

12.204: Denial, Revocation, Suspension, Cancellation and Withdrawal of Registration

(1) Dishonest and Unethical Practices in the Securities Business.

(a) Broker-dealers. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. Acts and practices, including, but not limited to the following, are considered contrary to such standards and constitute dishonest or unethical practices which are grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration, or such other appropriate action:

...

4. ~~Except as provided in 950 CMR 12.207, recommending to a customer an investment strategy, the opening of or transferring of assets to any type of account, or~~ the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

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~~29. Failing to act in accordance with the duties and standards described in 950 CMR 12.207.~~

(b) Agents. Each agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of his or her business. Acts and practices, including, but not limited to, the following, are considered contrary to such standards and constitute dishonest or unethical practices in the securities industry and are thereby grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration or such other action as is appropriate:

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8. Engaging in conduct specified in 950 CMR 12.204(1)(a)1., 2., 3., 4., 5., 6., 10., 11., 12., 13., 18., 19., 22., 23., 27., ~~28., or 29.~~

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12.205: Investment Advisers and Federal Covered Advisers

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(9) Fraudulent Practices/Dishonest or Unethical Practices.

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(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. ~~Except as provided in 950 CMR 12.207, recommending to a client to whom investment supervisory, management or consulting services are provided an investment strategy, the opening of or transferring of assets to any type of account, or~~ the purchase, sale or exchange of any security without reasonable grounds to believe that the

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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.

12.207: Fiduciary Duty

(a) As used in 950 CMR 12.207, "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 are a non-exclusive list of practices by a broker-dealer, agent, or 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. Failing to act in accordance with a fiduciary duty to a customer or client when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.

i. If a broker-dealer, agent, or adviser makes a standalone recommendation, the fiduciary duty required in 950 CMR 12.207(b)1. shall extend through the execution of the recommendation and shall not be deemed an ongoing obligation, except as provided in 950 CMR 12.207(b)2.

ii. If a broker-dealer, agent, or adviser makes ongoing recommendations or provides investment advice, in any capacity, to a customer or client, or receives ongoing compensation in connection with the recommendation or advice, the fiduciary duty shall be deemed an ongoing.

2. Having discretionary authority over a customer's or client's account or a contractual fiduciary duty, and failing to act in accordance with the fiduciary duty to the customer or client when making a recommendation or providing investment advice.

(c) To meet the fiduciary duty, a broker-dealer, agent, or adviser shall satisfy both the duty of care and duty of loyalty.

1. When making a recommendation or providing investment advice, the duty of care requires a broker-dealer, agent, or adviser to use the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use

taking into consideration all of the facts and circumstances. For purposes of this paragraph, a broker-dealer, agent, or adviser shall make reasonable inquiry, including:

- i. risks, costs, and conflicts of interest related to the recommendation or investment advice,
- ii. the customer's or client's investment objectives, financial situation, and needs, and
- iii. any other relevant information.

2. When making a recommendation or providing investment advice, the duty of loyalty requires a broker-dealer, agent, or adviser to avoid conflicts of interest and to make recommendations and provide investment advice without regard to the financial or any other interest of the broker-dealer, agent, adviser, any affiliated or related entity or its officers, directors, agents, employees, or contractors, or any other third-party.

- i. There shall be a presumption of a breach of the duty of loyalty for offering or receiving direct or indirect compensation to or from a broker-dealer, agent, or adviser for recommending an investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security that is not the best of the reasonably available options for the customer or client.
- ii. There shall not be a presumption that disclosing a conflict of interest alone shall satisfy the duty of loyalty.

3. Notwithstanding the presumption set forth at 950 CMR 12.207(c)2.i. above, it shall not be presumed a breach of the fiduciary duty owed to a customer or client for the broker-dealer, agent, or adviser to receive transaction-based remuneration, as long as:

- i. the remuneration is reasonable,
- ii. the remuneration represents the best of the reasonably available remuneration options for the customer or client, and
- iii. the broker-dealer, agent, or adviser has otherwise satisfied its duty of care.

(d) For purposes of this section, the terms "customer" and "client" shall not include:

- 1. A bank, savings and loan association, insurance company, or registered investment company;
- 2. A broker-dealer registered with a state securities commission (or agency or office performing like function);

3. An investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or agency or office performing like function); or

4. Any other institutional buyer, as defined in 950 CMR 12.205(1)(a)6.

(e) Nothing in this section shall be construed to apply to a person acting in the capacity of a fiduciary to an employee benefit plan, its participants or beneficiaries, as those terms are defined in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq.

(f) Nothing in this section shall be construed to establish any requirements for capital, custody, margin, financial responsibility, making and keeping of records, bonding, or financial or operation reporting for any broker-dealer or agent that differ from, or are in addition to, the requirements established under 15 U.S.C. § 78o(i).