

| ±950 CMR 12.200: REGISTRATION OF BROKER-DEALER, AGENTS, INVESTMENT
ADVISER, INVESTMENT ADVISER REPRESENTATIVES AND NOTICE
FILING PROCEDURES FOR FEDERAL COVERED ADVISERS

Section

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12.205: Investment Advisers and Federal Covered Advisers

(1) Definition of Investment Adviser.

(a) 950 CMR 12.205(1) shall cover the exclusions from the definition of investment adviser, as set forth in M.G.L. c. 110A, § 401(m) (**Note:** These definitions cover only the exclusions from the definition of investment adviser and do not pertain to other parts of the regulations):

1. Incidental shall mean occurring as a fortuitous or minor concomitant.
2. An investment adviser exercises investment discretion with respect to an account if, directly or indirectly, the investment adviser:
 - a. Is authorized to determine what securities or other property shall be purchased or sold by or for the account; or
 - b. Makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person (including the client) may have responsibility for those investment decisions.

3. The Registered Broker-dealer Agent exclusion from the definition of "investment adviser" shall apply only to activities performed within the scope of the agency relationship, *i.e.*, to activities of the agent performed under the control and supervision of the broker-dealer. **Note:** If an agent conducts an investment advisory business outside the control and supervision of the registered broker-dealer, that agent cannot claim the exclusion from the definition of investment adviser by virtue of being a registered agent of such broker-dealer.

4. Qualified Institutional Buyer shall be defined as set forth in 17 CFR 230.144A(a)(1).

5. Affiliate of a qualified institutional buyer (QIB) means a person that directly, or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the QIB.

6. Institutional Buyer, for the purposes of M.G.L. c. 110A, § 401(m), shall include any of the following:

a. An organization described in Section 501(c)(3) of the Internal Revenue Code with a securities portfolio of more than \$25 million.

b. An investing entity:

i. whose only investors are accredited investors as defined in Rule 501(a) under the Securities Act of 1933 (17 CFR 230.501(a)) each of whom has invested a minimum of \$50,000; and

ii. the subject fund existed prior to February 3, 2012; and

iii. as of February 3, 2012, the subject fund ceased to accept new beneficial owners.

iv. 950 CMR 12.205(1)(a)6.b. shall be enforced as of August 3, 2012.

c. An investing entity whose only investors are financial institutions and institutional buyers as set forth in M.G.L. c. 110A, § 401(m) and 950 CMR 12.205(1)(a)6.a. or 950 CMR 12.205(1)(a)6.b.

7. Solicitation. A registered broker-dealer or agent shall not be deemed to be soliciting, offering or negotiating for the sale or selling investment advisory services if it refers its customers as part of a wrap-fee, asset allocation, market-timing program or otherwise to a registered investment adviser.

(b) The following entities are excluded by designation of the Secretary from the definition of investment adviser and federal covered adviser:

1. Any instrumentality created by the Commonwealth whose mission is to assist Massachusetts businesses in obtaining finance to start and expand. Such instrumentalities shall include the Massachusetts Technology Development Corporation, the Massachusetts Community Development Finance Corporation, the Massachusetts Industrial Services Program, the Massachusetts Industrial Finance Agency and the Massachusetts Government Land Bank.

2. Any entity having a place of business in the Commonwealth but having no clients located in the Commonwealth, so long as such entity is registered as an investment adviser in at least one jurisdiction where it does have clients or with the U.S. Securities and Exchange Commission (SEC).

3. A corporate general partner of a limited partnership if the limited partnership is registered as an investor ~~adviser~~ ~~adviser~~ and any employee of the corporate general partner providing investment advice to or on behalf of the limited partnership is registered as an investment adviser representative of the limited partnership.

4. A person who has no office or other physical presence in the Commonwealth, and has had fewer than six clients in the Commonwealth during the preceding 12 months.

(2) Registration and Notice Filing Requirements and Private Fund Exemption.

(a) Registration of Investment Advisers.

1. Pursuant to M.G.L. c. 110A, § 202(a), the Secretary designates the web-based Investment Adviser Registration Depository (IARD) and the Central Registration Depository (CRD) both operated by FINRA to receive and store filings and collect related fees from investment advisers and investment adviser representatives on behalf of the Securities Division of the Office of the Secretary of the Commonwealth (Division). All applications for initial registration as an investment adviser shall be made via the IARD located at www.iard.com. (Any documents required to be filed with the Division that cannot be accepted by the IARD, including, but not limited to, ~~Part II of the Form ADV and~~ the section 202(a) affidavit described in 950 CMR 12.205(2)(a)2. shall be filed directly with the Division.) Each application for registration as an investment adviser shall contain:

- a. The Form ADV, including all parts and schedules.
 - b. If required by 950 CMR 12.205(5)(a), ~~financial statements or~~ a surety bond evidencing compliance with the minimum financial requirements set forth in 950 CMR 12.205(5).
 - c. A Form U-4 for each person listed on Schedule A or Schedule B of Form ADV as a sole proprietor, executive officer, director, partner or controlling member (or person occupying a similar status or performing similar functions).
 - d. A non-refundable registration fee of \$300.
 - e. A non-refundable registration fee of \$50 for each person listed on Schedule A or Schedule B of the Form ADV as a sole proprietor, executive officer, director, partner, controlling member (or person occupying a similar status or performing similar functions), unless such person, other than a sole proprietor, files an affidavit described in 950 CMR 12.205(2)(a)2. (See 950 CMR 12.205(2)(ed) for investment adviser representative registration requirements.) **Note:** Each executive officer, director, partner, controlling member, (or person performing similar functions) listed on Schedule A or Schedule B of the Form ADV or sole proprietor who acts as an investment adviser representative is automatically registered as an investment adviser representative when the investment adviser's application is made effective.
2. Each executive officer, director, partner, controlling member or sole proprietor (or person occupying a similar status or performing similar functions) is presumed to be acting as an investment adviser representative and thus registered automatically unless such person, other than a sole proprietor, files with the Division an affidavit stating that he or she performs no activity for the investment adviser that would require him or her to register as an investment adviser representative. Such affidavit shall be in substantially the following form: "The undersigned hereby swears or affirms that as an [executive officer, director, partner, controlling member (or person occupying a similar status or performing similar functions)] of [name of investment adviser], I (a) make no recommendations nor otherwise render advice regarding securities; (b) do not manage accounts or portfolios for clients; (c) do not determine which recommendations or advice regarding securities should be given; (d) neither solicit, offer nor negotiate the sale of investment advisory services; and, (e) do not supervise any employee who performs any of the foregoing activities."
3. Every registration as an investment adviser shall expire on December 31st. An investment adviser registration shall be renewed annually via the IARD located at www.iard.com. The renewal application shall contain:
- a. The information requested by the IARD.
 - b. The information requested by the CRD for each investment adviser representative whose registration is being renewed. (See 950 CMR 12.205(2)(c)2.)
 - c. A non-refundable registration fee of \$300 for the investment adviser and non-refundable registration fees of \$50 for each investment adviser representative.
- (b) **Notice Filing Procedures for Federal Covered Advisers.**
1. Pursuant to M.G.L. c. 110A, § 202(a), the Secretary designates the web-based Investment Adviser Registration Depository (IARD) and the Central Registration Depository (CRD) both operated by FINRA to receive and store filings and collect related fees from Federal Covered Advisers and investment adviser representatives on behalf of the Securities Division of the Office of the Secretary of the Commonwealth (Division). Each Federal Covered Adviser required to provide notice shall file the following with the Division via the IARD located at www.iard.com.
 - a. A copy of its complete, most recent, Form ADV, including all parts and schedules, on file with the U.S. Securities and Exchange Commission. **Note:** ~~Until the IARD is able to accept it, Part II of the Form ADV need not be filed with the Division.~~
 - b. A non-refundable notice-filing fee of \$300.
 - c. A non-refundable registration fee of \$50 for each investment adviser representative required to be registered in Massachusetts. (See 950 CMR 12.205(2)(c) for investment adviser representative registration requirements.)
 2. Each Federal Covered Adviser's status as a notice filer shall expire on December 31st and must be renewed annually via the IARD located at www.iard.com. The renewal application shall contain:

- a. The information requested by the IARD.
 - b. The information requested by the CRD for each investment adviser representative whose registration is being renewed. (*See* 950 CMR 12.205(2)(c)2.)
 - c. A non-refundable notice-filing fee of \$300 for the investment adviser and a non-refundable registration fee of \$50 for each investment adviser representative.
- (c) Registration Exemption for Certain Private Fund Advisers.
1. Definitions. For purposes of 950 CMR 12.205(2)(c), the following definitions shall apply:
 - a. Value of Primary Residence means the fair market value of a person's primary residence, less the amount of debt secured by the property up to its fair market value.
 - b. Private Fund Adviser means an investment adviser who provides advice solely to one or more private funds.
 - c. Private Fund means an issuer that qualifies for an exclusion from the definition of an investment company pursuant to section(s) 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, 15 U.S.C. 80a.
 - d. 3(c)(1) Fund means a private fund that qualifies for an exclusion from the definition of an investment company pursuant to section 3(c)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c)(1).
 - e. 3(c)(7) Fund means a private fund that qualifies for an exclusion from the definition of an investment company pursuant to section 3(c)(7) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c)(7).
 - f. Venture Capital Fund means a private fund that meets the definition of a venture capital fund in SEC Rule 203(l)-1, 17 C.F.R. § 275.203(l)-1.
 2. Exemption for Private Fund Advisers. Subject to the additional requirements of 950 CMR 12.205(2)(c)3., a private fund adviser shall be exempt from the registration requirements of M.G.L. c.110A, § 201 if the private fund adviser satisfies all of the following conditions:
 - a. neither the private fund adviser nor any of its advisory affiliates are subject to a disqualification as described in Rule 262 of SEC Regulation A, 17 C.F.R. § 230.262;
 - b. the private fund adviser files with the state each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to SEC Rule 204-4, 17 C.F.R. § 275.204-4; and
 - c. the private fund adviser pays a \$300 reporting fee;
 3. Additional requirements for private fund advisers to certain 3(c)(1) funds. In order to qualify for the exemption described in 950 CMR 12.205(2)(c)~~2,3~~, a private fund adviser who advises at least one (3)(c)(1) fund that is not a venture capital fund nor a 3(c)(7) fund shall, in addition to satisfying each of the conditions specified in 950 CMR 12.205(2)(a) through (c), comply with the following requirements:
 - a. The private fund adviser shall advise only those 3(c)(1) funds (other than venture capital funds or 3(c)(7) funds) whose outstanding securities (other than short-term paper) are beneficially owned solely by persons who, after deducting the value of the primary residence from the person's net worth, would each meet the definition of a qualified client in SEC Rule 205-3, 17 C.F.R. § 275.205-3, at the time the securities are purchased from the issuer;
 - b. At the time of purchase, the private fund adviser shall disclose the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund nor a 3(c)(7) fund:
 - i. all services, if any, to be provided to individual beneficial owners. If no services are to be provided to individual beneficial owners, that fact must be disclosed;
 - ii. all duties, if any, the investment adviser owes to the beneficial owners. If no duties are owed to individual beneficial owners, that fact must be disclosed; and
 - iii. any other material information affecting the rights or responsibilities of the beneficial owners.
 - c. The private fund adviser shall obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund nor a 3(c)(7) fund, and shall deliver a copy of such audited financial statements to each beneficial owner of the fund.

4. Federal Covered Investment Advisers. If a private fund adviser is registered with the Securities and Exchange Commission, the adviser shall comply with the state notice filing requirements applicable to federal covered investment advisers in M.G.L. c.110A, § 202(b).
 5. Investment Adviser Representatives. A person acting as an investment adviser representative is exempt from the registration requirements of M.G.L. c. 110A, § 201 if he or she is employed by or associated with an investment adviser that is exempt from registration in the Commonwealth pursuant to 950 CMR 12.205(2) and does not otherwise act as an investment adviser representative.
 6. Electronic Filing. The report filings described in paragraph (2)(b) above shall be made electronically through the IARD. A report shall be deemed filed when the report and the fee are filed and accepted by the IARD on the behalf of the Securities Division.
 7. Grandfathering for Private Fund Advisers with Non-qualified Clients. A private fund adviser to one or more 3(c)(1) funds that is not a venture capital fund nor a 3(c)(7) fund that is beneficially owned by persons who are not qualified clients as described in 950 CMR 12.205(2)(c)~~(3)(a)~~ may nonetheless qualify for the exemption described in 950 CMR 12.205(2)(c) if:
 - a. the subject fund(s) existed prior to February 3, 2012; and
 - b. as of February 3, 2012, the fund(s) cease(s) to accept beneficial owners who are not qualified clients, as described in 950 CMR 12.205(2)(c)3.a.; and
 - c. the private fund adviser to the subject fund(s) was in compliance with the requirements of M.G.L. c. 110A § 201(c) as of February 3, 2012; and
 - d. the private fund adviser discloses in writing the information described in 950 CMR 12.205(2)(c)~~(3)(b)~~ to all beneficial owners of the fund(s); and
 - e. the adviser delivers audited financial statements as required by 950 CMR 12.205(3)(c).
 8. Enforcement. 950 CMR 12.205(2)(c) shall be enforced as of August 3, 2012.
- (d) Registration of Investment Adviser Representatives.
1. Pursuant to M.G.L. c. 110A, § 202(a) the Secretary designates the web-based Central Registration Depository (CRD) operated by FINRA to receive and store filings and collect related fees from investment adviser representatives on behalf of the Securities Division of the Office of the Secretary of the Commonwealth (Division). All applications for initial registration as an investment adviser representative shall be made via the CRD, which may be located through www.iard.com. ~~(Any documents required to be filed that cannot be accepted by the CRD, including, but not limited to, the Acknowledgement Form described in 950 CMR 12.205(2)(d)1.d. shall be filed directly with the Division).~~ The application and shall contain:
 - a. A complete, current Form U-4 indicating Massachusetts as a jurisdiction.
 - b. A non-refundable registration fee of \$50.
 - c. Proof of meeting the examination or certification requirements of 950 CMR 12.205(4).
 - d. A Criminal Offender Record Information (CORI) Acknowledgement Form, or other similar form, necessary for the Division to obtain the applicant's Criminal Offender Record Information through the Massachusetts Department of Criminal Justice Information Services.
 2. Every registration as an investment adviser representative shall expire on December 31st. An investment adviser representative registration shall be renewed annually via the CRD, which may be located through www.iard.com, and shall contain:
 - a. The information requested by the CRD.
 - b. A non-refundable registration fee of \$50.
 3. Renewal registration of an investment adviser representative shall be accomplished through the investment adviser or the Federal Covered Adviser.
- (3) Withdrawals, Terminations and Transfers.
- (a) An investment adviser which seeks to withdraw its registration pursuant to M.G.L. c. 110A, § 204(e), or a Federal Covered Adviser which seeks to terminate its notice filing status shall file with the Division, via the IARD located at www.iard.com, Form ADV-W in accordance with the instructions contained therein.
 - (b) An investment adviser or a Federal Covered Adviser which seeks to terminate the registration of an investment adviser representative employed or associated with it, shall file with the Division, via the CRD which may be located through www.iard.com, a Form U-5 prepared in accordance with the instructions contained therein. The investment adviser or the Federal Covered Adviser shall send a copy of the Form U-5 to the terminated

employee within five days after it is filed with the Division.

(c) An investment adviser or a Federal Covered Adviser shall notify the Division that it intends to employ or associate with an investment adviser representative currently registered in the Commonwealth by filing a Form U-4 with the Division, via the CRD which may be located through www.iard.com, for such representative. Such filing will be considered a new application under M.G.L. c. 110A, § 202. If the application discloses no affirmative responses to the disclosure item of Form U-4, the investment adviser or Federal Covered Adviser may request that the effective date of the registration be accelerated.

(4) Examination or Certification Requirement.

(a) Each individual submitting an initial application for registration as an investment adviser representative in the Commonwealth shall demonstrate compliance with either 950 CMR 12.205(4)(a)1. or 2.

1. Currently hold the professional designation of Certified Financial Planner (CFP) awarded by the Certified Financial Planner Board of Standards, Inc.; Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts; Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, PA; Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.; or Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants.

2. Have obtained a passing score on the examination(s) in one of the following: (1) The Uniform Investment Adviser Law Examination (the Series 65 examination); or (2) the Uniform Combined State Law Examination (the Series 66 examination) and the General Securities Representative Examination (the Series 7 examination of FINRA).

Note: The Division will accept in place of the Series 7 examination (i) a passing score on the Series 2 examination formerly administered by FINRA, (ii) successful completion of an academic program at an accredited institution of higher education leading to a degree or certificate in financial planning (or its equivalent) or an academic program at an accredited institution of higher education leading to a degree in a subject involving significant financial and investment analysis, or (iii) successful completion of a nationally recognized examination or course of study specifically designed in part or whole for investment advisers or financial planners such as: any part of the CFA examination administered by the Institute of Chartered Financial Analyst (now known as AIMR); the examination for course HS328 of the Chartered Financial Consultant Examination administered by the American College of Bryn Mawr; the examination for the course currently known as CFPE 1102, Investment Planning, offered by the College for Financial Planning administered by the Certified Financial Planner Board of Standards, Inc.; the examination required for the admission to the Registry of Financial Planning Practitioners administered by the IAFP; the examination required for the designation Certified Investment Management Consultant administered by the Institute for Investment Management Consultants; the examinations required for the designation Certified Fund Specialist administered by The Institute of Certified Fund Specialists; the examination required for the designation Certified Investment Management Analyst administered by the Investment Management Consultants Association; and the examinations required for the designation Chartered Pension Professional administered by The Institute of Chartered Pension Professionals.

(b) Any individual who is registered as an investment adviser or investment adviser representative in any jurisdiction in the United States on December 9, 1999 shall not be required to satisfy the examination requirement for continued registration, unless notified otherwise by the Director, except that the Director may require additional examinations for any individual found to have violated any state or federal securities law. Notwithstanding 950 CMR 12.205(4)(b), any individual who has not been registered in any jurisdiction for a period of two years shall be required to comply with 950 CMR 12.205(4)(a) or (c).

(c) The Director may waive the examination or certification requirement if the applicant demonstrates, in writing, one of the following:

1. The individual functions solely as a solicitor for new clients.
2. The individual's duties do not pertain directly or indirectly to clients located in the Commonwealth.

3. The individual renders investment advisory services solely by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts or solely through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security.
4. Such other characteristics that would demonstrate that there is no need to meet the examination requirements, *e.g.* substantial experience in the securities or investment industry.

(5) Discretion and Custody Requirements.

(a) An investment adviser registered or required to be registered under M.G.L. c. 110A who has discretionary authority over client funds or securities shall be bonded in an amount of not less than \$10,000.00 by a bonding company qualified to do business in the Commonwealth. These requirements shall be waived provided the following conditions are met:

1. the investment adviser is registered in the jurisdiction where its principal place of business is located; and
2. the investment adviser meets the minimum financial requirements of the jurisdiction where its principal place of business is located.

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(b) An investment adviser registered or required to be registered under M.G.L. c. 110A who has custody of client funds or securities shall comply with the provisions of Rule 206(4)-2 under the Investment Advisers Act of 1940 (17 CFR 275.206(4)-2).

1. Custody shall have the meaning defined in Rule 206(4)-2(d)(2) under the Investment Advisers Act of 1940 (17 CFR 275.206(4)-(2)(d)(2)).
2. An adviser is not exempt from the independent verification requirement pursuant to Rule 206(4)-2(b)(3) under the Investment Advisers Act of 1940 unless the adviser meets the following additional requirements:
 - a. The adviser has written authorization from the client to deduct advisory fees from the account held with the qualified custodian; and
 - b. The adviser sends the qualified custodian and client an invoice or statement of the amount of the fee to be deducted from the client's account each time a fee is directly deducted.

(c). 950 CMR 12.205(5) shall be enforced as of August 3, 2012.

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(6) Post-registration/Post-notice Filing Requirements.

~~(a) If the information contained in Part I, Items 1, 2, 3, 4, 5, 8, 11, 13A, 13B, 14A and 14B of Form ADV, Form U-4 or any representation or undertaking contained in any affidavit filed with the Division, changes in any respect, or if the information contained in Part I, Items 9 and 10 and all items of Part II except Item 14 of Form ADV changes in any material respect, an amendment shall be filed promptly with the Division. If any changes occur in other items of Part I or II of the Form ADV, such changes shall be filed as amendments within 90 days of the end of the investment adviser's fiscal year. This requirement shall apply so long as the registration is effective.~~

~~(a) An investment adviser registered or required to be registered shall file the following information with the Division:~~

1. annual and other than annual amendments in compliance with the language, organizational format and the timing of filing requirements as specified in the Instructions to Form ADV, including the requirements for both annual and other-than-annual amendments; and
2. updates to Form U-4 or any representation or undertaking contained in any affidavit filed with the Division if such U-4 or any representation or undertaking changes in any respect.

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~~(b) The registrant will have complied with the requirement of prompt notification if an amendment is filed with the Division in writing as soon as possible, but in no event more than ten business days after the registrant has knowledge of the circumstances requiring such notification.~~

~~(c) Filing an amendment to the Form U-4 of an investment adviser representative is within the supervisory responsibilities of the investment adviser. Each investment adviser must establish written procedures to ensure compliance with this provision.~~

~~(d) Each investment adviser having custody of client funds or securities, exercising discretionary investment authority by written agreement or receiving prepayment of advisory fees in excess of \$500 and more than six months in advance, must file financial statements evidencing compliance with the financial requirements or evidence of a bond within 90 days from fiscal year end.~~

(d) Each investment adviser registered or required to be registered exercising discretionary investment authority or having custody of client funds shall file the following as evidence of compliance with 950 CMR 12.205(5):

1. An investment adviser exercising discretionary investment authority shall file evidence of a surety bond within 90 days from fiscal year-end.

2. An investment adviser having custody of client funds as defined in 950 CMR 12.205(5)(b)1. shall file annually with the Division Form ADV-E in compliance with the requirements of Rule 206(4)-2 under the Investment Advisers Act of 1940.

(e) An investment adviser registered with the Division who subsequently becomes registered with the U.S. Securities and Exchange Commission shall promptly notify the Division of such registration by filing a copy of its SEC registration notice with the Division.

(f) Within ten business days of filing any amendment with the U.S. Securities and Exchange Commission, a federal covered adviser shall file a copy of such amendment with the Division.

(7) Record Keeping Requirements.

(a) Each investment adviser shall make and keep true, accurate and current the following accounts, correspondence, memoranda, papers, books, and other records relating to its investment advisory business:

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1. All books and records required to be maintained by SEC Rule 204-2 (Books and Records to Be Maintained by Investment Advisers, 17 CFR 275.204-2).
 2. A complaint file, containing all correspondence between the investment adviser and its clients pertaining to any complaint about services rendered. This file must be maintained in such a manner:
 - a. To identify all complaints made against a particular investment adviser representative employed or associated with the investment adviser.
 - b. To segregate any material within the file for which a claim of privilege is asserted, including the justification for such assertion.
 - c. To describe what action was taken by the investment adviser with respect to the complaint.
 3. A litigation file documenting any criminal or civil action or administrative proceeding filed in any state or federal court or by any administrative agency against the investment adviser or any of its personnel with respect to a securities or an investment advisory transaction and the disposition of the action or proceeding.
 4. A chronological correspondence file containing, or a chronological correspondence log identifying all correspondence disseminated to or received from clients or prospective clients in connection with the business of the investment adviser. If a file is maintained, it should include copies of all correspondence. If a log is maintained, it should list the date, the name of the sender or recipient, and a brief description of the subject matter of the correspondence. **Note:** The investment adviser may elect to meet this requirement by maintaining either a file or a log. It is not necessary that both be maintained.
 5. The name and address of each investment advisory client.
 6. Copies of the written disclosure delivered pursuant to 950 CMR 12.205(8)(e). If the disclosure obligation is met in whole or in part by the delivery of a prospectus, the investment adviser need only note such delivery and not retain a copy of the prospectus in each client's file.
- (b) All items required by 950 CMR 12.200 must be maintained in a form permitting easy access for reasonable periodic, special, or other examinations by representatives of the Division. Inspection may be made either in person on the premises of the investment adviser or by written inquiry from the Division. If inspection is made by written inquiry, the investment adviser shall produce legible and reproducible copies of the requested records to the Division at the investment adviser's expense. Unless otherwise stated in the written inquiry, such copies shall be delivered to the Division within five business days after the request is received. Copies can be either reproductions of the original or prints-outs if kept in electronic form.
- (c) All items required by 950 CMR 12.200 shall be maintained and preserved for a period of not less than five years, the first two years in an appropriate office of the investment adviser. All items must be arranged or indexed to permit prompt retrieval of any particular record.
- (d) All requirements of 950 CMR 12.205(7) shall be waived provided the following conditions are met:
1. The investment adviser is registered in the jurisdiction where it has its principal place of business located.
 2. The investment adviser maintains its books and records in accordance with the applicable law of the jurisdiction where it has its principal place of business.
- (8) Disclosure Requirements.
- (a) An investment adviser must provide each client or prospective client with a disclosure statement at least 48 hours before entering into a contract, or, if given the statement at the time of entering into the contract, the client must be given the option to cancel the contract within five business days. The disclosure statement may be a copy of Part ~~H-2~~ of the Form ADV or another written document containing the equivalent information. If the document is not Part ~~H-2~~ of Form ADV, then it must be filed with the Division prior to its first use.
- (b) An investment adviser annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the statement required by 950 CMR 12.205. Any statement requested in writing by an advisory client pursuant to an offer required hereby must be sent out within seven days of the receipt of the request.

(c) If an investment adviser renders substantially different types of investment advisory services to different advisory clients, any information required by Part ~~H-2~~ of Form ADV may be omitted from the statement furnished to an advisory client or prospective advisory client if such information is applicable only to a type of investment advisory service or fee which is not rendered or charged, or proposed to be rendered or charged, to that client or prospective client.

(d) The disclosure obligations required by M.G.L. c. 110A, § 203A(a) will be met if prior to the client entering into an advisory contract, the investment adviser delivers the Form ADV Part ~~H-2~~ (or the brochure) and any additional information required to be disclosed under the Investment ~~Advisors—Advisers~~ Act of 1940 together with a notice that disciplinary history of the investment adviser and its representatives can be obtained from the Division.

(e) Disclosure obligations under M.G.L. c. 110A, § 203A(b):

1. Before the purchase or sale of a security with respect to which investment advice has been rendered, the investment adviser or investment adviser representative shall disclose to each client in Massachusetts:

a. The total amount of sales commission or other fees, including mark-ups or mark-downs, that may reasonably be expected to be charged or deducted in connection with the purchase or sale.

b. That the investment adviser or investment adviser representative will receive such amount or a portion of such amount, or, in the case of a transaction to be effected through a broker-dealer that is a person affiliated or under common control with the investment adviser or investment adviser representative, that the broker-dealer is affiliated with the adviser and will receive such amount or portion of such amount. **Note:** Any person who regularly receives a transactions-based fee for effecting transactions in securities is presumed to be in the business and thus must register as a broker-dealer or an agent of a broker-dealer.

c. The existence of any compensation arrangement with an issuer of securities or other third parties, including sales incentives (*e.g.* special bonuses, discounts, premiums or prizes), or arrangements which bestow soft-dollar or other such indirect benefits to the investment adviser or investment adviser representative.

2. The disclosure required hereunder shall be in writing if the investment advice was given in writing.

3. The disclosure required under M.G.L. c. 110A, § 203A(b) need not be given in any of the following circumstances:

a. The investment advice is rendered pursuant to a written agreement giving discretionary authority to the investment adviser or investment adviser representative.

b. The investment advice pertains to a security traded on a national exchange or through the NASDAQ Stock Market; the commission, mark-up or mark-down is permitted under the rules of FINRA; and, the broker-dealer effecting the transaction has no affiliation with the investment adviser or investment adviser representative.

4. The client may waive, in writing, receipt of the disclosure required by 950 CMR 12.205(8)(e)1. under any of the following conditions:

a. The investment advice pertains to an investment company registered with the Division; and, the client has previously received a prospectus for the investment company and a separate, clear written explanation of the information required to be disclosed in 950 CMR 12.205(8)(e)1.a. through c.

b. The investment advice pertains to a subsequent sale after the initial sale made pursuant to an agreement to invest a certain sum of money on a periodic basis.

(9) Fraudulent Practices/Dishonest or Unethical Practices.

(a) As used in 950 CMR 12.205(9), "adviser" refers to any person, including persons registered or excluded from registration under M.G.L. c. 110A, who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase and sale, whether through the issuance of analyses or reports or otherwise. It is a rebuttable presumption that such term includes all investment advisers and investment adviser representatives, as well as other persons who charge fees based on assets under management or portfolio performance for rendering investment advice.

(b) The following practices by an adviser shall be deemed to operate as a fraud or deceit upon the other person under M.G.L. c. 110A, § 102(2):

12.205: continued

1. Any practice proscribed under the SEC rules promulgated under Section 206(4) of the Investment Advisers Act of 1940 (17 CFR 275.206(4)-1 *et seq.*) unless such practice meets all conditions stated within those rules.
 2. Use of a business name by an investment adviser so similar as to be likely to be mistaken for it, to any other firm, association or person already carrying on business in the Commonwealth unless the business name is the same as the personal name of one of the principals.
- (c) The following practices are a non-exclusive list of practices by an adviser which shall be deemed "dishonest or unethical conduct or practices in the securities business" for purposes of M.G.L. c. 110A, § 204(a)(2)(G):
1. Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's overall portfolio, investment objectives, financial situation and needs, investment experience and any other information known or acquired by the adviser after reasonable examination of the client's records as may be provided to the adviser.
 2. Placing an order to purchase or sell a security for the account of a client without authority to do so.
 3. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.
 4. Exercising any discretionary power in placing an order for the purchase or sale of securities without first obtaining written discretionary authority unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of specified securities shall be executed, or both.
 5. Inducing trading in a client's account that is excessive in size and frequency in view of the financial resources, investment objectives and character of the account.
 6. Borrowing money or securities from a client unless the adviser is a broker-dealer or the client is a broker-dealer, an affiliate of the adviser, a family member or a financial institution engaged in the business of loaning funds or securities.
 7. Loaning money to a client unless the adviser is a registered broker-dealer engaged in the management of margin accounts, or a financial institution engaged in the business of loaning funds, or the client is an affiliate of the adviser or a family member.
 8. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the adviser, its representatives or any employees, or misrepresenting the nature of the advisory services being offered or fees to be charged for such services, or omitting to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.
 9. Providing a report or recommendation to any advisory client prepared by someone other than the adviser without disclosing that fact. (950 CMR 12.205(9)(c)9. does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing services.)
 10. Charging a client an advisory fee that is unreasonable in light of the fees charged by other investment advisers providing essentially the same services.
 11. Failing to disclose to a client in writing before rendering investment advice any material conflict of interest relating to the adviser, its representatives or any of its employees, which could reasonably be expected to influence or impair the rendering of unbiased and objective advice including:
 - a. Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and
 - b. Charging a client an advisory fee for rendering advice without disclosing that a commission or other remuneration for executing securities transactions pursuant to such advice will be received by the adviser, its representatives or its employees or that such advisory fee is being reduced by the amount of the commission or other remuneration earned by the adviser, its representatives or employees for the sale of securities to the client.

12. Guaranteeing a client that a specific result will be achieved (gain or loss) as a result of the advice which will be rendered.

13. Disclosing the identity, affairs, or investments of any client to any third party unless required by law to do so, or unless consented to by the client.

14. Entering into, extending or renewing any investment advisory contract, other than a contract for impersonal advisory services, unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee or the formula for computing the fee, the amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser or its representatives and that no assignment of such contract shall be made by the adviser without the consent of the client.

15. a. Using a purported credential or professional designation that indicates or implies that an investment adviser representative has special certification or training in advising or servicing senior citizens, unless such credential or professional designation has been accredited by an accreditation organization recognized by the Secretary by rule or order. For the purposes of 950 CMR 12.205(9)(c)15., the term "senior citizen" shall include a person 65 years of age or older.

b. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a purported credential or professional designation indicating or implying that an investment adviser representative has special certification or training in advising or servicing senior citizens, factors to be considered shall include:

- (i) use of one or more words such as "senior", "retirement", "elder", or like words combined with one or more words such as "certified", "chartered", "adviser", "specialist", or like words in the name of the credential or professional designation;
- (ii) how those words are combined; and
- (iii) whether they are capitalized.

950 CMR 12.205(9)(c)15. is not intended to apply to job titles provided by an investment adviser specifying one's area of specialization within an organization unless the facts and circumstances associated with the provision or use of a job title indicate that it improperly suggests or implies certification or training beyond that which the titleholder possesses or that it otherwise misleads investors. It is also not intended to apply to job titles provided by an investment adviser indicating seniority within an organization.

c. There shall be a grace period commencing June 1, 2007 and running until two months after the date that at least one accreditation organization is recognized by the Secretary pursuant to 950 CMR 12.205(9)(c)15.e. In addition, there shall be a six month grace period with respect to any credential or professional designation that has been submitted to an accreditation organization described in 950 CMR 12.205(9)(c)15.a. for accreditation, running from the date of such submission; provided, that the Secretary may, at his discretion (consistent with the public interest and protection of investors), increase such grace period by an additional period of up to 12 months upon a showing of substantial progress in the accreditation process and a showing that such additional time is needed to complete the accreditation process; however, if accreditation of such credential has been denied in a final decision of such accreditation organization, any grace period provided for in 950 CMR 12.205(9)(c)15.c. shall terminate on the date of such denial.

d. 950 CMR 12.205(9)(c)15. shall not apply to a degree or certificate evidencing completion of an academic program at an accredited institution of higher education unless the facts and circumstances associated with the provision or use of such degree or certificate indicate that it improperly suggests or implies certification or training beyond that which the degree holder or certificate holder possesses or that it otherwise misleads investors.

- e. The Secretary may recognize any accreditation organization by rule or order. The Secretary shall consider any request for recognition by an accreditation organization. In determining whether to recognize an accreditation organization, the Secretary shall consider, among other factors that the Secretary deems appropriate in his discretion, whether or the extent to which the accreditation organization is nationally recognized and independent, whether it is for-profit or nonprofit, whether the primary purpose of the organization is to develop standards and implement methods for assuring competency and whether the organization has standards to address the status of designees who obtained the credential or designation prior to accreditation. The Secretary shall maintain a readily-accessible list, with contact information, of all accreditation organizations he or she recognizes.
16. a. To retain Investment Consulting Services, for compensation that is provided either directly to the consultant or indirectly through a Matching or Expert Network Service, unless the investment adviser obtains a written certification that:
- describes all confidentiality restrictions relevant to the potential consultation which the consultant has, or reasonably expects to have;
 - affirmatively states that the consultant will not provide any Confidential Information to the investment adviser; and
 - is signed and dated by the consultant, and is accurate as of the date of the initial, and any subsequent, consultation(s).
- b. Notwithstanding 950 CMR 12.205(9)(c)16.a., an investment adviser who comes into possession of material Confidential Information through a consultation is precluded from trading any relevant security until such time as the Confidential Information is made public.
- c. Definitions. For purposes of 950 CMR 12.205(9)(c)16.:
- Confidential Information means any non-public information, which one is bound by a confidentiality agreement or fiduciary (or similar) duty not to disclose.
 - Matching or Expert Network Service means a firm that for compensation matches consultants with investment advisers.
 - Investment Consulting Services means a consultation for the purposes of assisting the investment adviser's decision as to whether to buy, sell, or abstain from buying or selling, positions in client accounts.
- 950 CMR 12.205(9)(c)16. shall be enforced as of December 1, 2011.
17. Receiving any compensation on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of a client unless such compensation is received in compliance with Rule 205-3 under the Investment Advisers Act of 1940 (17 CFR 275.205-3).

(10) Supervision.

- (a) Each investment adviser shall establish and maintain a system to supervise the activities of each investment adviser representative and other employees that is reasonably designed to achieve compliance with M.G.L. c. 110A, 950 CMR 10.00 through 14.413, the Securities Act of 1933 (15 USC § 77a), 17 CFR Part 230; the Securities Exchange Act of 1934 (15 USC § 78a); 17 CFR Part 240; the Investment Company Act of 1940 (15 USC § 80a-1); 17 CFR Part 270; and the Investment Advisers Act of 1940 (15 USC § 80b-1) under 17 CFR Part 275. Final responsibility for proper supervision shall rest with the investment adviser. This supervisory system shall provide, at a minimum, for the following:
- The establishment and maintenance of written procedures as required in 950 CMR 12.205(10)(a).
 - The designation of an appropriately registered officer or partner with authority to carry out the supervisory responsibilities of the investment adviser for each type of business in which it engages for which registration as an investment adviser is required.
 - The designation of an appropriately registered investment adviser representative in each office where the investment adviser does business in the Commonwealth with authority to carry out the supervisory responsibilities assigned to that office by the investment adviser.
 - The assignment of each registered investment adviser representative to an appropriately registered investment adviser representative who shall be responsible for supervising that person's activities.

5. Reasonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities.

6. The participation of each registered investment adviser representative, either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by the investment adviser at which compliance matters relevant to the activities of the investment adviser representatives are discussed. Such interview or meeting may occur in conjunction with the discussion of other matters and may be conducted at a central or regional location or at the representative's place of business.

(b) Establishment of Written Procedures.

1. Each investment adviser shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of its investment adviser representatives and other employees that are reasonably designed to achieve compliance with applicable state and federal securities laws and regulations.

2. The investment adviser's written supervisory procedures shall set forth the supervisory system established by the investment adviser pursuant to 950 CMR 12.205(10)(a), and shall include the titles, registration status and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, and applicable state and federal securities laws and regulations. The investment adviser shall maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective.

3. A copy of an investment adviser's written supervisory procedures, or the relevant portions thereof, shall be kept at each location where activities are conducted on behalf of the investment advisers with persons located in the Commonwealth. The written supervisory procedures shall be amended to reflect any change in state and federal securities laws and regulations.

4. Except as provided in 950 CMR 12.205(6)(c), investment advisers with five or fewer investment adviser representatives are excused from the requirements of 950 CMR 12.205(10)(b).

(c) Each investment adviser shall conduct a review, at least annually or more often if circumstances warrant, to determine that it is in compliance with the written supervisory procedures. A record of such review shall be maintained by the investment adviser for five years after the review is conducted.

(d) Each investment adviser shall establish procedures for review and endorsement by supervisory personnel in writing, on an internal record, of all transactions and all correspondence of its investment adviser representatives pertaining to the rendering of investment advice to individual clients.

(e) Each investment adviser shall have the responsibility and duty to ascertain by investigation the good character, business repute, qualifications, and experience of any person prior to making a certification in the application of such person for registration. Where an applicant for registration has previously been registered, the investment adviser shall obtain from the applicant a copy of the Uniform Termination Notice of Securities Industry Registration (Form U-5) filed with the Division by such person's most recent investment adviser employer. The investment adviser shall obtain the Form U-5 as required by 950 CMR 12.205 no later than 60 days following the filing of the application. An investment adviser receiving a Form U-5 pursuant to 950 CMR 12.205 shall review the Form U-5 and any amendments thereto and shall take such action as may be deemed appropriate.

(f) Any applicant for registration who receives a request for a copy of his or her Form U-5 from an investment adviser pursuant to 950 CMR 12.205 shall provide such copy to the investment adviser within two business days from the request if the Form U-5 has been provided to such person by his or her former employer. If a former employer has failed to provide the Form U-5 to the applicant for registration, such person shall promptly request the Form U-5, and shall provide it to the requesting investment adviser within two business days of receipt thereof. The applicant shall promptly provide any subsequent amendments to a Form U-5 he or she receives to the requesting investment adviser.

REGULATORY AUTHORITY

950 CMR 12.200: M.G.L. c. 110A, § 412(a).

NON-TEXT PAGE