

(Reflects amendments effective July 9, 2014)

Part 11. INVESTMENT ADVISORY SERVICES

11.1 General provisions and definitions.

(a) Effective date. This Part shall become effective upon legal adoption.

(b) Short title. Chapter 961 of the Laws of 1960, as amended, when referred to in all rules and regulations promulgated by the Attorney General relating thereto, shall be referred to as the “New York Investment Advisory Act.”

(c) Administration. The Investment Protection Bureau of the Department of Law shall be responsible for the administration of the New York Investment Adviser Act. Whenever in this Part there is reference to a submission of filing with the Department of Law, this shall mean the Investment Protection Bureau, 120 Broadway, New York, NY 10271 or the designee.

(d) Designation. The Attorney General may by regulation, rule or order designate the web-based Investment Adviser Registration Depository (“IARD”) operated by FINRA to receive and store filings and collect related fees from investment advisers on behalf of the Attorney General.

11.2 Use of IARD.

(a) Unless otherwise provided, all investment adviser applications, amendments, reports, notices related filings and fees required to be filed with the Attorney General pursuant to the rules promulgated under this section, shall be filed electronically with and transmitted to IARD. The following additional conditions related to such electronic filings:

(1) Electronic Signature. When a signature or signatures are required by the particular instructions of any filing to be made through the IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individuals whose names are typed on the filing.

(2) When filed. Solely for purposes of a filing made through IARD, a document is considered filed with the Attorney General when all fees are received and the filing is accepted by IARD on behalf of the state.

(3) Electronic Filing. Notwithstanding subdivision (a) of this section, the electronic filing of any particular document and the collection of related processing fees shall not be required until such time as IARD provides for receipt of such filings and fees and thirty (30) days notice is provided by the Department or its designee. Any documents or fees required to

be filed with the Department of Law that are not permitted to be filed with or cannot be accepted by IARD shall be filed directly with the Department of Law.

(b) Approval Process. Filings made through the IARD system shall be reviewed for completeness by the IARD system. All applications for registration meeting all existing requirements and qualifications shall be reviewed on a case-by-case basis for approval. Advisers submitting the filings shall be notified of deficiencies and required to correct same. Failure to correct any deficiencies pursuant to sections 11.4, 11.6, 11.7, 11.8, 11.9 or 11.14 or other submissions within one hundred eighty (180) days from receipt by the Department of Law or its designee will result in the withdrawal of the registration and will require a complete new filing. No refunds will be made for filings that are withdrawn either on a voluntary basis or as a result of the failure to correct deficiencies.

11.3 Hardship Exemptions.

(a) This section provides two “hardship exemptions” from the requirements to make electronic filings as required by the rules.

(1) Temporary Hardship Exemption.

(i) Investment advisers registered or required to be registered under section 11.4(c) who experience unanticipated technical difficulties that prevent submission of an

electronic filing to IARD may request a temporary hardship exemption from the requirements to file electronically.

(ii) To request a temporary hardship exemption, the investment adviser must:

(a) File Form ADV-H (Application for Temporary or Continuing Hardship Exemption)(17-CFR 279.3) in paper format with the Department of Law, no later than one (1) business day after the filing (that is the subject of the Form ADV-H) was due; and

(b) Submit the filing that is subject of the Form ADV-H in electronic format to IARD no later than seven (7) business days after the filing was due.

(iii) Effective Date--Upon Filing. The temporary hardship exemption will be deemed effective upon receipt by the Department of Law of the complete Form ADV-H. Multiple temporary hardship exemption requests within the same calendar year may be disallowed by the Department of Law.

(2) Continuing Hardship Exemption.

(i) Criteria for Exemption. A continuing hardship exemption will be granted only if the investment adviser is able to demonstrate that the electronic filing requirements of this rule are prohibitively burdensome.

(ii) To apply for a continuing hardship exemption, the investment adviser must:

(a) File Form ADV-H (17 CFR 279.3) in paper format with the Department of Law at least twenty (20) business days before a filing is due.

(iii) Effective Date--Upon Approval. The exemption is effective upon approval by the Department of Law. The time period of the exemption may be no longer than one (1) year after the date on which the Form ADV-H is filed. If the Department of Law, approves the application, the investment adviser must, no later than five (5) business days after the exemption approval date, submit filings to IARD in paper format (along with the appropriate processing fees) for the period of time for which the exemption is granted.

11.4 Registration Information

(a) Initial Application. The application for initial registration as an investment adviser pursuant to these rules shall be made by completing Form ADV (Uniform Application for Investment Adviser Registration) (17 C.F.R. 279.1) in accordance with the form instructions and by filing the form with IARD.

(1) Portions of Form ADV Not Yet Accepted by IARD. Until IARD provides for the filing of Part 2 of Form ADV, the Department of Law requires the filing of Part 2 of Form ADV in paper form.

(b) Time for filing. An investment adviser application, should be filed with IARD no less than ten (10) days prior to engaging in investment advisory activities in the State of New York.

(c) Where registration required. All investment advisers with more than five (5) clients in the State of New York must make application to register as an investment adviser.

(d) Annual Renewal. The application for annual renewal as an investment adviser shall be filed with IARD. The application for annual renewal registration shall include the required fee and any other information the Department of Law may reasonably require.

(e) Length of registration. The registration is for a calendar year or for that remaining part of the calendar year in which it is submitted.

(f) Updates and Amendments.

(1) An investment adviser must file with IARD, in accordance with the instructions in the Form ADV, any amendments to the investment adviser's Form ADV;

(2) An amendment will be considered to be filed promptly if the amendment is filed within thirty (30) days of the event that requires the filing of the amendment; and

(3) Within ninety (90) days after the end of the investment's adviser's fiscal year, an

investment adviser must file with IARD, an updated Form ADV.

(g) Completion of Filing. An application for initial or renewal registration is not considered filed for purposes of these rules until the required fee and all required submissions have been received by the Department of Law or the designee.

11.5 Notice Filing Requirements for Federally Covered Investment Advisers.

(a) Notice Filing. The notice filing for a federally covered investment adviser shall be filed with IARD on an electronically signed Form ADV (Uniform Application for Investment Adviser Registration (17 C.F.R. 279.1)). All federally covered investment advisers with more than five (5) clients in the State of New York must notice file. A notice filing of a federally covered investment adviser shall be deemed filed when the fee required and the Form ADV are filed with and accepted by IARD on behalf of the state.

(1) Portions of Form ADV Not Yet Accepted by IARD. Until IARD provides for the filing of Part 2 of Form ADV, the Department of Law requires the filing of Part 2 of Form ADV in paper form.

(b) Renewal. The annual renewal of the notice filing for a federally covered investment adviser shall be filed with IARD. The renewal of the notice filing for a federally covered investment adviser shall be deemed filed when the fee required is filed and accepted on behalf of the state.

(c) Updates and Amendments. A federally covered investment adviser must file with IARD, in accordance with the instructions in the Form ADV, any amendments to the federally covered investment adviser's Form ADV. A federally covered investment adviser shall submit their amendments pursuant to Securities and Exchange Commission requirements.

11.6 Investment adviser examination requirements.

(a) Every investment adviser who is required to register in this jurisdiction and who is an individual, and every individual who represents a state registered investment adviser in doing any of the acts which makes that person an investment adviser as defined in section 11.12(f), or solicits business for an investment adviser, and does not qualify for a waiver pursuant to section 11.7, must take and receive a passing grade within two (2) years prior to the date of filing registration information pursuant to section 11.4(c) on

(1) the Uniform Investment Adviser Law Examination (Series 65 examination); or

(2) the General Securities Representative Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination).

(b) Every investment adviser registered and who is an individual, and every individual who represented a state registered investment adviser in doing any of the acts as defined in section 11.12(f), or who solicited business for an investment adviser in this jurisdiction prior to July 1,

2003, and who does not qualify for a waiver pursuant to section 11.7, must take and receive a passing grade by July 1, 2004 on

- (1) the Uniform Investment Adviser Law Examination(s) (Series 65 examination(s)); or
- (2) the General Securities Representative Examination (Series 7 examination) and the Uniform Combines State Law Examination (Series 66 examination).

11.7 Waivers.

(a) An individual who represents an investment adviser in doing any of the acts which make that person an investment adviser as defined in section 11.12(f), or solicits business for an investment adviser, and who has been continuously registered in any jurisdiction, other than New York, for a period of two (2) years prior to the date of filing registration information pursuant to section 11.4(c) without any regulatory action or arbitrations, shall be exempt from provisions of section 11.6.

(b) The examination requirement of section 11.6 shall not apply to any individual who currently holds one of the following professional designations in good standing:

- (1) Certified Financial Planner(CFP) awarded by the Certified Financial Planner Board of Standards, Inc.;

- (2) Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, Pennsylvania;

(3) Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants;

(4) Chartered Financial Analyst (CFA) awarded by the Association for Investment Management Research;

(5) Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.; or

(6) Such other professional designation as the administrator may by rule or order recognize.

(c) All requests for waivers under the subdivisions of section 11.7 must be made on Form NY-IAQ (New York Investment Adviser Qualification).

11.8 Filing fees.

(a) The fees for initial and annual renewal registrations filed directly with the Department of Law or its designee are \$200. Checks should be made payable to the New York State Department of Law or its designee and need not be certified.

11.9 Record keeping requirements.

(a) All of the following books and records must be maintained and preserved in an easily accessible place for a period of not less than five (5) years from last transaction or publication, the first two (2) years in an appropriate office of the investment adviser. Before ceasing operations, the investor adviser must arrange for maintenance and preservation and be responsible for all books and records for the full period described above.

(1). Journals, ledgers and underlying documentation for entries; annual financial statements (including trial balances and internal working papers), business tax returns (income & employer taxes).

(2). Check books, bank statements, canceled checks, reconciliations.

(3). All bills and statements, paid or unpaid.

(4). Employment records. Records should include, but are not limited to, a list of all individuals who give investment advice on behalf of the applicant in this jurisdiction.

(5). Record of complaints organized by complainant. These records should include, but are not limited to any regulatory or disciplinary action against any individuals who give investment advice on behalf of the applicant in this jurisdiction.

(6). A list or record of all accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client.

(7). A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment advisor circulates or distributes, directly or indirectly to five (5) or more persons. If purchase or sale of a specific security is recommended and the reason is not stated, there must be a memorandum indicating the reason. The investment adviser is not required to keep a record of the names and addresses the notice, circular, letter or other communication is sent to, except if it is distributed to persons named on any list, then a memorandum describing the list and its source should be retained with the notice, circular, letter or other communication.

(8). All written agreements entered into by the investment adviser with the client or otherwise relating to the business of the investment adviser.

(9). Record of every transaction in a security in which the investment adviser has or by reason of such transaction acquires, any direct or indirect beneficial ownership (not including accounts over which the investment adviser has no control or influence or transactions in securities which are direct obligations of the United States). The record shall state the title and amount of security involved; date and nature of transaction; price at which it was effected; name of broker, dealer or bank. The transaction must be recorded not later than ten (10) days after the

end of the calendar quarter in which the transaction was effected. The record may contain the statement that this is not an admission of direct or indirect beneficial ownership in the security.

(10). A copy of each written statement and each amendment or revision, given or sent to any client or prospective client and a record of the dates that each written statement, was given or offered.

(11). All accounts, books, internal working papers and any other records or documents necessary to form the basis for or to demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular or letter. Investment records including documentation and verification of all claims of investment performance record or any projections made to client(s).

(12). Certificates or other documentation for continuing education.

(13). Client file should contain:

(i). Written contract--must be original.

(ii). All correspondence to or from client.

(iii). All powers of attorney and any other evidence of the granting of discretionary authority.

(iv). Memorandum of each order given by investment adviser for purchase or sale of any security; any instruction from the client concerning the purchase, sale, delivery or receipt of a particular security, and of any modification or cancellation of orders or instructions. (Must show terms and conditions of the order, instruction, modification or cancellation, identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order, the account, the date, entity that executed it, duly noted if entered pursuant to discretionary power).

(v). Brokerage, bank statements.

(vi). All written acknowledgments of receipt obtained from clients and copies of disclosure documents.

(vii). Risk analysis for each client.

(viii). Records of fees charged, collected.

(ix). Recommendations to clients including but not limited to portfolio review analyses.

(x). Investments made on behalf of clients.

(xi). If known--name of client broker, bank, accountant, insurance agent, prior investments, real estate, mortgages, amounts of coverage, assumed tax brackets, significant family relationships including ages.

(xii). Assets managed.

(xiii). Unusual material items affecting cash flow.

(xiv). Person responsible for the account.

(xv). Record of ending relationship, date.

(14). Investment advisers with custody or possession of securities or funds of any client must additionally keep the following records:

(i). Journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for such accounts and all other debits and credits to such accounts.

(ii). Separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each such purchase and sale, and all debits and credits.

(iii). Copies of confirmations of all transactions effected by or for the account of any such client.

(iv). A record for each security in which any client has a position showing the name of each client having any interest in each security, the amount or interest of each such client, and the location of each security.

(15). Investment advisers who render investment supervisory or management service must keep the following records (with respect to the portfolio):

(i). Records showing separately for each such client the securities bought and sold, the date, amount and price of each such purchase and sale.

(ii). For each security in which the client has a current position, information from which the investment adviser can promptly furnish the name of such client and the current amount or interest of such client

11.10 Filing of investment advisory literature and advertisements.

(a) All investment advisers who shall sell to clients or prospective clients investment advisory literature in this State, shall mail or transmit to the Department of Law on the date of the first general distribution to the investing public one (1) copy of such literature.

(b) Every investment adviser who shall in this State, publish, give publication to, or make general distribution of any notice, circular, advertisement, form letter or other advertising communication for the purpose of soliciting investment advisory accounts or clients, whether in writing or by radio or television broadcast, shall file with the Department of Law one (1) copy thereof as promptly as is reasonably possible, but not later than five (5) days after such advertisement, notice, circular, letter or other advertising communication has been made.

(c) Investment supervisory services, and that part of any regular investment advisory business constituting the same, are not required to file with the Department of Law under the foregoing paragraphs personalized letters, presentations or other literature, issued in servicing of investment supervisory accounts, distributed to clients.

11.11 Withdrawal of Registration.

(a) The application for withdrawal of registration as an investment adviser shall be completed by following the instructions on Form ADV-W (Notice of Withdrawal from Registration as Investment Adviser) (17 C.F.R. 279.2) and filed upon Form ADV-W with IARD.

11.12 Definitions.

(a) A single client or a single person for purposes of §359-eee (a)(5) shall mean

(1) a natural person, and:

(i) Any minor child of the natural person;

(ii) Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence;

(iii) All accounts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and

(iv) All trusts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries;

(2) (i) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(1) (iv) of this section, or other legal organization (any of which are referred to hereinafter as a “legal organization”) that receives investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries (any of which are referred to hereinafter as an”owner”); and

(ii) Two (2) or more legal organizations referred to in paragraph (a)(2)(i) of this section that have identical owners.

(3) Special Rules. For purposes of this section:

(i) An owner must be counted as a client if the investment adviser provides investment advisory services to the owner separate and apart from the investment advisory services provided to the legal organization, provided, however, that the determination that an owner is a client will not affect the applicability of this section with regard to any other owner;

(ii) An owner need not be counted as a client of an investment adviser solely because the investment adviser, on behalf of the legal organization, offers, promotes, or sells interests in the legal organization to the owner, or reports periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters;

(iii) A limited partnership is a client of any general partner or other person acting as investment adviser to the partnership;

(iv) Any person for whom an investment adviser provides investment advisory services without compensation need not be counted as a client; and

(v) An investment adviser that has its principal office and place of business outside of the United States must count only clients that are United States residents.

(b) Federally covered investment adviser means a person who is registered under section 203 of the Investment Advisers Act of 1940, 15 U.S.C. §80 (B) et seq.

(c) Financial institution shall mean

(1) a bank as defined under General Business Law §359-e(1)(e); or

(2) credit union, or similar institution that is organized or chartered under the laws of a State or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a State or the United States if its deposits or share accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law. The terms does not include:

(A) an insurance company or other organization primarily engaged in the business of insurance;

(B) a Morris Plan bank; or

(C) an industrial loan company.

(d) General distribution shall mean a distribution to more than five (5) persons in this State at any one time.

(e) Institutional buyer shall mean any of the following, whether acting for itself or for others in a fiduciary capacity:

(1) a depository institution or international banking institution;

(2) an insurance company;

(3) a separate account of an insurance company;

(4) an investment company as defined in the Investment Company Act of 1940;

(5) a broker-dealer registered under the Securities Exchange Act of 1934;

(6) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974 (ERISA), that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Investment Adviser Act, a depository institution, or an insurance company;

(7) a plan established and maintained by a State, a political subdivision of a State, or an agency or instrumentality of a State or a political subdivision of a State for the benefit of its employees, if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in ERISA, that is a broker-dealer registered under the Securities Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Investment Adviser Act, a depository institution, or an insurance company;

(8) a trust, if it has total assets in excess of \$10,000,000, its trustee is a depository institution, and its participants are exclusively plans of the types identified in subparagraph (6) or (7), regardless of size of assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(9) an organization described in Section 501(c)(3) of the Internal Revenue Code (26

U.S.C. Section 501(c)(3)), a corporation, Massachusetts or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$10,000,000;

(10) a small business investment company licensed by the Small Business Administration under Section 301 (c) of the Small Business Investment Act of 1958 (15 U.S.C. Section 681(c)) with total assets in excess of \$10,000,000;

(11) a private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with total assets in excess of \$10,000,000;

(12) a federally covered investment adviser acting for its own account;

(13) a “qualified institutional buyer” as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(H), adopted under the Securities Act of 1933;

(14) a “major United States institutional investor” as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934;

(f) Investment adviser shall mean any person who, for compensation, engages in the business of advising members of the public, either directly or through publications or writings within or from

the State of New York, as to the value of securities or as to the advisability of investing in, purchasing, or selling or holding securities, or who, for compensation and as a part of a regular business issues or promulgates analyses or reports concerning securities to members of the public within or from the State of New York.

(g) Investment supervisory service shall mean any person giving continuous advice as to the investment of funds on the basis of individual needs of each client.

(h) Person shall mean a natural person, corporation, company, partnership, trust or association.

11.13 Exemptions

(a) The following investment advisers are exempted from the registration provisions of the Investment Adviser Act and the regulations issued thereunder:

(1) A bank or trust company, unless it is considered an investment adviser under the federal Investment Advisers Act of 1940;

(2) A lawyer, accountant, engineer or teacher whose performance of these services is solely incidental to the practice of this profession;

(3) a broker or dealer whose performance of these services is solely incidental to the

conduct of its business as broker or dealer and who receives no special compensation for them;

(4) a publisher of a bona fide newspaper or news magazine.

(5) a person who sells investment advisory services to less than six (6) persons in this state exclusive of financial institutions and institutional buyers;

(b) The following investment advisers are exempted from the registration provisions and the advertising and literature filing provisions of the Investment Adviser Act and the regulations issued thereunder;

(1) a person who gathers raw data from one (1) or more sources and published it in chart form without comment as an information source to investors; and

(2) a person who renders investment advice for compensation solely in the form of seminars attended by more than five (5) persons in this State.

11.14 Financial statements.

(a) Financial statements of an investment adviser shall be prepared in accordance with generally accepted accounting principles including reserves or liabilities for unfulfilled subscriptions.

Where financial statements are unaudited by an independent public accountant, a certification by management is required attesting to the accuracy of such statements. Nothing in this regulation shall abrogate the requirement, set forth in Form ADV; Part 2A, Item 18A, 1., that investment advisers charging certain fees six months or more in advance must submit audited financial statements.

(b) Each investment adviser filing an initial registration through the IARD shall submit a balance sheet and an income statement as of the close of its last fiscal or calendar year as prepared by the adviser's accountant or by management. Where the financial statements submitted are more than ninety (90) days old, an interim balance sheet no more than ninety (90) days old shall also be submitted directly to the Department of Law.

(c) Annually, each registered investment adviser shall submit a balance sheet and an income statement as of the close of its last fiscal or calendar year within ninety (90) days after completion of its fiscal or calendar year end directly to the Department of Law.

11.15 Distribution of investment adviser statement.

Each investment adviser registered in the State of New York must:

(a) deliver to a client or prospective client either a copy of the investment adviser statement form ADV, or a brochure containing all of the information set forth therein, before or at the time of entering into an investment contract with that client; and

(b) deliver to each client, annually within 120 days after the end of the fiscal year of such

adviser, and without charge, if there are material changes in such statement or brochure since any annual updating amendment:

- (1) a current statement or brochure; or
- (2) the summary of material changes to any statement or brochure as required by item 2 of form ADV, part 2A that offers to provide your current brochure without charge, accompanied by the web site address (if available) and an e-mail address (if available) and telephone number by which a client may obtain the current statement or brochure from you, and web site address for obtaining information about you through the investment advisers public disclosure (IAPD) system.

11.16 Transition to new regulations. [Repealed]

11.17 Forms.

- (a) Form ADV. Uniform Application for Investment Adviser Registration (Appendix 3).
- (b) Form ADV-H. Application for Temporary or Continuing Hardship Exemption (Appendix 3).
- (c) Form ADV-W. Notice of Withdrawal From Registration as Investment Adviser (Appendix3).
- (d) Form NY-IAQ. New York Investment Adviser Qualification (Appendix 3).