

as prescribed by rule 201(a) of Regulation S-T (§232.201(a) of this chapter).

[58 FR 14861, Mar. 18, 1993]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form TH, see the List of CFR Sections Affected in the Finding Aids section of this volume.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

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AUTHORITY: 15 U.S.C. 80b-2(a)(17), 80b-3, 80b-4, 80b-6(4), 0b-6a, 80b-11, unless otherwise noted.

Section 275.203A-1 is also issued under 15 U.S.C. 80b-3a.

Section 275.203A-2 is also issued under 15 U.S.C. 80b-3a.

Section 275.204-2 is also issued under 15 U.S.C. 80b-6.

Section 275.205-3 is also issued under 15 U.S.C. 80b-5(e).

§275.0-2 Consent to service of process to be furnished by non-resident investment advisers and by non-resident investment general partners or managing agents of investment advisers.

(a) Each non-resident investment adviser registered or applying for registration pursuant to section 203 of the Investment Advisers Act of 1940, each non-resident general partner of an investment adviser partnership which is registered or applying for registration, and each non-resident managing agent of any other unincorporated investment adviser which is registered or applying for registration, shall furnish to the Commission, in a form prescribed by or acceptable to it, a written irrevocable consent and power of attorney which (i) designates the Securities and Exchange Commission as an agent upon whom may be served any process, pleadings, or other papers in any civil suit or action brought in any appropriate court in any place subject to the jurisdiction of the United States, where the cause of action (i) accrues on or after the effective date of this section, (ii) arises out of any activity, in any place subject to the jurisdiction of the United States, occurring in connection with the conduct of business of an

investment adviser, and (iii) is founded, directly or indirectly upon the provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, or any rule or regulation under any of said acts; and (2) stipulates and agrees that any such civil suit or action may be commenced by the service of process upon the Commission and the forwarding of a copy thereof as provided in paragraph (c) of this section, and that the service as aforesaid of any such process, pleadings, or other papers upon the Commission shall be taken and held in all courts to be as valid and binding as if due personal service thereof had been made.

(b) The required consent and power of attorney shall be furnished to the Commission within the following period of time:

(1) Each non-resident investment adviser registered at the time this section becomes effective, and each non-resident general partner or managing agent of an unincorporated investment adviser registered at the time this section becomes effective, shall furnish such consent and power of attorney within 60 days after such date;

(2) Each investment adviser applying for registration after the effective date of this section shall furnish, at the time of filing such application, all the consents and powers of attorney required to be furnished by such investment adviser and by each general partner or managing agent thereof: *Provided, however,* That where an application for registration of an investment adviser is pending at the time this rule becomes effective such consents and powers of attorney shall be furnished within 30 days after this section becomes effective.

(3) Each investment adviser registered or applying for registration who or which becomes a non-resident investment adviser after the effective date of this section, and each general partner or managing agent, or an unincorporated investment adviser registered or applying for registration, who becomes a non-resident after the effective date of this section shall fur-

nish such consent and power of attorney within 30 days thereafter.

(c) Service of any process, pleadings or other papers on the Commission under this part shall be made by delivering the requisite number of copies thereof to the Secretary of the Commission or to such other person as the Commission may authorize to act on its behalf. Whenever any process, pleadings or other papers as aforesaid are served upon the Commission, it shall promptly forward a copy thereof by registered or certified mail to the appropriate defendants at their last address of record filed with the Commission. The Commission shall be furnished a sufficient number of copies for such purpose, and one copy for its file.

(d) For purposes of this section the following definitions shall apply:

(1) The term *investment adviser* shall have the meaning set out in section 202(a)(11) of the Investment Advisers Act of 1940.

(2) The term *managing agent* shall mean any person, including a trustee, who directs or manages or who participates in the directing or managing of the affairs of any unincorporated organization or association which is not a partnership.

(3) The term *non-resident investment adviser* shall mean (i) in the case of an individual, one who resides in or has his principal place of business in any place not subject to the jurisdiction of the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not subject to the jurisdiction of the United States; (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not subject to the jurisdiction of the United States.

(4) A general partner or managing agent of an investment adviser shall be deemed to be a nonresident if he resides in any place not subject to the jurisdiction of the United States.

(Secs. 19, 23, 48 Stat. 85, as amended, 901, as amended, sec. 319, 53 Stat. 1173, sec. 38, 54 Stat. 841; 15 U.S.C. 77s, 78w, 77sss, 80a-37)

[19 FR 4300, July 14, 1954, as amended at 29 FR 16982, Dec. 11, 1964; 30 FR 4129, Mar. 30, 1965]

§ 275.0-3 References to rules and regulations.

The term *rules and regulations* refers to all rules and regulations adopted by the Commission pursuant to the Act, including the forms for registration and reports and the accompanying instructions thereto.

[30 FR 4129, Mar. 30, 1965]

§ 275.0-4 General requirements of papers and applications.

(a) *Filing of papers.* All papers required to be filed with the Commission shall, unless otherwise provided by the rules and regulations in this part, be delivered through the mails or otherwise to the Securities and Exchange Commission, Washington, DC 20549. Except as otherwise provided by the rules and regulations in this part, such papers shall be deemed to have been filed with the Securities and Exchange Commission on the date when they are actually received by it.

(b) *Formal specifications respecting applications.* Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed, and every amendment to such application, shall be filed in quintuplicate. One copy shall be signed by the applicant, but the other four copies may have facsimile or typed signatures. Such applications shall be on paper no larger than 8½ x 11 inches in size. To the extent that the reduction of larger documents would render them illegible, those documents may be filed on paper larger than 8½ x 11 inches in size. The left margin should be at least 1½ inches wide and, if the application is bound, it should be bound on the left side. All typewritten or printed matter (including deficits in financial statements) should be set forth in black so as to permit photocopying and micro-filming.

(c) *Authorization respecting applications.* (1) Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed and which is executed by a corporation, partnership, or other company and filed with the Commission, shall contain a concise statement of the applicable provisions

of the articles of incorporation, bylaws, or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the same is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions shall be attached as an exhibit to, or the pertinent provisions thereof shall be quoted in, the application.

(2) If an amendment to any such application shall be filed, such amendment shall contain a similar statement or, in lieu thereof, shall state that the authorization described in the original application is applicable to the individual who signs such amendment and that such authorization still remains in effect.

(3) When any such application or amendment is signed by an agent or attorney, the power of attorney evidencing his authority to sign shall contain similar statements and shall be filed with the Commission.

(d) *Verification of applications and statements of fact.* Every application for an order under any provision of the Act, for which a form with instructions is not specifically prescribed and every amendment to such application, and every statement of fact formally filed in support of, or in opposition to, any application or declaration shall be verified by the person executing the same. An instrument executed on behalf of a corporation shall be verified in substantially the following form, but suitable changes may be made in such form for other kinds of companies and for individuals:

State of _____
County of _____, ss: _____

The undersigned being duly sworn deposes and says that he has duly executed the attached _____ dated _____, 19____, for and on behalf of _____ (Name of company); that he is the _____ (Title of officer) of such company; and that all action by stockholders, directors, and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument, and the contents thereof,

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and that the facts therein set forth are true to the best of his knowledge, information and belief.

(Signature) _____

(Type or print name beneath) _____

Subscribed and sworn to before me a _____ (Title of officer) this _____ day of _____, 19____.

[OFFICIAL SEAL]

My commission expires _____

(e) *Statement of grounds for application.* Each application should contain a brief statement of the reasons why the applicant is deemed to be entitled to the action requested with a reference to the provisions of the Act and of the rules and regulations under which application is made.

(f) *Name and address.* Every application shall contain the name and address of each applicant and the name and address of any person to whom any applicant wishes any question regarding the application to be directed.

(g) *Proposed notice.* A proposed notice of the proceeding initiated by the filing of the application shall accompany each application as an exhibit thereto and, if necessary, shall be modified to reflect any amendments to such application.

(h) *Definition of application.* For purposes of this rule, an "application" means any application for an order of the Commission under the Act other than an application for registration as an investment adviser.

(i) The manually signed original (or in the case of duplicate original) one duplicate originals of all registrations, applications, statements, reports, or other documents filed under the Investment Advisers Act of 1940, as amended, shall be numbered sequentially (in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed, or other legible form of notation from the facing page of the document through the last page of that document and any exhibits or attachments thereto. Further, the total number of pages contained in

a numbered original shall be set forth on the first page of the document.

(15 U.S.C. 77s (48 Stat. 85); 15 U.S.C. 78w (48 Stat. 901); 15 U.S.C. 79c and 79t (49 Stat. 810, 833); 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss (53 Stat. 1154, 1156, 1167, 1173); 15 U.S.C. 80w-37, 80c-39 (54 Stat. 841, 342); 15 U.S.C. 80b-3, 80b-4, 80b-11 (54 Stat. 850, 852, 855))

[41 FR 39019, Sept. 14, 1976, as amended at 44 FR 4666, Jan. 23, 1979; 47 FR 58239, Dec. 30, 1982]

§ 275.0-5 Procedure with respect to applications and other matters.

The procedure hereinbelow set forth will be followed with respect to any proceeding initiated by the filing of an application, or upon the Commission's own motion, pursuant to any section of the Act or any rule or regulation thereunder, unless in the particular case a different procedure is provided:

(a) Notice of the initiation of the proceeding will be published in the FEDERAL REGISTER and will indicate the earliest date upon which an order disposing of the matter may be entered. The notice will also provide that any interested person may, within the period of time specified therein, submit to the Commission in writing any facts bearing upon the desirability of a hearing on the matter and may request that a hearing be held, stating his reasons therefor and the nature of his interest in the matter.

(b) An order disposing of the matter will be issued as of course following the expiration of the period of time referred to in paragraph (a) of this section, unless the Commission thereafter orders a hearing on the matter.

(c) The Commission will order a hearing on the matter, if it appears that a hearing is necessary or appropriate in the public interest or for the protection of investors, (1) upon the request of any interested person or (2) upon its own motion.

(d) *Definition of application.* For purposes of this rule, an "application" means any application for an order of the Commission under the Act other

than an application for registration as an investment adviser.

[41 FR 39020, Sept. 14, 1976, as amended at 61 FR 49962, Sept. 24, 1996]

§ 275.0-6 Incorporation by reference in applications.

(a) A person filing an application may, subject to the limitations of § 228.10(f) and § 229.10(d) of this chapter, incorporate by reference as an exhibit to such application any document or part thereof, including any financial statement or part thereof, previously or concurrently filed with the Commission pursuant to any act administered by the Commission. The incorporation may be made whether the matter incorporated was filed by such applicant or any other person. If any modification has occurred in the text of any such document since the filing thereof, the applicant shall file with the reference a statement containing the text of any such modification and the date thereof. If the number of copies of any document previously or concurrently filed with the Commission is less than the number required to be filed with the application which incorporates such document, the applicant shall file therewith as many additional copies of the document as may be necessary to meet the requirements of the application.

(b) Notwithstanding paragraph (a) of this section, a certificate of an independent public accountant or accountants previously or concurrently filed may not be incorporated by reference in any application unless the written consent of the accountant or accountants to such incorporation is filed with the application.

(c) In each case of incorporation by reference, the matter incorporated shall be clearly identified in the reference. An express statement shall be made to the effect that the specified matter is incorporated in the application at the particular place where the information is required.

(d) Notwithstanding paragraph (a) of this section, no application shall incorporate by reference any exhibit or financial statement which (1) has been withdrawn, or (2) was filed under any act administered by the Commission in connection with a registration which

has ceased to be effective, or (3) is contained in an application for registration, registration statement, or report subject, at the time of the incorporation by reference, to pending proceedings under section 8(b) (15 U.S.C. 77a-8(b)) or 8(d) (15 U.S.C. 77a-8(d)) of the Securities Act of 1933 (15 U.S.C. 77a-1 et seq.), section 8(e) (15 U.S.C. 80a-8(e)) of the Investment Company Act of 1940, section 15(b)(4)(A) (15 U.S.C. 78a-15(b)(4)(A)) of the Securities Exchange Act of 1934 (15 U.S.C. 78a-1 et seq.), section 203(e)(1) (15 U.S.C. 80b-3(e)(1)) of the Investment Advisers Act of 1940 or to an order entered under any of those sections.

(e) Notwithstanding paragraph (a) of this section, the Commission may refuse to permit incorporation by reference in any case in which its judgment such incorporation would render an application incomplete, unclear, or confusing.

(f) *Definition of Application.* For purposes of this rule, an "application" means any application for an order of the Commission under the Act other than an application for registration as an investment adviser.

NOTE: Prior to incorporating by reference any document as an exhibit to an application, applicants are advised to review § 228.10(f) and § 229.10(d) of this chapter as in effect at the time the application is filed to determine whether such incorporation by reference would be permissible under that rule.

[41 FR 39020, Sept. 14, 1976, as amended at 60 FR 32825, June 23, 1995]

§ 275.0-7 Small entities under the Investment Advisers Act for purposes of the Regulatory Flexibility Act.

(a) For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.) and unless otherwise defined for purposes of a particular rulemaking proceeding, the term *small business* or *small organization* for purposes of the Investment Advisers Act of 1940 shall mean an investment adviser that:

(1) Has assets under management, as defined under Section 203A(a)(2) of the Act (15 U.S.C. 80b-3a(a)(2)) and reported on Form ADV-T (17 CFR 279.3) or its most recent Schedule I to Form ADV (17 CFR 279.1), having a total value of

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less than \$25 million, or such higher amount as the Commission may by rule deem appropriate under Section 203A(a)(1)(A) of the Act (15 U.S.C. 80b-3a(a)(1)(A));

(2) Did not have total assets of \$5 million or more on the last day of the most recent fiscal year; and

(3) Does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of \$25 million or more (or such higher amount as the Commission may deem appropriate), or any person (other than a natural person) that had total assets of \$5 million or more on the last day of the most recent fiscal year.

(b) For purposes of this section:

(1) *Control* means the power to direct or cause the direction of the management or policies of a person, whether through ownership of securities, by contract, or otherwise. Any person that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of another person is presumed to control the other person.

(2) *Total assets* means the total assets as shown on the balance sheet of the investment adviser or other person described above under paragraph (a)(3) of this section, or the balance sheet of the investment adviser or such other person with its subsidiaries consolidated, whichever is larger.

[63 FR 35515, June 30, 1998]

§ 275.202(a)(1)-1 Certain transactions not deemed assignments.

A transaction which does not result in a change of actual control or management of an investment adviser is not an assignment for purposes of section 205(a)(2) of the Act.

[51 FR 32907, Sept. 17, 1986; 64 FR 2567, Jan. 15, 1999]

§ 275.203-1 Application for registration of investment adviser.

(a) An application for registration of an investment adviser filed pursuant to section 203(c) of the Act shall be filed on Form ADV in accordance with the instructions contained therein.

(b) A Form ADV filed by an investment-adviser partnership which is not registered when such form is filed and which succeeds to and continues the business of a predecessor partnership registered as an investment adviser shall be deemed to be an application for registration even though designated as an amendment if it is filed to reflect the changes in the partnership and to furnish required information concerning any new partners.

(c) A Form ADV filed by an investment adviser corporation which is not registered when such form is filed and which succeeds to and continues the business of a predecessor corporation registered as an investment adviser shall be deemed to be an application for registration even though designated as an amendment if the succession is based solely on a change in the predecessor's state of incorporation and the amendment is filed to reflect that change.

(d) A Form ADV filed by an investment adviser corporation, partnership, sole proprietorship or other entity which is not registered when such form is filed and which succeeds to and continues the business of a predecessor corporation, partnership, sole proprietorship or other entity registered as an investment adviser shall be deemed to be an application for registration even though designated as an amendment if the succession is based solely on a change in the predecessor's form of organization and the amendment is filed to reflect that change.

[19 FR 4079, July 3, 1954, as amended at 40 FR 57796, Dec. 12, 1975; 47 FR 22507, May 25, 1982]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting Form ADV, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 275.203-2 Withdrawal from registration.

(a) Notice of withdrawal from registration as an investment adviser pursuant to section 203(h) shall be filed on Form ADV-W in accordance with the instructions contained therein.

(b) Except as hereinafter provided, a notice to withdraw from registration filed by an investment adviser pursuant to section 203(h) shall become effective on the 60th day after the filing

thereof with the Commission or within such shorter period of time as the Commission may determine. If, prior to the effective date of a notice of withdrawal from registration, the Commission has instituted a proceeding pursuant to section 203(e) to suspend or revoke registration, or a proceeding pursuant to section 203(h) to impose terms or conditions upon withdrawal, the notice of withdrawal shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(c) Every notice of withdrawal filed pursuant to this section shall constitute a “report” within the meaning of sections 204 and 207 and other applicable provisions of the Act.

[32 FR 16151, Nov. 25, 1967, as amended at 39 FR 794, Jan. 3, 1974; 40 FR 57796, Dec. 12, 1975]

§ 275.203-3 [Reserved]

§ 275.203(b)(3)-1 Definition of “client” of an investment adviser.

PRELIMINARY NOTE TO § 203(b)(3)-1

This rule is a safe harbor and is not intended to specify the exclusive method for determining who may be deemed a single client for purposes of section 203(b)(3) of the Act.

(a) *General.* For purposes of section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)), the following are deemed a single client:

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

(b) *Special Rules.* For purposes of this section:

(1) 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;

(2) 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;

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

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

(5) 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; an investment adviser that has its principal office and place of business in the United States must count all clients.

(c) *Holding Out.* Any investment adviser relying on this section shall not be deemed to be holding itself out generally to the public as an investment adviser, within the meaning of section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)), solely because such investment

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adviser participates in a non-public offering of interests in a limited partnership under the Securities Act of 1933.

[62 FR 28132, May 22, 1997]

§ 275.203A-1 Eligibility for Commission registration.

(a) *Threshold increased to \$30 million of assets under management.* No investment adviser that is registered or required to be registered as an investment adviser in the State in which it maintains its principal office and place of business shall register with the Commission under section 203 of the Act (15 U.S.C. 80b-3), unless the investment adviser:

(1) Has assets under management of not less than \$30,000,000, as reported on the Form ADV (17 CFR 279.1) of the investment adviser; or

(2) Is an investment adviser to an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*].

(b) *Exemption for Investment advisers having between \$25 and \$30 million of assets under management.* Notwithstanding paragraph (a) of this section, an investment adviser that is registered or required to be registered as an investment adviser in the State in which it maintains its principal office and place of business may register with the Commission if the investment adviser has assets under management of not less than \$25,000,000 but not more than \$30,000,000, as reported on the Form ADV (17 CFR 279.1) of the investment adviser. This paragraph (b) shall not apply to an investment adviser:

(1) To an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*); or

(2) That is exempted by § 275.203A-2 from the prohibition in section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) on registering with the Commission.

NOTE TO PARAGRAPHS (a) AND (b)

Paragraphs (a) and (b) together make registration with the Commission optional for certain investment advisers that have between \$25 and \$30 million of assets under management.

(c) *Grace period for transition from Commission to State Registration.* An investment adviser registered with the

Commission, upon filing an amendment to Form ADV (17 CFR 279.1) that indicates that it would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) from registering with the Commission, shall be subject to having its registration cancelled pursuant to section 203(h) of the Act (15 U.S.C. 80b-3(h)), *Provided, That* the Commission shall not commence any cancellation proceeding on the basis of the amendment until the expiration of a period of not less than 90 days from the date the investment adviser was required by § 275.204-1(a) to file the amendment.

(d) *Transition From State to Commission Registration.* An investment adviser that is registered with a securities commissioner (or any agency or officer performing like functions) of any State that requires such investment adviser annually to report to it the amount of assets under management pursuant to a form or rule substantially similar to Schedule I to Form ADV (17 CFR 279.1) must register with the Commission within 90 days after the date on which the investment adviser is required to report assets under management of \$30,000,000 or more to the state securities commissioner, unless, at the time of registration with the Commission, the investment adviser is prohibited by section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) from registering with the Commission.

NOTES TO PARAGRAPH (d)

1. An investment adviser may be prohibited by section 203A(a) from registering with the Commission if its assets under management have decreased to an amount less than \$25,000,000 during the 90-day period.

2. An investment adviser not eligible to rely on paragraph (d) must register with the Commission promptly when no longer prohibited by section 203A(a) from registering with the Commission.

[62 FR 28133, May 22, 1997, as amended at 63 FR 39716, July 24, 1998]

§ 275.203A-2 Exemptions from prohibition on Commission registration.

The prohibition of section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) does not apply to:

(a) *Nationally recognized statistical rating organizations.* An investment adviser that is a nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F), and (H) of §240.15c3-1 of this chapter.

(b) *Pension Consultants.* (1) An investment adviser that is a "pension consultant," as defined in this section, with respect to assets of plans having an aggregate value of at least \$50,000,000.

(2) An investment adviser is a pension consultant, for purposes of paragraph (b) of this section, if the investment adviser provides investment advice to:

(i) Any employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. 1002(3)];

(ii) Any governmental plan described in section 3(32) of ERISA (29 U.S.C. 1002(32)); or

(iii) Any church plan described in section 3(33) of ERISA (29 U.S.C. 1002(33)).

(3) In determining the aggregate value of assets of plans, include only that portion of a plan's assets for which the investment adviser provided investment advice (including any advice with respect to the selection of an investment adviser to manage such assets). Determine the aggregate value of assets by cumulating the value of assets of plans with respect to which the investment adviser was last employed or retained by contract to provide investment advice during a 12-month period ended within 90 days of filing Schedule I to Form ADV (17 CFR 279.1).

(c) *Investment advisers controlling, controlled by, or under common control with an investment adviser registered with the Commission.* An investment adviser that controls, is controlled by, or is under common control with, an investment adviser eligible to register, and registered with, the Commission ("registered adviser"), provided that the principal office and place of business of the investment adviser is the same as that of the registered adviser. For purposes of this paragraph, control means the power to direct or cause the direction of the management or policies of an investment adviser, whether

through ownership of securities, by contract, or otherwise. Any person that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of an investment adviser is presumed to control that investment adviser.

(d) *Investment advisers expecting to be eligible for Commission registration within 120 Days.* An investment adviser that:

(1) Immediately before it registers with the Commission, is not registered or required to be registered with the Commission or a securities commissioner (or any agency or officer performing like functions) of any State and has a reasonable expectation that it would be eligible to register with the Commission within 120 days after the date the investment adviser's registration with the Commission becomes effective;

(2) Includes on Schedule E to its Form ADV (17 CFR 279.1) an undertaking to withdraw from registration with the Commission if, on the 120th day after the date the investment adviser's registration with the Commission becomes effective, the investment adviser would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) from registering with the Commission; and

(3) Within 120 days after the date the investment adviser's registration with the Commission becomes effective, files an amendment to Form ADV (17 CFR 279.1) revising Schedule I thereto and, if the amendment indicates that the investment adviser would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) from registering with the Commission, the amendment is accompanied by a completed Form ADV-W (17 CFR 279.2) whereby it withdraws from registration with the Commission.

(e) *Multi-state investment advisers.* An investment adviser that:

(1) Upon submission of its application for registration with the Commission, is required by the laws of 30 or more States to register as an investment adviser with the securities commissioners (or any agencies or officers performing like functions) in the respective States, and thereafter would, but for this section, be required by the laws of

at least 25 States to register as an investment adviser with the securities commissioners (or any agencies or officers performing like functions) in the respective States;

(2) Attaches a representation to Schedule I to Form ADV (17 CFR 279.1) that the investment adviser has reviewed the applicable State and federal laws and has concluded that, in the case of an application for registration with the Commission, it is required by the laws of 30 or more States to register as an investment adviser with the securities commissioners (or any agencies or officers performing like functions) in the respective States or, in the case of an amendment to Form ADV revising Schedule I to Form ADV, it would be required by the laws of at least 25 States to register as an investment adviser with the securities commissioners (or any agencies or officers performing like functions) in the respective States, within 90 days prior to the date of filing Schedule I;

(3) Includes on Schedule E to Form ADV (17 CFR 279.1) an undertaking to withdraw from registration with the Commission if an amendment to Form ADV revising Schedule I to Form ADV indicates that the investment adviser would be required by the laws of fewer than 25 States to register as an investment adviser with the securities commissioners (or any agencies or officers performing like functions) in the respective States, and, if an amendment to Form ADV revising Schedule I indicates that the investment adviser would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b-3a(a)) from registering with the Commission, files a completed Form ADV-W (17 CFR 279.2) within 90 days from the date the investment adviser was required by § 275.204-1(a) to file the amendment to Form ADV revising Schedule I, whereby the investment adviser withdraws from registration with the Commission; and

(4) Maintains in an easily accessible place a record of the States in which the investment adviser has determined it would, but for the exemption, be required to register for a period of not less than five years from the filing of a Schedule I to Form ADV that includes

a representation that is based on such record.

[62 FR 28133, May 22, 1997, as amended at 63 FR 39715, 39716, July 24, 1998]

§ 275.203A-3 Definitions.

For purposes of section 203A of the Act (15 U.S.C. 80b-3a) and the rules thereunder:

(a)(1) *Investment adviser representative.* “Investment adviser representative” of an investment adviser means a supervised person of the investment adviser:

(i) Who has more than five clients who are natural persons (other than excepted persons described in paragraph (a)(3)(i) of this section); and

(ii) More than ten percent of whose clients are natural persons (other than excepted persons described in paragraph (a)(3)(i) of this section).

(2) Notwithstanding paragraph (a)(1) of this section, a supervised person is not an investment adviser representative if the supervised person:

(i) Does not on a regular basis solicit, meet with, or otherwise communicate with clients of the investment adviser; or

(ii) Provides only impersonal investment advice.

(3) For purposes of this section:

(i) “Excepted person” means a natural person who is a qualified client as described in § 275.205-3(d)(1).

(ii) “Impersonal investment advice” means investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts.

(4) Supervised persons may rely on the definition of “client” in § 275.203(b)(3)-1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

(b) *Place of business.* “Place of business” of an investment adviser representative means:

(1) An office at which the investment adviser representative regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and

(2) Any other location that is held out to the general public as a location

at which the investment adviser representative provides investment advisory services, solicits, meets with, or otherwise communicates with clients.

(c) *Principal office and place of business.* "Principal office and place of business" of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

[62 FR 28134, May 22, 1997, as amended at 63 FR 39715, July 24, 1998]

§ 275.203A-4 Investment advisers registered with a State securities commission.

The Commission shall not assert a violation of section 203 of the Act (15 U.S.C. 80b-3) (or any provision of the Act to which an investment adviser becomes subject upon registration under section 203 of the Act (15 U.S.C. 80b-3)) for the failure of an investment adviser registered with the securities commission (or any agency or office performing like functions) in the State in which it has its principal office and place of business to register with the Commission if the investment adviser reasonably believes that it does not have assets under management of at least \$30,000,000 and is therefore not required to register with the Commission.

[62 FR 28134, May 22, 1997]

§ 275.203A-5 [Reserved]

§ 275.203A-6 Transition period for Ohio investment advisers.

(a) *Ohio Authority.* Notwithstanding section 203A(b) of the Act (15 U.S.C. 80b-3a(b)), the Ohio Revised Code, sections 1707.01 to 1707.99, is effective with respect to an investment adviser registered with the Commission that, but for having its principal office and place of business in Ohio, would be prohibited from registering with the Commission under section 203A of the Act (15 U.S.C. 80b-3a).

(b) *Withdrawal Required.* Every investment adviser that is registered with the Commission solely because its principal office and place of business is

located in Ohio must withdraw from Commission registration by March 30, 2000.

[64 FR 15683, Apr. 1, 1999]

EFFECTIVE DATE NOTE: At 64 FR 15683, Apr. 1, 1999, § 275.203A-6 was added, effective May 3, 1999.

§ 275.204-1 Amendments to application for registration.

(a) Every investment adviser whose registration with the Commission is effective on the last day of its fiscal year shall, within 90 days of the end of its fiscal year, unless its registration has been withdrawn, cancelled, or revoked prior to that day, file:

(1) Schedule I to Form ADV (17 CFR 279.1);

(2) A balance sheet if the balance sheet is required by Item 14 of Part II of Form ADV (17 CFR 279.1); and

(3) An executed page one of Part I of Form ADV (17 CFR 279.1).

(b)(1) If the information contained in the response to Items 1, 2, 3, 4, 5, 8, 11, 13A, 13B, 14A and 14B of Part I of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate for any reason, or if the information contained in response to any question in Items 9 and 10 of Part I, all of Part II (except Item 14), and all of Schedule H of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate in a material manner, the investment adviser shall promptly file an amendment on Form ADV (17 CFR 279.1) correcting the information.

(2) For all other changes not designated in paragraph (b)(1) of this section, the investment adviser shall file an amendment on Form ADV (17 CFR 279.1) updating the information together with the amendments required by paragraph (a) of this section.

(c) Every document required pursuant to this section shall constitute a "report" within the meaning of sections 204 and 207 of the Act [15 U.S.C. 80b-4, 80b-7].

[62 FR 28135, May 22, 1997, as amended at 64 FR 2567, Jan. 15, 1999]

§ 275.204-2 Books and records to be maintained by investment advisers.

(a) Every investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) shall make and keep true, accurate and current the following books and records relating to its investment advisory business;

(1) A journal or journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger.

(2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

(3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. Such memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed such order; and shall show the account for which entered, the date of entry, and the bank, broker or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.

(4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.

(5) All bills or statements (or copies thereof), paid or unpaid, relating to the business of the investment adviser as such.

(6) All trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.

(7) Originals of all written communications received and copies of all written communications sent by such investment adviser relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given, (ii) any receipt, dis-

bursement or delivery of funds or securities, or (iii) the placing or execution of any order to purchase or sell any security: *Provided, however,* (a) That the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and (b) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if such notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular or advertisement a memorandum describing the list and the source thereof.

(8) A list or other 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.

(9) All powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser, or copies thereof.

(10) All written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such.

(11) A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than persons connected with such investment adviser), and if such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication recommends the purchase or sale of a specific security and does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor.

(12)(i) A record of every transaction in a security in which the investment adviser or any advisory representative

(as hereinafter defined) of such investment adviser has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except (A) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and (B) transactions in securities which are direct obligations of the United States. Such record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. Such record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(ii) For purposes of this paragraph—

(A) The term *advisory representative* shall mean any partner, officer or director of the investment adviser; any employee who makes any recommendation, who participates in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which recommendation shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of such recommendations or of the information concerning such recommendations; and any of the following persons who obtain information concerning securities recommendations being made by such investment advisor prior to the effective dissemination of such recommendations or of the information concerning such recommendations: (1) Any person in a control relationship to the investment adviser, (2) any affiliated person of such controlling person, and (3) any affiliated person of such affiliated person.

(B) *Control* shall have the same meaning as that set forth in section 2(a)(9) of the Investment Company Act of 1940, as amended.

(iii) An investment adviser shall not be deemed to have violated the provisions of paragraph (a)(12) of this section because of his failure to record securities transactions of any advisory representative if he establishes that he instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

(13)(i) Notwithstanding the provisions of paragraph (a)(12) of this section above, where the investment adviser is primarily engaged in a business or businesses other than advising registered investment companies or other advisory clients, a record must be maintained of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of such investment adviser has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except (A) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and (B) transactions in securities which are direct obligations of the United States. Such record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. Such record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(ii) For purposes of this paragraph—

(A) The term *advisory representative*, when used in connection with a company primarily engaged in a business

or businesses other than advising registered investment companies or other advisory clients, shall mean any partner, officer, director, or employee of the investment adviser who makes any recommendation, who participates in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which recommendation shall be made, or who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of such recommendations or of the information concerning such recommendations; and any of the following persons who obtain information concerning securities recommendation being made by such investment adviser prior to the effective dissemination of such recommendations or of the information concerning such recommendations: (1) Any person in a control relationship to the investment adviser, (2) any affiliated person of such controlling person, and (3) any affiliated person of such affiliated person.

(B) *Control* shall have the same meaning as that set forth in section 2(a)(9) of the Investment Company Act of 1940, as amended.

(C) An investment adviser is “primarily engaged in a business or businesses other than advising registered investment companies or other advisory clients” when, for each of its most recent three fiscal years or for the period of time since organization, whichever is lesser, the investment adviser derived, on an unconsolidated basis, more than 50 percent of (1) its total sales and revenues, and (2) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.

(iii) An investment adviser shall not be deemed to have violated the provisions of this paragraph (a)(13) because of his failure to record securities transactions of any advisory representative if he establishes that he instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

(14) A copy of each written statement and each amendment or revision there-

of, given or sent to any client or prospective client of such investment adviser in accordance with the provisions of Rule 204-3 under the Act, and a record of the dates that each written statement, and each amendment or revision thereof, was given, or offered to be given, to any client or prospective client who subsequently becomes a client.

(15) All written acknowledgments of receipt obtained from clients pursuant to § 275.206(4)-3(a)(2)(iii)(B) and copies of the disclosure documents delivered to clients by solicitors pursuant to § 275.206(4)-3.

(16) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than persons connected with such investment adviser); *provided, however*, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client’s account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.

(b) If an investment adviser subject to paragraph (a) of this section has custody or possession of securities or funds of any client, the records required to be made and kept under paragraph (a) of this section shall include:

(1) A 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.

(2) A separate ledger account for each such client showing all purchases,

sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.

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

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

(c) Every investment adviser subject to paragraph (a) of this section who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

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

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

(d) Any books or records required by this section may be maintained by the investment adviser in such manner that the identity of any client to whom such investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this rule (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.

(2) Partnership articles and any amendments thereto, articles of incorporation, charters, minute books, and

stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.

(3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication.

(f) An investment adviser subject to paragraph (a) of this section, before ceasing to conduct or discontinuing business as an investment adviser shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the Commission in writing, at its principal office, Washington, D.C. 20549, of the exact address where such books and records will be maintained during such period.

(g)(1) The records required to be maintained and preserved pursuant to this rule may be immediately produced or reproduced by photograph on film or, as provided in paragraph (g)(2) of this section, on magnetic disk, tape or other computer storage medium, and be maintained and preserved for the required time in that form. If records are produced or reproduced by photographic film or computer storage medium, the investment adviser shall:

(i) Arrange the records and index the films or computer storage medium so as to permit the immediate location of any particular record,

(ii) Be ready at all times to provide, and promptly provide, any facsimile enlargement of film or computer print-out or copy of the computer storage medium which the Commission by its examiners or other representatives may request,

(iii) Store separately from the original one other copy of the film or computer storage medium for the time required.

(iv) With respect to records stored on computer storage medium, maintain procedures for maintenance and preservation of, and access to, records so as to reasonably safeguard records from loss, alteration, or destruction, and

(v) With respect to records stored on photographic film, at all times have available for Commission examination of its records pursuant to section 204 of the Investment Advisers Act of 1940, facilities for immediate, easily readable projection of the film and for producing easily readable facsimile enlargements.

(2) Pursuant to paragraph (g)(1) of this section an adviser may maintain and preserve on computer tape or disk or other computer storage medium records which, in the ordinary course of the adviser's business, are created by the adviser on electronic media or are received by the adviser solely on electronic media or by electronic data transmission.

(h)(1) Any book or other record made, kept, maintained and preserved in compliance with §§ 240.17a-3 and 240.17a-4 of this chapter under the Securities Exchange Act of 1934, which is substantially the same as the book or other record required to be made, kept, maintained and preserved under this section, shall be deemed to be made, kept maintained and preserved in compliance with this section.

(2) A record made and kept pursuant to any provision of paragraph (a) of this section, which contains all the information required under any other provision of paragraph (a) of this section, need not be maintained in duplicate in order to meet the requirements of the other provision of paragraph (a) of this section.

(i) As used in this section the term "discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

(j)(1) Except as provided in paragraph (j)(3) of this section, each non-resident investment adviser registered or applying for registration pursuant to section 203 of the Act shall keep, maintain and preserve, at a place within the United States designated in a notice from him as provided in paragraph (j)(2) of this section true, correct, complete and current copies of books and records which he is required to make, keep current, maintain or preserve pursuant to any provisions of any rule or regulation of the Commission adopted under the Act.

(2) Except as provided in paragraph (j)(3) of this section, each nonresident investment adviser subject to this paragraph (j) shall furnish to the Commission a written notice specifying the address of the place within the United States where the copies of the books and records required to be kept and preserved by him pursuant to paragraph (j)(1) of this section are located. Each non-resident investment adviser registered or applying for registration when this paragraph becomes effective shall file such notice within 30 days after such rule becomes effective. Each non-resident investment adviser who files an application for registration after this paragraph becomes effective shall file such notice with such application for registration.

(3) Notwithstanding the provisions of paragraphs (j)(1) and (2) of this section, a non-resident investment adviser need not keep or preserve within the United States copies of the books and records referred to in said paragraphs (j)(1) and (2), if:

(i) Such non-resident investment adviser files with the Commission, at the time or within the period provided by paragraph (j)(2) of this section, a written undertaking, in form acceptable to the Commission and signed by a duly authorized person, to furnish to the Commission, upon demand, at its principal office in Washington, D.C., or at any Regional or District Office of the Commission designated in such demand, true, correct, complete and current copies of any or all of the books and records which he is required to make, keep current, maintain or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of

such books and records which may be specified in such demand. Such undertaking shall be in substantially the following form:

The undersigned hereby undertakes to furnish at its own expense to the Securities and Exchange Commission at its principal office in Washington, D.C. or at any Regional or District Office of said Commission specified in a demand for copies of books and records made by or on behalf of said Commission, true, correct, complete and current copies of any or all, or any part, of the books and records which the undersigned is required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Securities and Exchange Commission under the Investment Advisers Act of 1940. This undertaking shall be suspended during any period when the undersigned is making, keeping current, and preserving copies of all of said books and records at a place within the United States in compliance with Rule 204-2(j) under the Investment Advisers Act of 1940. This undertaking shall be binding upon the undersigned and the heirs, successors and assigns of the undersigned, and the written irrevocable consents and powers of attorney of the undersigned, its general partners and managing agents filed with the Securities and Exchange Commission shall extend to and cover any action to enforce same.

and

(ii) Such non-resident investment adviser furnishes to the Commission, at his own expense 14 days after written demand therefor forwarded to him by registered mail at his last address of record filed with the Commission and signed by the Secretary of the Commission or such person as the Commission may authorize to act in its behalf, true, correct, complete and current copies of any or all books and records which such investment adviser is required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records which may be specified in said written demand. Such copies shall be furnished to the Commission at its principal office in Washington, D.C., or at any Regional or District Office of the Commission which may be specified in said written demand.

(4) For purposes of this rule the term *non-resident investment adviser* shall have the meaning set out in §275.0-2(d)(3) under the Act.

(k) Every investment adviser that registers under section 203 of the Act (15 U.S.C. 80b-3) after July 8, 1997 shall be required to preserve in accordance with this section the books and records the investment adviser had been required to maintain by the State in which the investment adviser had its principal office and place of business prior to registering with the Commission.

(Sec. 206, 54 Stat. 852, as amended, 15 U.S.C. 80b-6; sec. 211(a); Pub. L. 76-768, as amended by Pub. L. 86-750; 855 as amended by 74 Stat. 886, 887, 888; secs. 204, 206(4) and 211(a) (15 U.S.C. 80b-4 and 80b-11(a)))

[26 FR 5002, June 6, 1961, as amended at 31 FR 10921, Aug. 17, 1966; 40 FR 8549, Feb. 28, 1975; 40 FR 45162, Oct. 1, 1975; 44 FR 7877, Feb. 7, 1979; 44 FR 42130, July 18, 1979; 50 FR 2543, Jan. 17, 1985; 53 FR 32035, Aug. 23, 1988; 59 FR 5946, Feb. 9, 1994; 62 FR 28135, May 22, 1997]

§ 275.204-3 Written disclosure statements.

(a) *General requirement.* Unless otherwise provided in this rule, an investment adviser, registered or required to be registered pursuant to section 203 of the Act shall, in accordance with the provisions of this section, furnish each advisory client and prospective advisory client with a written disclosure statement which may be either a copy of Part II of its form ADV which complies with §275.204-1(b) under the Act or a written document containing at least the information then so required by Part II of Form ADV.

(b) *Delivery.* (1) An investment adviser, except as provided in paragraph (2), shall deliver the statement required by this section to an advisory client or prospective advisory client (i) not less than 48 hours prior to entering into any written or oral investment advisory contract with such client or prospective client, or (ii) at the time of entering into any such contract, if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract.

(2) Delivery of the statement required by paragraph (1) need not be made in connection with entering into (i) an investment company contract or (ii) a contract for impersonal advisory services.

(c) *Offer to deliver.* (1) An investment adviser, except as provided in paragraph (2), annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the statement required by this section.

(2) The delivery or offer required by paragraph (c)(1) of this section need not be made to advisory clients receiving advisory services solely pursuant to (i) an investment company contract or (ii) a contract for impersonal advisory services requiring a payment of less than \$200;

(3) With respect to an advisory client entering into a contract or receiving advisory services pursuant to a contract for impersonal advisory services which requires a payment of \$200 or more, an offer of the type specified in paragraph (c)(1) of this section shall also be made at the time of entering into an advisory contract.

(4) Any statement requested in writing by an advisory client pursuant to an offer required by this paragraph must be mailed or delivered within seven days of the receipt of the request.

(d) *Omission of inapplicable information.* If an investment adviser renders substantially different types of investment advisory services to different advisory clients, any information required by Part II 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.

(e) *Other disclosures.* Nothing in this rule shall relieve any investment adviser from any obligation pursuant to any provision of the Act or the rules and regulations thereunder or other federal or state law to disclose any information to its advisory clients or prospective advisory clients not specifically required by this rule.

(f) *Sponsors of wrap fee programs.* (1) An investment adviser, registered or required to be registered pursuant to section 203 of the Act, that is compensated under a wrap fee program for sponsoring, organizing, or admin-

istering the program, or for selecting, or providing advice to clients regarding the selection of, other investment advisers in the program, shall, in lieu of the written disclosure statement required by paragraph (a) of this section and in accordance with the other provisions of this section, furnish each client and prospective client of the wrap fee program with a written disclosure statement containing at least the information required by Schedule H of Form ADV (§279.1 of this chapter). Any additional information included in such disclosure statement should be limited to information concerning wrap fee programs sponsored by the investment adviser.

(2) If an investment adviser is required under this paragraph (f) to furnish disclosure statements to clients or prospective clients of more than one wrap fee program, the investment adviser may omit from the disclosure statement furnished to clients and prospective clients of a wrap fee program or programs any information required by Schedule H that is not applicable to clients or prospective clients of that wrap fee program or programs.

(3) An investment adviser need not furnish the written disclosure statement required by paragraph (f)(1) of this section to clients and prospective clients of a wrap fee program if another investment adviser is required to furnish and does furnish the written disclosure statement to all clients and prospective clients of the wrap fee program.

(4) An investment adviser that is required under this paragraph (f) to furnish a disclosure statement to clients of a wrap fee program shall furnish the disclosure statement to each client of the wrap fee program (including clients that have previously been furnished the brochure required under paragraph (a) of this section) no later than October 1, 1994.

(g) *Definitions.* For the purpose of this rule:

(1) *Contract for impersonal advisory services* means any contract relating solely to the provision of investment advisory services (i) by means of written material or oral statements which do not purport to meet the objectives

or needs of specific individuals or accounts; (ii) through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or (iii) any combination of the foregoing services.

(2) *Entering into*, in reference to an investment advisory contract, does not include an extension or renewal without material change of any such contract which is in effect immediately prior to such extension or renewal.

(3) *Investment company contract* means a contract with an investment company registered under the Investment Company Act of 1940 which meets the requirements of section 15(c) of that Act.

(4) *Wrap fee program* means a program under which any client is charged a specified fee or fees not based directly upon transactions in a client's account for investment advisory services (which may include portfolio management or advice concerning the selection of other investment advisers) and execution of client transactions.

(Secs. 204, 206(4) and 211(a) (15 U.S.C. 80b-4 and 80b-11(a)))

[44 FR 7877, Feb. 7, 1979, as amended at 47 FR 22507, May 25, 1982; 59 FR 21661, Apr. 26, 1994]

§ 275.204-4 [Reserved]

§ 275.204-5 Year 2000 reports.

Every investment adviser registered with the Commission that has assets under management of not less than \$25 million or is an investment adviser to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) must file with the Commission:

(a) A completed Form ADV-Y2K (17 CFR 279.9) no later than December 7, 1998; and

(b) An additional completed Form ADV-Y2K no later than June 7, 1999.

[63 FR 54312, Oct. 8, 1998]

§ 275.205-1 Definition of "investment performance" of an investment company and "investment record" of an appropriate index of securities prices.

(a) *Investment performance* of an investment company for any period shall mean the sum of:

(1) The change in its net asset value per share during such period;

(2) The value of its cash distributions per share accumulated to the end of such period; and

(3) The value of capital gains taxes per share paid or payable on undistributed realized long-term capital gains accumulated to the end of such period; expressed as a percentage of its net asset value per share at the beginning of such period. For this purpose, the value of distributions per share of realized capital gains, of dividends per share paid from investment income and of capital gains taxes per share paid or payable on undistributed realized long-term capital gains shall be treated as reinvested in shares of the investment company at the net asset value per share in effect at the close of business on the record date for the payment of such distributions and dividends and the date on which provision is made for such taxes, after giving effect to such distributions, dividends and taxes.

(b) *Investment record* of an appropriate index of securities prices for any period shall mean the sum of:

(1) The change in the level of the index during such period; and

(2) The value, computed consistently with the index, of cash distributions made by companies whose securities comprise the index accumulated to the end of such period; expressed as a percentage of the index level at the beginning of such period. For this purpose cash distributions on the securities which comprise the index shall be treated as reinvested in the index at least as frequently as the end of each calendar quarter following the payment of the dividend.

EXHIBIT I

[METHOD OF COMPUTING THE INVESTMENT RECORD OF THE STANDARD & POOR'S 500 STOCK COMPOSITE INDEX FOR CALENDAR 1971]

Quarterly ending—	Index value ¹	Quarterly dividend yield-composite index	
		Annual percent ²	Quarterly percent ³ (1/4 of annual)
Dec. 1970	92.15		
Mar. 1971	100.31	3.10	0.78
June 1971	99.70	3.11	.78
Sept. 1971	98.34	3.14	.79
Dec. 1971	102.09	3.01	.75

¹ Source: Standard & Poor's Trade and Securities Statistics, Jan. 1972, p. 33.

² *Id.* See Standard & Poor's Trade and Securities Statistics Security and Price Index Record—1970 Edition, p. 133 for explanation of quarterly dividend yield.

³ Quarterly percentages have been rounded to two decimal places.

Change in index value for 1971: 102.09-92.15=9.94. Accumulated value of dividends for 1971:

$$\frac{\text{Quarter ending:}}{\text{Percent yield}} = \frac{\text{March}}{1.0078} \times \frac{\text{June}}{1.0079} \times \frac{\text{Sept.}}{1.0079} \times \frac{\text{Dec.}}{1.0075} - 1.00 = .0314$$

Aggregate value of dividends paid, assuming quarterly reinvestment and computed consistently with the index:

(Percent yield as computed above) × (ending index value) = Aggregate value of dividends paid

For 1971:

$$.0314 \times 102.09 = 3.21$$

Investment record of Standard & Poor's 500 stock composite index assuming quarterly reinvestment dividends:

$$\frac{9.94 + 3.21}{92.15} = 14.27 \text{ percent}$$

The same method can be extended to cases where an investment company's fiscal quarters do not coincide with the fiscal quarters of the S & P dividend record or to instances where a "rolling period" is used for performance comparisons as indicated by the following example of the calculation of the investment record of the Standard & Poor's 500 Stock Composite Index for the 12 months ended November 1971:

Index value Nov. 30, 1971	93.99
Index value Nov. 30, 1970	87.20
Change in index value	6.79

Quarter ending—	Dividend yield		Rate for each month of quarter (1/2 of annual)
	Annual rate	1/4 of annual	
Dec. 1970	3.41	0.85	0.28

Quarter ending—	Dividend yield		Rate for each month of quarter (1/2 of annual)
	Annual rate	1/4 of annual	
Mar. 1971	3.10	.78	.26
June 1971	3.11	.78	.26
Sept. 1971	3.14	.79	.26
Dec. 1971	3.01	.75	.25

Accumulated value of dividends reinvested:

December=1.0028
 January-March=1.0078
 April-June=1.0078
 July-September=1.0079
 October-November=1.0053⁴
 Dividend yield:

$$(1.0028 \times 1.0078 \times 1.0078 \times 1.0079 \times 1.0053) - 1.00 = .0320$$

Aggregate value of dividends paid computed consistently with the index:

$$.0320 \times 93.99 = 3.01$$

Investment record of the Standard & Poor's 500 Stock Composite Index for the 12 months ended November 30, 1971:

$$\frac{6.79 + 3.01}{87.20} = 11.24 \text{ percent}$$

⁴The rate for October and November would be two-thirds of the yield for the quarter ended Sept. 30 (i.e. .667 × .79 = 5269) since the yield for the quarter ended Dec. 31 would not be available as of Nov. 30.

EXHIBIT II

[METHOD OF COMPUTING THE INVESTMENT RECORD OF THE NEW YORK STOCK EXCHANGE COMPOSITE INDEX FOR CALENDAR 1971]

(1)—Quarter ending	(2)—Index value ¹	(3)—Aggregate market value of shares listed on the NYSE as of end of quarter (billions of dollars) ²	(4)—Quarterly value of estimated cash payments of shares listed on the NYSE (millions of dollars) ³	(5)—Estimated yield ⁴ (quarterly percent)
Dec. 1970	50.23			
Mar. 1971	55.44	\$709	\$5,106	0.72
June 1971	55.09	710	4,961	.70
Sept. 1971	54.33	709	5,006	.71
Dec. 1971	56.43	742	5,183	.70

¹ Source: New York Stock Exchange Composite Index as reported daily by the New York Stock Exchange.
² Source: Monthly Review, New York Stock Exchange.
³ Source: The Exchange, New York Stock Exchange magazine, May, Aug., Nov. 1971 and Feb. 1972 editions. Upon request the Statistics Division of the Research Department of the NYSE will make this figure available within 10 days of the end of each quarter.
⁴ The ratio of column 4 to column 3.

Change in NYSE Composite Index value for 1971: 56.43 - 50.23 = 6.20.

Accumulated Value of Dividends of NYSE Composite Index for 1971:

$$\frac{\text{Quarter ending:}}{\text{Percent yield}} = \frac{\text{March}}{1.0072} \times \frac{\text{June}}{1.0070} \times \frac{\text{Sept.}}{1.0071} \times \frac{\text{Dec.}}{1.0070} - 1.00 = 0.0286$$

Aggregate value of dividends paid on NYSE Composite Index assuming quarterly reinvestment:
 For 1971:

$$.0286 \times 56.43 = 1.61$$

Investment record of the New York Stock Exchange Composite Index assuming quarterly reinvestment of dividends:

$$\frac{6.20 + 1.61}{50.23} = 15.55 \text{ percent}$$

The same method can be extended to cases where an investment company's fiscal quarters do not coincide with the fiscal quarters of the NYSE dividend record or to instances where a "rolling period" is used for performance comparisons as indicated by the following example of the calculation of the investment record of the NYSE Composite Index for the 12 months ended November 1971:

Index value Nov. 30, 1971	51.84
Index value Nov. 30, 1970	47.41
Change in index value	4.43

Quarter ending	Dividend yield quarterly percent	Rate for each month of quarter (1/2 of annual)
Dec. 1970	0.79	0.26
Mar. 197172	.24
June 197170	.23
Sept. 197171	.24
Dec. 197170	.23

Accumulated value of dividends reinvested:
 December = 1.0026
 January-March = 1.0072
 April-June = 1.0070
 July-September = 1.0071
 October-November = 1.0047⁴
 Dividend yield:

$$(1.0026 \times 1.0072 \times 1.0070 \times 1.0071 \times 1.0047) - 1.00 = .0289$$

Aggregate value of dividends paid computed consistently with the index:

⁴ The rate for October and November would be two thirds of the yield for the quarter ended September 30 (i.e. .667 x .71 = 4736), since the yield for the quarter ended December 31 would not be available as of November 30.

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$$.0289 \times 51.84 = 1.50$$

Investment record of the NYSE Composite Index for the 12 months ended November 30, 1971:

$$\frac{4.43 + 1.50}{47.41} = 12.51 \text{ percent}$$

(Secs. 205, 211, 54 Stat. 852, 74 Stat. 887, 15 U.S.C. 80b-205, 80b-211; sec. 25, 84 Stat. 1432, 1433, Pub. L. 91-547)

[37 FR 17468, Aug. 29, 1972]

§ 275.205-2 Definition of "specified period" over which the asset value of the company or fund under management is averaged.

(a) For purposes of this rule:

(1) *Fulcrum fee* shall mean the fee which is paid or earned when the investment company's performance is equivalent to that of the index or other measure of performance.

(2) *Rolling period* shall mean a period consisting of a specified number of subperiods of definite length in which the most recent subperiod is substituted for the earliest subperiod as time passes.

(b) The specified period over which the asset value of the company or fund under management is averaged shall mean the period over which the investment performance of the company or fund and the investment record of an appropriate index of securities prices or such other measure of investment performance are computed.

(c) Notwithstanding paragraph (b) of this section, the specified period over which the asset value of the company or fund is averaged for the purpose of computing the fulcrum fee may differ from the period over which the asset value is averaged for computing the performance related portion of the fee, only if:

(1) The performance related portion of the fee is computed over a rolling period and the total fee is payable at the end of each subperiod of the rolling period; and

(2) The fulcrum fee is computed on the basis of the asset value averaged

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over the most recent subperiod or subperiods of the rolling period.

(Secs. 205, 106A, 211; 54 Stat. 852, 855; 84 Stat. 1433, 15 U.S.C. 80b-5, 80b-6a, 80b-11)

[37 FR 24896, Nov. 22, 1972]

§ 275.205-3 Exemption from the compensation prohibition of section 205(a)(1) for investment advisers.

(a) *General.* The provisions of section 205(a)(1) of the Act (15 U.S.C. 80b-5(a)(1)) will not be deemed to prohibit an investment adviser from entering into, performing, renewing or extending an investment advisory contract that provides for compensation to the investment adviser on the basis of a share of the capital gains upon, or the capital appreciation of, the funds, or any portion of the funds, of a client, *Provided,* That the client entering into the contract subject to this section is a qualified client, as defined in paragraph (d)(1) of this section.

(b) *Identification of the client.* In the case of a private investment company, as defined in paragraph (d)(3) of this section, an investment company registered under the Investment Company Act of 1940, or a business development company, as defined in section 202(a)(22) of the Act (15 U.S.C. 80b-2(a)(22)), each equity owner of any such company (except for the investment adviser entering into the contract and any other equity owners not charged a fee on the basis of a share of capital gains or capital appreciation) will be considered a client for purposes of paragraph (a) of this section.

(c) *Transition rule.* An investment adviser that entered into a contract before August 20, 1998 and satisfied the conditions of this section as in effect on the date that the contract was entered into will be considered to satisfy the conditions of this section; *Provided,* however, that this section will apply with respect to any natural person or company who is not a party to the contract prior to and becomes a party to the contract after August 20, 1998.

(d) *Definitions.* For the purposes of this section:

(1) The term *qualified client* means:

(i) A natural person who or a company that immediately after entering into the contract has at least \$750,000 under the management of the investment adviser;

(ii) A natural person who or a company that the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either:

(A) Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than \$1,500,000 at the time the contract is entered into; or

(B) Is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(51)(A)) at the time the contract is entered into; or

(iii) A natural person who immediately prior to entering into the contract is:

(A) An executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or

(B) An employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

(2) The term *company* has the same meaning as in section 202(a)(5) of the Act (15 U.S.C. 80b-2(a)(5)), but does not include a company that is required to be registered under the Investment Company Act of 1940 but is not registered.

(3) The term *private investment company* means a company that would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) but for the exception provided from that definition by section 3(c)(1) of such Act (15 U.S.C. 80a-3(c)(1)).

(4) The term *executive officer* means the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions, for the investment adviser.

[63 FR 39027, July 21, 1998]

§ 275.206(3)-1 Exemption of investment advisers registered as broker-dealers in connection with the provision of certain investment advisory services.

(a) An investment adviser which is a broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934 shall be exempt from section 206(3) in connection with any transaction in relation to which such broker or dealer is acting as an investment adviser solely (1) by means of publicly distributed written materials or publicly made oral statements; (2) by means of written materials or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts; (3) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or (4) any combination of the foregoing services: *Provided, however,* That such materials and oral statements include a statement that if the purchaser of the advisory communication uses the services of the adviser in connection with a sale or purchase of a security which is a subject of such communication, the adviser may act as principal for its own account or as agent for another person.

(b) For the purpose of this Rule, publicly distributed written materials are those which are distributed to 35 or more persons who pay for such materials, and publicly made oral statements are those made simultaneously to 35 or more persons who pay for access to such statements.

NOTE: The requirement that the investment adviser disclose that it may act as principal or agent for another person in the sale or purchase of a security that is the subject of investment advice does not relieve the investment adviser of any disclosure obligation which, depending upon the nature of

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the relationship between the investment adviser and the client, may be imposed by subparagraphs (1) or (2) of section 206 or the other provisions of the federal securities laws.

[40 FR 38159, Aug. 27, 1975]

§ 275.206(3)-2 Agency cross transactions for advisory clients.

(a) An investment adviser, or a person registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and controlling, controlled by, or under common control with an investment adviser, shall be deemed in compliance with the provisions of sections 206(3) of the Act (15 U.S.C. 80b-6(3)) in effecting an agency cross transaction for an advisory client, if:

(1) The advisory client has executed a written consent prospectively authorizing the investment adviser, or any other person relying on this rule, to effect agency cross transactions for such advisory client, provided that such written consent is obtained after full written disclosure that with respect to agency cross transactions the investment adviser or such other person will act as broker for, receive commissions from, and have a potentially conflicting division of loyalties and responsibilities regarding, both parties to such transactions;

(2) The investment adviser, or any other person relying on this rule, sends to each such client a written confirmation at or before the completion of each such transaction, which confirmation includes (i) a statement of the nature of such transaction, (ii) the date such transaction took place, (iii) an offer to furnish upon request, the time when such transaction took place, and (iv) the source and amount of any other remuneration received or to be received by the investment adviser and any other person relying on this rule in connection with the transaction, *Provided, however,* That if, in the case of a purchase, neither the investment adviser nor any other person relying on this rule was participating in a distribution, or in the case of a sale, neither the investment adviser nor any other person relying on this rule was participating in a tender offer, the written confirmation may state wheth-

er any other remuneration has been or will be received and that the source and amount of such other remuneration will be furnished upon written request of such customer;

(3) The investment adviser, or any other person relying in this rule, sends to each such client, at least annually, and with or as part of any written statement or summary of such account from the investment adviser or such other person, a written disclosure statement identifying the total number of such transactions during the period since the date of the last such statement or summary, and the total amount of all commissions or other remuneration received or to be received by the investment adviser or any other person relying on this rule in connection with such transactions during such period;

(4) Each written disclosure statement and confirmation required by this rule includes a conspicuous statement that the written consent referred to in paragraph (a)(1) of this section may be revoked at any time by written notice to the investment adviser, or to any other person relying on this rule, from the advisory client; and

(5) No such transaction is effected in which the same investment adviser or an investment adviser and any person controlling, controlled by or under common control with such investment adviser recommended the transaction to both any seller and any purchaser.

(b) For purposes of this rule the term *agency cross transaction for an advisory client* shall mean a transaction in which a person acts as an investment adviser in relation to a transaction in which such investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, acts as broker for both such advisory client and for another person on the other side of the transaction.

(c) This rule shall not be construed as relieving in any way the investment adviser or another person relying on this rule from acting in the best interests of the advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for the advisory client; nor shall it relieve such person or

persons from any disclosure obligation which may be imposed by subparagraphs (1) or (2) of section 206 of the Act or by other applicable provisions of the federal securities laws.

[42 FR 29301 June 8, 1977, as amended at 48 FR 41379, Sept. 15, 1983; 62 FR 28135, May 22, 1997]

§ 275.206(4)-1 Advertisements by investment advisers.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3), directly or indirectly, to publish, circulate, or distribute any advertisement:

(1) Which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

(2) Which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person: *Provided, however,* That this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (i) State the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (ii) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or

(3) Which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and

of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

(4) Which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or

(5) Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

(b) For the purposes of this section the term *advertisement* shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

(Sec. 206, 54 Stat. 852, as amended; 15 U.S.C. 80b-6)

[26 FR 10549, Nov. 9, 1961, as amended at 62 FR 28135, May 22, 1997]

§ 275.206(4)-2 Custody or possession of funds or securities of clients.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) who has custody or possession of any funds or securities in

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which any client has any beneficial interest, to do any act or take any action, directly or indirectly, with respect to any such funds or securities, unless:

(1) All such securities of each such client are segregated, marked to identify the particular client who has the beneficial interest therein, and held in safekeeping in some place reasonably free from risk of destruction or other loss; and

(2)(i) All such funds of such clients are deposited in one or more bank accounts which contain only clients' funds, (ii) such account or accounts are maintained in the name of the investment adviser as agent or trustee for such clients; and (iii) the investment adviser maintains a separate record for each such account which shows the name and address of the bank where such account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interest in such account; and

(3) Such investment adviser, immediately after accepting custody or possession of such funds or securities from any client, notifies such client in writing of the place and manner in which such funds and securities will be maintained, and thereafter, if and when there is any change in the place or manner in which such funds, or securities are being maintained, gives each such client written notice thereof; and

(4) Such investment adviser sends to each client, not less frequently than once every 3 months, an itemized statement showing the funds and securities in the custody or possession of the investment adviser at the end of such period, and all debits, credits and transactions in such client's account during such period; and

(5) All such funds and securities of clients are verified by actual examination at least once during each calendar year by an independent public accountant at a time that shall be chosen by such accountant without prior notice to the investment adviser. A certificate of such accountant stating that an examination of such funds and securities has been made, and describing the nature and extent of the examination, shall be attached to a completed Form

ADV-E (17 CFR 279.8) and transmitted to the Commission promptly after each examination.

(b) This section shall not apply to an investment adviser also registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 if (1) such broker-dealer is subject to and in compliance with §240.15c3-1 under the Securities Exchange Act of 1934, or (2) such broker-dealer is a member of an exchange whose members are exempt from §240.15c3-1 under the provisions of paragraph (b)(2) thereof, and such broker-dealer is in compliance with all rules and settled practices of such exchange imposing requirements with respect to financial responsibility and the segregation of funds or securities carried for the account of customers.

(Sec. 206(4), 54 Stat. 852, as amended; 15 U.S.C. 80b-6)

[27 FR 2150, Mar. 6, 1962, as amended at 54 FR 32049, Aug. 4, 1989; 62 FR 28135, May 22, 1997]

§275.206(4)-3 Cash payments for client solicitations.

(a) It shall be unlawful for any investment adviser required to be registered pursuant to section 203 of the Act to pay a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless:

(1)(i) The investment adviser is registered under the Act;

(ii) The solicitor is not a person (A) subject to a Commission order issued under section 203(f) of the Act, or (B) convicted within the previous ten years of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Act, or (C) who has been found by the Commission to have engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (5) or (6) of section 203(e) of the Act, or (D) is subject to an order, judgment or decree described in section 203(e)(4) of the Act; and

(iii) Such cash fee is paid pursuant to a written agreement to which the adviser is a party; and

NOTE: The investment adviser shall retain a copy of each written agreement required by this paragraph as part of the records required to be kept under §275.204-2(a)(10) of this chapter.

(2) Such cash fee is paid to a solicitor:

(i) With respect to solicitation activities for the provision of impersonal advisory services only; or

(ii) Who is (A) a partner, officer, director or employee of such investment adviser or (B) a partner, officer, director or employee of a person which controls, is controlled by, or is under common control with such investment adviser: *Provided*, That the status of such solicitor as a partner, officer, director or employee of such investment adviser or other person, and any affiliation between the investment adviser and such other person, is disclosed to the client at the time of the solicitation or referral; or

(iii) Other than a solicitor specified in paragraph (a)(2) (i) or (ii) of this section if all of the following conditions are met:

(A) The written agreement required by paragraph (a)(1)(iii) of this section: (1) Describes the solicitation activities to be engaged in by the solicitor on behalf of the investment adviser and the compensation to be received therefor; (2) contains an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the Act and the rules thereunder; (3) requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser's written disclosure statement required by §275.204-3 of this chapter ("brochure rule") and a separate written disclosure document described in paragraph (b) of this rule.

(B) The investment adviser receives from the client, prior to, or at the time of, entering into any written or oral investment advisory contract with such client, a signed and dated acknowledgment of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document.

NOTE: The investment adviser shall retain a copy of each such acknowledgment and solicitor disclosure document as part of the records required to be kept under §275.204-2(a)(15) of this chapter.

(C) The investment adviser makes a bona fide effort to ascertain whether the solicitor has complied with the agreement, and has a reasonable basis for believing that the solicitor has so complied.

(b) The separate written disclosure document required to be furnished by the solicitor to the client pursuant to this section shall contain the following information:

(1) The name of the solicitor;

(2) The name of the investment adviser;

(3) The nature of the relationship, including any affiliation, between the solicitor and the investment adviser;

(4) A statement that the solicitor will be compensated for his solicitation services by the investment adviser;

(5) The terms of such compensation arrangement, including a description of the compensation paid or to be paid to the solicitor; and

(6) The amount, if any, for the cost of obtaining his account the client will be charged in addition to the advisory fee, and the differential, if any, among clients with respect to the amount or level of advisory fees charged by the investment adviser if such differential is attributable to the existence of any arrangement pursuant to which the investment adviser has agreed to compensate the solicitor for soliciting clients for, or referring clients to, the investment adviser.

(c) Nothing in this section shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law.

(d) For purposes of this section,

(1) *Solicitor* means any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser.

(2) *Client* includes any prospective client.

(3) *Impersonal advisory services* means investment advisory services provided solely by means of (i) written materials or oral statements which do not purport to meet the objectives or needs of the specific client, (ii) statistical information containing no expressions of opinions as to the investment merits of

particular securities, or (iii) any combination of the foregoing services.

(Secs. 204, 206, and 211 of the Advisers Act (15 U.S.C. 80b-4, 80b-6 and 80b-11(a)))

[44 FR 42130, July 18, 1979; 54 FR 32441, Aug. 8, 1989, as amended at 62 FR 28135, May 22, 1997; 63 FR 39716, July 24, 1998]

§ 275.206(4)-4 Financial and disciplinary information that investment advisers must disclose to clients.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) to fail to disclose to any client or prospective client all material facts with respect to:

(1) A financial condition of the adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, if the adviser has discretionary authority (express or implied) or custody over such client's funds or securities, or requires prepayment of advisory fees of more than \$500 from such client, 6 months or more in advance; or

(2) A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients.

(b) It shall constitute a rebuttable presumption that the following legal or disciplinary events involving the adviser or a management person of the adviser (any of the foregoing being referred to hereafter as "person") that were not resolved in the person's favor or subsequently reversed, suspended, or vacated are material within the meaning of paragraph (a)(2) of the rule for a period of 10 years from the time of the event:

(1) A criminal or civil action in a court of competent jurisdiction in which the person—

(i) Was convicted, pleaded guilty or nolo contendere ("no contest") to a felony or misdemeanor, or is the named subject of a pending criminal proceeding (any of the foregoing referred to hereafter as "action"), and such action involved: an investment-related business; fraud, false statements, or omissions; wrongful taking of property;

or bribery, forgery, counterfeiting, or extortion;

(ii) Was found to have been involved in a violation of an investment-related statute or regulation; or

(iii) Was the subject of any order, judgment, or decree permanently or temporarily enjoining the person from, or otherwise limiting the person from, engaging in any investment-related activity.

(2) Administrative proceedings before the Securities and Exchange Commission, and other federal regulatory agency or any state agency (any of the foregoing being referred to hereafter as "agency") in which the person—

(i) Was found to have caused an investment-related business to lose its authorization to do business; or

(ii) Was found to have been involved in a violation of an investment-related statute or regulation and was the subject of an order by the agency denying, suspending, or revoking the authorization of the person to act in, or barring or suspending the person's association with, an investment-related business; or otherwise significantly limiting the person's investment-related activities.

(3) Self-Regulatory Organization (SRO) proceedings in which the person—

(i) Was found to have caused an investment-related business to lose its authorization to do business; or

(ii) Was found to have been involved in a violation of the SRO's rules and was the subject of an order by the SRO barring or suspending the person from membership or from association with other members, or expelling the person from membership; fining the person more than \$2,500; or otherwise significantly limiting the person's investment-related activities.

(c) The information required to be disclosed by paragraph (a) of this section shall be disclosed to clients promptly, and to prospective clients not less than 48 hours prior to entering into any written or oral investment advisory contract, or no later than the time of entering into such contract if the client has the right to terminate the contract without penalty within five business days after entering into the contract.

(d) For purposes of this rule:

(1) *Management person* means a person with power to exercise, directly or indirectly, a controlling influence over the management or policies of an adviser which is a company or to determine the general investment advice given to clients.

(2) *Found* means determined or ascertained by adjudication or consent in a final SRO proceeding, administrative proceeding, or court action.

(3) *Investment-related* means pertaining to securities commodities, banking, insurance, or real estate (including, but not limited to, action as or being associated with a broker, dealer, investment company, investment adviser, government securities broker or dealer, municipal securities dealer, bank, savings and loan association, entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or fiduciary).

(4) *Involved* means acting or aiding, abetting, causing, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

(5) *Self-Regulatory Organization* or *SRO* means any national securities or commodities exchange, registered association, or registered clearing agency.

(e) For purposes of calculating the 10-year period during which events are presumed to be material under paragraph (b), the date of a reportable event shall be the date on which the final order, judgment, or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees lapsed.

(f) Compliance with paragraph (b) of this rule shall not relieve any investment adviser from the disclosure obligations of paragraph (a) of the rule; compliance with paragraph (a) of the rule shall not relieve any investment adviser from any other disclosure requirement under the Act, the rules and

regulations thereunder, or under any other federal or state law.

NOTE: Registered investment advisers may disclose this information to clients and prospective clients in their "brochure," the written disclosure statement to clients under Rule 204-3 (17 CFR 275.204-3); *Provided*, That the delivery of the brochure satisfies the timing of disclosure requirements described in paragraph (c) of this rule.

[52 FR 36918, Oct. 2, 1987, as amended at 62 FR 28135, May 22, 1997]

§275.222-1 Definitions.

For purposes of section 222 (15 U.S.C. 80b-18a) of the Act:

(a) *Place of business*. "Place of business" of an investment adviser means:

(1) An office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and

(2) Any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.

(b) *Principal place of business*. "Principal place of business" of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

[62 FR 28135, May 22, 1997]

§275.222-2 Definition of "client" for purposes of the national de minimis standard.

For purposes of section 222(d)(2) of the Act (15 U.S.C. 80b-18a(d)(2)), an investment adviser may rely upon the definition of "client" provided by §275.203(b)(3)-1.

[62 FR 28136, May 22, 1997]

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

Subject	Release No.	Date	Fed. Reg. Vol. and Page
Opinion of General Counsel relating to section 202(a)(11)(C) of the Investment Advisers Act of 1940.	2	Oct. 28, 1940	11 FR 10996.
Opinion of the General Counsel relating to the use of the name "investment counsel" under section 208(c) of the Investment Advisers Act of 1940.	8	Dec. 12, 1940	Do.

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER—Continued

Subject	Release No.	Date	Fed. Reg. Vol. and Page
Opinion of Director of Trading and Exchange Division, relating to section 206 of the Investment Advisers Act of 1940, section 17(a) of the Securities Act of 1933, and sections 10(b) and 15(c)(1) of the Securities Exchange Act of 1934.	40	Feb. 5, 1945	11 FR 10997.
Opinion of the General Counsel relating to the use of "hedge clauses" by brokers, dealers, investment advisers, and others.	58	Apr. 10, 1951	16 FR 3387.
Statement of the Commission to clarify the meaning of "beneficial ownership of securities" as relates to beneficial ownership of securities held by family members.	194	Jan. 25, 1966	31 FR 1005.
Statement of the Commission setting the date of May 1, 1966 after which filings must reflect beneficial ownership of securities held by family members.	196	Feb. 14, 1966	31 FR 3175.
Statement of the Commission describing nature of examination required to be made of all funds and securities held by an investment adviser and the content of related accountant's certificate.	201	June 1, 1966	31 FR 7821.
Publication of the Commission's procedure to be followed if requests are to be met for no action or interpretative letters and responses thereto to be made available for public use.	281	Jan. 25, 1971	36 FR 2600.
Commission's statement of factors to be considered in connection with investment company advisory contracts containing incentive arrangements.	315	Apr. 19, 1972	37 FR 7690.
Applicability of Commission's policy statement on the future structure of securities markets to selection of brokers and payment of commissions by institutional managers.	318	May 18, 1972	37 FR 9988.
Commission's decisions on advisory committee recommendations regarding commencement of enforcement proceedings and termination of staff investigations.	336	Mar. 1, 1973	38 FR 5457.
Commission's statement on obligations of underwriters with respect to discretionary accounts.	377	June 29, 1973	38 FR 17201.
Applicability of investment advisers act to certain publications	563	Jan. 10, 1977	42 FR 2953; 42 FR 8140.
Contingent advisory compensation arrangements	721	May 16, 1980	45 FR 34876.
Applicability of investment advisers act to financial planners, pension consultants, and other persons who provide investment advisory services as an integral component of other financially related services.	770	Aug. 13, 1981	46 FR 41771.
Statement of position of Commission's Division of Investment Management ..	969	Apr. 30, 1985	50 FR 19341.
Statement of staff interpretive position regarding certain rules and forms; uniform registration, disclosure, and reporting requirements.	1000	Dec. 3, 1985	50 FR 49835.
Applicability of the investment Advisers Act to financial planners, pension consultants, and other persons who provide investment advisory services as a component of other financial services.	1092	Oct. 8, 1987	52 FR 38400.
Registration of Successors to Broker-Dealers and Investment Advisers	1357	Jan. 4, 1993	58 FR 11.
Use of electronic media for delivery purposes	1562	May 9, 1996	61 FR 24651.
Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore.	1710	Mar. 23, 1998	63 FR 14814
Interpretation of Section 206(3) of the Investment Advisers Act of 1940	1732	July 17, 1998	63 FR 39508
Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers.	1738	July 29, 1998	63 FR 41404

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

Sec.

279.0-1 Availability of forms.

279.1 Form ADV, for application for registration of investment adviser and for amendments to such registration statement.

279.2 Form ADV-W, notice of withdrawal from registration as investment adviser.

279.3 [Reserved]

279.4 Form 4-R, irrevocable appointment of agent for service of process, pleadings and other papers by individual non-resident investment adviser.

279.5 Form 5-R, irrevocable appointment of agent for service of process, pleadings and other papers by corporation non-resident investment adviser.

279.6 Form 6-R, irrevocable appointment of agent for service of process, pleadings and other papers by partnership non-resident investment adviser.

279.7 Form 7-R, irrevocable appointment of agent for service of process, pleadings