



The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Securities Division

REQUEST FOR COMMENT

DATE: March 14, 2013

RE: Request for Comment Regarding Additional Requirement for Investment
Adviser Representative Registration Applications (950 CMR 12.205(2)(d)1.).

Introduction and Background

The Massachusetts Securities Division (the “Division”) of the Office of the Secretary of the Commonwealth is proposing to amend 950 CMR 12.205 (the “Regulations”) in several respects as they relate to investment advisers. Specifically, the Division is proposing and requesting comment on amendments that would 1) add a requirement that those seeking Massachusetts investment adviser representative (“IAR”) registration file as part of their application a Criminal Offender Record Information (“CORI”) Acknowledgement Form (the “CORI Acknowledgement Form”); 2) update filing requirements with respect to Form ADV; and 3) update certain citations and references to forms to address changes that have occurred over time.

Changes in Investment Adviser Representative Application Requirements

An application for IAR registration currently consists of: 1) a complete, current Form U-4 indicating Massachusetts as a jurisdiction for registration; 2) a non-refundable fee of fifty (50) dollars, and proof that the applicant meets the examination or certification requirements prescribed in 950 CMR 12.205(4).¹ Upon filing of the application, the Division is afforded thirty days to review the application. If no denial order is in effect and the Division has not instituted a proceeding against the applicant under Section 204 of MASS. GEN. LAWS CH. 110A (the “Act”), the registration becomes effective on noon of the thirtieth day after the application is filed.² The thirty-day review period does not initiate until each of the elements of the application, as described above, has been filed.

The Division believes that it is in the public interest and for the protection of investors to conduct criminal background checks of those individuals seeking IAR registration in

¹ See 950 CMR 12.205(2)(c).

² See MASS. GEN. LAWS CH. 110A, §202(a).

order to ensure that the applicant is not subject to a statutory disqualification³ and has truthfully and accurately disclosed any criminal background required on Form U-4.⁴ The Registrations, Inspections, Compliance and Examinations (“RICE”) Section of the Division has recently been granted access to utilize the Massachusetts “iCORI system,” an electronic criminal history database, in order to conduct these reviews.

On August 6, 2010, significant changes were made regarding the use of CORI information and the circumstances under which CORI information can be used. Beginning on May 4, 2012, state licensing authorities such as the Division were required to obtain CORI information via the new iCORI system. Before using the iCORI system, however, applicable laws and regulations require the Division to procure a completed and notarized CORI Acknowledgement Form. The CORI Acknowledgement Form discloses to the applicant the Division’s intention to run a criminal background check (with the applicant’s assent) and asks questions designed to properly identify the applicant for purposes of the CORI background check, including the applicant’s partial social security number and date of birth. The Division believes that the applicant would readily know the information requested, and that the substance of the form would be completed in ten to twenty minutes. The form must also be notarized, however, which may add time in completing the form. Once the Division has received a CORI Acknowledgement Form, the Division is authorized to procure and review the applicant’s CORI, which can then be utilized as a part of the Division’s application review process.

The Division proposes to amend the IAR application requirements so that the application, in addition to the requirements outlined above, will also consist of a signed and notarized CORI Acknowledgement Form.⁵ Specifically, the Division proposes to amend 950 CMR 12.205(2)(d) to require that an application contain a complete, signed and notarized CORI Acknowledgement Form or other such form(s) that may be required in order for the Division to obtain the applicant’s criminal history. Upon filing of a completed, signed and notarized CORI Acknowledgement Form, the Division would then be authorized to review the applicant’s criminal history and consider that information as part of the application process.

The CRD system is not capable of accepting the CORI Acknowledgement Form as part of the electronic submission process; therefore, the Division also proposes to amend the regulation to clarify that the form must be filed directly with the Division.

Because the Division is proposing to include the CORI Acknowledgement Form as part of the application, the thirty-day (30) statutory application review period will not begin until the completed, signed and notarized form has been filed with the Division and the other components of the application have been filed via the CRD. Under the amended

³ The Secretary may by order deny any registration if he finds that the order is in the public interest and that the applicant has been convicted within the past ten years of any misdemeanor involving a security or any aspect of the securities business, or any felony. See MASS. GEN. LAWS CH. 110A §204(a)(2)(C).

⁴ Questions 14A and 14B of Form U-4 require an applicant to disclose, among other things, all felony and certain misdemeanor *charges* regardless of the timeframe.

⁵ The Secretary has been granted statutory authority pursuant to Sections 202(a) and 412 of the Act to amend, *inter alia*, the contents of an application.

regulation, an applicant that fails to complete the CORI Acknowledgement Form will not have filed a component of the application and could be denied registration under section 202(a)(2)(A) of the Act due to the application's incompleteness.

The Division seeks comment on the following:

- 1. What are the potential effects of requiring a CORI Acknowledgement Form as part of the registration process?*
- 2. What are the potential costs to an applicant or his or her firm (including the added time needed to complete an application) should the CORI Acknowledgement Form be made part of the application?*
- 3. Should the Division specifically designate methods of filing CORI Acknowledgement Forms?*
- 4. The completed CORI Acknowledgement Form contains personal information including the applicant's name, partial social security number, and date of birth. What are the potential effects of this regulation change as it relates to Massachusetts privacy laws (including, but not limited to, M.G.L. Ch. 93H)?*
- 5. What other matters should the Division consider in the implementation of this requirement?*

Proposed Changes to Form ADV Amendment Requirements

The Division is proposing to amend the Form ADV amendment and delivery requirements located at 950 CMR 12.205(6) in order to conform to changes made to the Form ADV itself. In October 2010, the Securities and Exchange Commission ("SEC") issued a final rule regarding amendments to Part 2 of Form ADV. A copy of the rule can be found on the SEC's website at <http://sec.gov/rules/final/2010/ia-3060.pdf>. The changes became effective October 12, 2010.

950 CMR 12.205(6)(a): The Form ADV has changed significantly over time. The proposed 950 CMR 12.205(6)(a)1. removes references to specific items in the Form ADV which have changed over time and incorporates by reference the filing requirements found in the Form ADV instructions. Because the Form ADV is maintained by the SEC in coordination with the North American Securities Administrators Association ("NASAA"), these proposed changes will more closely align state requirements with national standards. Further, because specific references to enumerated items have been eliminated in favor of referring to the instructions on the form, future changes are less likely to be required.

The proposed language is based upon the NASAA model brochure rule. Rather than stating enumerated items that may be changed as a result of changes to the Form ADV, the proposed regulation outlines that the adviser must comply with the filing requirements as outlined in the instructions to the Form ADV.

950 CMR 12.205(6)(a)2. is intended to capture the Division's requirements with respect

to Form U-4 and affidavits in the existing rule. There have not been any substantive changes in regulatory requirements.

The Division seeks comment on the following:

6. *What are the potential effects of the proposed changes to Form ADV Amendment Requirements that the Division should consider in the implementation of this proposal?*

Other Minor Changes or Corrections

950 CMR 12.205(1)(a)6.c.: In February 2012, the definition of institutional buyer was changed to narrow the definition. A grandfathering provision, however, was inserted in place of the eliminated definitional exclusion in order to allow certain investing entities to continue to rely upon the exclusion located at 950 CMR 12.205(1)(a)6.b. under certain limited circumstances. The Division is proposing to clarify that an institutional buyer may be an entity whose only investors are other institutional buyers, including those qualifying under the grandfathering provision 950 CMR 12.205(1)(a)6.b..

950 CMR 12.205(2)(a)1.b.: In February 2012, the Division modified the minimum financial requirements found at 950 CMR 12.205(5) to eliminate the option of maintaining a segregated account of \$5,000.00 or \$10,000.00 for those advisers with discretion over or custody of client funds, respectively. The current regulation requires an adviser with discretion to maintain a \$10,000.00 surety bond and an adviser with custody to comply with the requirements of SEC Rule 206(4)-2 under the Investment Advisers Act of 1940. The reference to financial statements in this provision, therefore, is outdated.

950 CMR 12.205(2)(a)1.c.: In February 2012, the Division modified the regulations in order to introduce an exemption for certain private fund advisers. As a result, the “old” section 12.205(2)(c) (which became the private fund exemption) was renumbered 12.205(2)(d). The proposed change to this section updates the reference to this subsection.

950 CMR 12.205(2)(c)7.: This proposed change corrects two typographical errors, including one citation error.

950 CMR 12.205(5)(a): This proposed change recodifies language found in earlier versions of the rule whereby the Division will not enforce surety bond requirements upon out-of-state registrants in compliance with their home state’s minimum financial requirements provided the adviser is registered in their home state.

950 CMR 12.205(5)(c): This proposed change corrects an improper indentation which results in a citation change from 950 CMR 12.205(5)(b)2.c. to 950 CMR 12.205(5)(c).

950 CMR 12.205(6)(b): The Division proposes to eliminate the requirement that amendments be filed “in writing,” given that with some limited exceptions filings are made through the IARD system.

950 CMR 12.205(6)(d): As referenced above, in February 2012 the Division modified the discretion and custody requirements related to investment advisers. The Division no longer accepts financial statements for advisers exercising investment discretion over client assets and no longer has any minimum financial requirement for advisers with custody in light of the new independent audit requirement. The Division, therefore, proposes to amend this section to reflect the new discretion and custody requirements of 950 CMR 12.205(5).

Changing references of Form ADV “Part II” to Form ADV “Part 2”: The Form ADV “Parts” now use cardinal numerals rather than Roman numerals. The Division proposes to modify the following sections to reflect this change: 12.205(2)(b)(1), 12.205(6)(a), 12.205(8)(a), 12.205(8)(c), and 12.205(8)(d).

Changing provisions to reflect electronic filing of Form ADV Part 2: Historically, the IARD system was unable to accept Form ADV Part 2 submissions. The IARD, however, now accepts Form ADV Part 2 electronically. References to this historical limitation have been removed or modified at 950 CMR 12.205(2)(a)1. and 12.205(2)(b)1.a..

The Division seeks comment on the following:

7. *What are the potential effects of these changes or corrections that the Division should consider in implementation of this proposal?*

Comment Submission Process

The Division should receive written comments on the amended proposed regulations no later than **Wednesday, May 15, 2013 at 5:00 p.m.** All comment letters should reference the specific question or question(s) the comment addresses, if applicable.

We may post comments on the Massachusetts Securities Division website and comments are subject to public records laws. We do not edit personal indentifying information from submissions; submit only information that you wish to make available publicly.

Submission via Regular Mail

Please mail any comments on the proposed changes to:

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations
Massachusetts Securities Division

One Ashburton Place, Room 1701
Boston, MA 02108

Submission via Facsimile

Faxed comments may be sent to (617) 248-0177. Comments sent via facsimile should include a cover sheet to the attention of “Proposed Regulations.”

Submission via E-Mail

E-mail comments or submissions of scanned comment letters attached to an e-mail may be submitted to securitiesregs-comments@sec.state.ma.us.

Public Hearing

A public hearing on these proposed changes will be held at **10:00 a.m. on Wednesday, May 15** at One Ashburton Place, 17th Floor, Boston, MA 02108.

Interested parties will be afforded an opportunity to orally present data, views and arguments relative to the proposed action. Written presentations may be made at the hearing or submitted at any time prior to the close of business on Wednesday, May 15, 2013 to the Massachusetts Securities Division, One Ashburton Place, Room 1701, Boston, Massachusetts 02108. Copies of the proposed amendments are available on the Division’s website at <http://www.sec.state.ma.us/sct/sctidx.htm> or by calling (617) 727-3548.