this subsection the term "member" means all partners and principals in the firm; and all professional employes participating in the audit or located in an office of the firm participating in a significant portion of the audit.

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

(b) Accountant's reports shall be in accordance with the following:

(1) *Auditor's report format.* The format of the auditor's report shall 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.

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

(3) *Accountant's compilation report format.* The format of the accountant's compilation report shall be in accordance with the reporting standards established by Statements on Standards for Accounting and Review Services 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 by § 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).

#### 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. Immediately preceding text appears at serial pages (234947) to (234952).

### § 609.034. Financial statements.

(a) When an issuer proposes to register its securities for sale under section 205 or section 206 of the act (70 P. S. §§ 1-205 and 1-206), and for which a registration statement has been filed with the United States Securities and Exchange Commission (SEC) under section 5 of the Securities Act of 1933 (15 U.S.C.A. § 77e), the issuer shall comply with the financial statement requirements as set forth in the rules and regulations of the SEC (17 CFR 210.1-01—210.12-29), all of which shall be prepared in accordance with generally accepted accounting principles and presented in comparative form.

(b) Except as provided in subsection (c), when an issuer proposes to register its securities for sale under section 206 of the act, when an 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, or when an issuer proposes to sell its securities under the exemption contained in section 203(p) of the act (70 P. S. § 1-203(p)), or when an issuer is required to file proxy materials under section 203(o) of the act (70 P. S. § 1-203(o)), it shall file the following financial statements, all of which shall be 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 Commission. If the balance sheet is not audited, there shall be filed, in addition, an audited balance sheet as of the issuer's last fiscal year,

unless the last fiscal year ended within 90 days of the date of filing, in which case there shall be filed an audited balance sheet as of the end of the issuer's next preceding fiscal year.

(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, except that issuers offering interests in a direct participation program and any corporation which has or intends to have significant oil and gas operations must file the statements for each of 3 fiscal years. These statements shall be audited up to the date of the latest audited balance sheet filed. However, if changes in stockholders' equity accounts are set forth in a note to the financial statements, a separate statement of stockholders' equity need not be filed.

(3) Consolidated balance sheets, statements of income, stockholders' equity, and cash flows complying with the audit requirements in paragraphs (1) and (2) should be filed for the issuer and its subsidiaries in accordance with this section.

(4) If the issuer is about to undergo a reorganization which will effect substantial changes in its assets, liabilities or capital accounts, include a balance sheet of the issuer prior to the reorganization, a column showing the changes to be effected in the reorganization, and a pro forma balance sheet after the reorganization. Explain in a footnote the adjustments made. If a reorganization has taken place at any time covered by the statements of income filed, explain in a footnote the effect thereof.

(5) If the issuer has succeeded, or is about to succeed, to one or more businesses, by merger, consolidation or otherwise, describe the plan of succession, show, 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. 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) If the issuer acquired any business (or the securities of any person giving the issuer control over such person) after the date of its latest balance sheet filed pursuant to paragraph (1), or if the issuer proposes to acquire such a business or securities, include financial statements for such business as would be required if it were an issuer. There shall also be filed pro forma statements of income in columnar form. The acquisition of securities which will extend the issuer's control over another person shall be deemed the acquisition of a business if the securities being registered under section 206 of the act (70 P. S. § 1-206) are to be offered for the securities to be acquired, or if the purpose of

the proxy statement is to effectuate such acquisition. No financial statements need be filed under this paragraph for any acquisition from a totally-held subsidiary. Statements of businesses may be omitted if, considered in the aggregate as a single subsidiary, they would not constitute a significant subsidiary, except that such statements may not be omitted when the securities being registered under section 206 of the act (70 P. S. § 1-206) are to be offered in exchange for the securities to be acquired, or if the purpose of the proxy statement is to effectuate such acquisition.

(7) For an issuer proposing to register its securities under section 206 of the act, the registration statement shall contain 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. The summary statements of income required in this paragraph are in addition to the financial statements required under paragraph (2).

(c) When 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 by subsection (b) except that the financial statements may be reviewed by an independent certified public accountant in accordance 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.

(d) The financial statements required by subsections (b) and (c) shall be included in the prospectus or offering circular distributed to offerees in this Commonwealth.

(e) For purposes of this subsection, the corporate form of financial statement title has been used. Financial statement title terminology may differ for other types of accounting entities, including not-for-profit organizations. In this case, the analogous financial statements of those entities should be included.

(f) When consistent with the protection of investors, the Commission may permit the omission of one or more of the financial statements required by this

section or the filing in substitution therefor of appropriate statements of comparable character. The Commission, by order, also may require the filing of other financial statements in addition to, or in substitution for, the financial statements required by this section or when the financial statements are necessary for an adequate presentation of the financial condition of the issuer.

#### 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)).

#### 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. Immediately preceding text appears at serial pages (252177) to (252180).

#### Cross References

This section cited in 64 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. Immediately preceding text appears at serial pages (25345) to (25346).

### § 609.036. Financial statements; annual reports.

#### (a) *Distribution and auditing.*

(1) When an issuer is required under the act and this title to distribute financial information to securityholders, it shall include the following financial statements as a part thereof:

(i) Financial statements to include 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 parent or 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. The financial statements need not be audited when the issuer is permitted by this title or by order of the Commission to distribute unaudited financial information to securityholders.

(b) *Form of financial statement.* For purposes of this section, the corporate form of financial statement title is used. Financial statement title terminology may differ for other types of accounting entities including not-for-profit organizations. In this case, the analogous financial statements of those entities should be included.

#### Authority

The provisions of this § 609.036 issued under the Pennsylvania Securities Act of 1972 (70 P. S. §§ 1-101—1-704).

#### 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. Immediately preceding text appears at serial pages (234955) to (234956).

### § 609.037. Foreign financial statements.

(a) Under section 609(c) of the act (70 P. S. § 1-609(c)), the Commission has determined that financial statements and financial information which have been prepared in accordance with Canadian generally accepted accounting principles, consistently applied, may be distributed to the public if:

(1) A registration statement has been filed with the Commission under section 205 or 206 of the act (70 P. S. §§ 1-205 and 1-206) which registration statement has been designated as Form F-7, F-8, F-9 or F-10 by the United States Securities and Exchange Commission (SEC).

(2) The securities which are the subject of the registration statement designated as Form F-9 by the SEC are either nonconvertible 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.

(3) The securities which are the subject of a registration statement designated as Form F-7 by the SEC are offered for cash upon the exercise of rights granted to existing securityholders.

(4) The securities which are the subject of a registration statement designated as Form F-8 by the SEC are securities to be issued in an exchange offer.

(5) The securities which are the subject of a registration statement designated as Form F-10 by the SEC are offered and sold pursuant to a prospectus in which the SEC 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 deemed to meet the requirement of subsection (a)(2).

**Authority**

The provisions of this § 609.037 issued under section 609 of the Pennsylvania Securities Act of 1972 (70 P. S. § 1-609).

**Source**

The provisions of this § 609.037 adopted July 6, 1990, effective July 28, 1990, 20 Pa.B. 3689 and 4089.

[Next page is 610-1.]