INVESTMENT COMPANY INSTITUTE

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May 23, 2011

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations
Securities Division, Room 1701
One Ashburton Place
Boston, MA 02108

Re: Proposed Revisions to Rule 12.205 Defining Advisers' Dishonest and Unethical Practices

Dear Person:

The Investment Company Institute* is writing to comment on the proposed amendment to 950 CMR 12.205(9)(c), which is a non-exclusive list of practices that, when engaged in by an investment adviser, constitutes a "dishonest or unethical conduct or practices in the securities business." The Office of the Secretary of the Commonwealth (the Secretary's Office") has proposed to add a new subdivision (16) to this list relating to an adviser's use of "Matching or Expert Network Services." The Institute recommends that the Secretary's Office clarify during this rulemaking that subdivision (16) will not be applied to Federally-registered investment advisers. Our legal basis for this recommendation is set forth below.

RULE 950 CMR 12.205(9)(C)(16), USE OF MATCHING OR EXPERT NETWORK SERVICES

As noted above, Rule 12.205(9)(c) sets for a non-exclusive list of practices that are considered dishonest or unethical conduct or practices in the securities business. Advisers engaging in any conduct on this list may be subject to regulatory sanctions under the Massachusetts Uniform Securities Act. As used in Rule 12.205(9), the term "adviser" includes state-registered investment advisers, Federally-registered investment advisers, and persons that receive compensation for providing investment advice but are excluded from registration under the Act.

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* The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.1 trillion and serve over 90 million shareholders.

Under the proposal, an adviser would be engaging in a dishonest or unethical practice or conduct if it retains consulting services for compensation that are provided through a matching or expert network service unless it obtains a written certification. This certification, which must be signed by the consultant, must: (1) describe all confidentiality restrictions that the consultant has or reasonably expects to have regarding confidential information and (2) affirmatively state that the consultant will not provide any confidential information to the adviser. In the absence of this rule, failure to have the proposed certification would not *per se* be unethical or dishonest conduct.

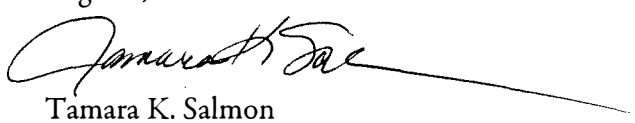
LIMITS ON STATE AUTHORITY UNDER THE INVESTMENT ADVISERS ACT OF 1940

As amended by the National Securities Markets Improvement Act of 1996 ("NSMIA"), Section 203A of the Investment Advisers Act of 1940 contains very real and enforceable limits on every state's jurisdiction over Federally-registered investment advisers. Specifically, aside from permitting states to require notice filings from Federally-registered advisers, this provision expressly limits each state's authority over such advisers to "investigating and bringing enforcement actions with respect to fraud or deceit." In others words, states lack the lawful authority to impose *any* conditions on how Federally-registered investment advisers conduct their business. To the extent such adviser engages in fraudulent or deceitful conduct, states may investigate the adviser's conduct and sanction it. States may not, however, regulate Federally-registered advisers' conduct by deeming conduct that is not *per se* fraudulent or deceitful to be so.

Importantly, Section 203A of the Investment Advisers Act trumps any inconsistent provision in or under state law. Because application of the proposed amendments to Rule 12.205(9)(c) would not be lawful under NSMIA, we strongly recommend that, in adopting this new provision, the Secretary's Office clarify that Federally-registered advisers are not required to obtain the required written certifications. This revision will avoid the Secretary's Office adopting rules that are not consistent with its authority under Federal law.

The Institute appreciates the opportunity to provide these comments. If you have any questions concerning them, please do not hesitate to contact the undersigned at 202-326-5825.

Regards,



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