NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 1 - GENERAL PROVISIONS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 ADMINISTRATION.

002.01 The Securities Act of Nebraska is administered by the Director of Banking and Finance, Department of Banking and Finance, pursuant to Sections 8-1101 through 8-1123, R.R.S. 1943. The offices of the Department are open from the hours of 8 a.m. to 5 p.m., Monday through Friday, legal holidays excepted. The mailing address of the agency is Department of Banking and Finance, P.O. Box 95006, Lincoln, Nebraska 68509-5006.

002.02 References in Chapters 1 through 4237 of Title 48 of the Nebraska Administrative Code to the Securities Act of 1933; the Securities Exchange Act of 1934; the Investment Company Act of 1940; the Investment Advisers Act of 1940; Securities and Exchange Commission ("SEC") rules, regulations, forms and ethical standards; and Financial Industry Regulatory Authority ("FINRA") rules and ethical standards are to such statutes, rules, regulations, forms and ethical standards as adopted on the effective date of these rules, or as may hereafter be amended. Copies of any statute, rule, regulation, standard, form or other material referenced in Chapters 1 through 37 42 are attached to the applicable Chapter or may be obtained through the Department.

002.03 References in Chapters 38 through 42 of Title 48 of the Nebraska Administrative Code to the Securities Act of 1933; the Securities Exchange Act of 1934; the Investment Company Act of 1940; the Investment Advisers Act of 1940; SEC rules, regulations, forms and ethical standards; and FINRA rules and ethical standards are to such statutes, rules, regulations, forms and ethical standards as adopted on the effective date of these rules. Copies of any statute, rule, regulation, standard, form or other material referenced in Chapters 38 through 42 are attached to the applicable Chapter or may be obtained through the Department.

003 FEE SCHEDULE. The following fee schedule has been set according to the provisions of the Act:

003.01	Broker-Dealer (initial and renewal)	$250.00
	Agent of Broker-Dealers and Issuer-Dealers (initial and renewal)	$ 40.00
	Investment Adviser (initial and renewal)	$200.00
	Issuer-Dealer (initial and renewal)	$100.00
	Nebraska Securities Law Examination	$ 5.00
	Exemption Filings pursuant to 8-1111(16), 8-1110(5), 8-1111(20), and 8-1111(24)	$200.00
	Investment Adviser Representative (initial and renewal)	$ 40.00
	Notice Filings by Federal Covered Adviser (initial and renewal)	$200.00
	Notice Filing for Federal Covered Securities, Except Securities Issued By an Investment Company	$200.00
	Portal Operator Registration	$200.00

003.02 With regard to fees for registration of securities, refer to Section 8-1108 of the Act as fees may vary depending upon the type of registration being sought.

003.03 With regard to fees for notice filings by investment companies, refer to Section 8-1108.03 of the Act, as fees are based on the amount of securities intended to be sold in Nebraska.

003.04 Fees are payable by corporate check or money order to the Nebraska Department of Banking and Finance or through a registration depository or electronic filing system recognized by the Director. Neither cash nor personal checks will be accepted.

004 RETENTION OF FEES UPON WITHDRAWAL OR DENIAL.

004.01 Upon withdrawal or denial of an application for registration as a broker-dealer, agent, investment adviser, investment adviser representative, or issuer-dealer, the entire fee shall be retained by the Department.

004.02 Upon withdrawal of a notice filing by a federal covered adviser, the entire fee shall be retained by the Department.

004.03 Upon withdrawal or denial of an application for registration of securities, one hundred dollars ($100.00) shall be retained by the Department.

004.04 Upon the withdrawal of a notice filing for federal covered securities, except securities issued by an investment company, the entire fee shall be retained by the Department.

004.05 Upon withdrawal of a notice filing by an investment company subject to the Investment Company Act of 1940, a fee of one hundred dollars ($100.00) shall be retained by the Department.

004.06 Upon the withdrawal or denial of an exemption notice, the entire fee shall be retained by the Department.

005 EFFECTIVE DATE OF FILING. A document is filed when it is received in the office of the Department with the appropriate fee. A document so filed cannot be returned.

006 FORMS.

006.01 The following forms for the registration of securities, for the claim of exemption from registration, or for a notice filing of federal covered securities, shall be used in Nebraska:

**Form U-1 - Uniform Application for Registration of Securities
Application for Registration of Securities by Qualification
**Form D - Notice of Sale of Securities Pursuant to Regulation D, Section 4(6), and/or Uniform Limited Offering Exemption
**Form NF -Uniform Investment Company Notice Filing Form
**Form U-2 -Uniform Consent to Service of Process
Indefinite Mutual Fund Sales Report for Nebraska
Indefinite Unit Investment Trust Sales Report for Nebraska
Form SODD –Securities Offering Disclosure Document
Form NCF –Nebraska Intrastate Crowd Funding Exemption Filing Form

006.02 The following forms for the registration of broker-dealers and agents and for registering as a portal operator shall be used in Nebraska:

**Form BD - Uniform Application for Broker-Dealer Registration
**Form BDW - Notice of Withdrawal from Registration as Broker-Dealer
**Form U-2A - Corporate Resolution
**Form U-2 -Uniform Consent to Service of Process
**Form U-4 - Uniform Application for Securities Industry Registration or Transfer
**Form U-5 - Uniform Termination Notice for Securities Industry Registration
~~**Form U-6 - Uniform Disciplinary Action Reporting~~
**Form U-10 - Uniform Examination Request for Non-FINRA Candidates
Affidavit of Broker-Dealer Activity in Nebraska
Form NPO -Nebraska Portal Operator Registration Form

006.03 The following forms for the registration of investment advisers and investment adviser representatives or for a notice filing by a federal covered adviser shall be used in Nebraska:

**Form ADV - Uniform Application for Investment Adviser Registration
**Form ADV-W - Notice of Withdrawal from Registration as Investment Adviser
~~Form IAR - Designation of Compliance Principal and Investment Adviser Representative~~
Affidavit of Investment Adviser Activity in Nebraska
I-A Corporate Resolution

**Form U-2A - Corporate Resolution
**Form U-2 - Uniform Consent to Service of Process
**Form U-4 - Uniform Application for Securities Industry Registration or Transfer
**Form U-5 - Uniform Termination Notice for Securities Industry Registration
~~**Form U-6 - Uniform Disciplinary Action Reporting~~
**Form U-10 - Uniform Examination Request for Non-FINRA Candidates

006.04 The following forms for the registration of issuer-dealers and agents shall be used in Nebraska:

Application for Registration as Issuer-Dealer
Application for Registration as Agent of Issuer-Dealer

** Uniform Form Accepted

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 2 - DEFINITIONS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to definitions be applied to Title 48 of the Nebraska Administrative Code, unless otherwise specified therein. This Rule is consistent with investor protection and is in the public interest.

001.03 Federal statutes and rules of the Securities and Exchange Commission ("SEC") and of the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Chapter. A copy of the statutes or rules referenced in this Rule is available as an appendix to this rule at http://www.ndbf.ne.gov/legal/title48.shtml.

002 DEFINITIONS. The following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

002.01 Adjusted net earnings means the issuer's net earnings ~~and~~ after charges for interest and dividends, adjusted on a pro forma basis to reflect:

002.01A The elimination of any required charges for debt, debt securities, or preferred stock that are to be redeemed or retired from the proceeds derived from the public offering of preferred stock;

002.01B The effect of any acquisitions or capital expenditures that were made by the issuer after its last fiscal year, or ~~which are~~ that it proposes ~~proposed~~ or is required to ~~be made~~make during the current fiscal year, which materially affect the issuer's net earnings;

002.01C The effect of charges or dividends on debt, debt securities, or preferred stock issued after the issuer's last fiscal year;

002.01D The effect of any charges or dividends on debt, debt securities, or preferred stock ~~that were~~ issued during, but outstanding for only a portion of, the issuer's last fiscal year, ~~but which were outstanding for only a portion of such fiscal year,~~ calculated as if ~~charges or dividends, such~~ the debt, debt securities, or preferred stock had been outstanding for the entire fiscal year; and

002.01E The effect of any other material changes to an issuer's future net earnings.

002.02 Affiliate means a person who, directly or indirectly, controls, is controlled by, or is under common control with the person specified herein.

002.03 Aggregate revenues means the aggregate amount of revenues a promotional or development stage company has received within the last three consecutive fiscal years immediately preceding the public offering plus revenues received during the period covered by any interim period financial information included in the prospectus, excluding revenues from interest and extraordinary items.

002.04 Associate, when used to indicate a relationship with a person, includes:

002.04A Corporations or legal entities, other than the issuer or majority-owned subsidiaries of the issuer, of which a person is an officer, director, partner, or a direct or indirect, legal or beneficial owner of five percent ~~(5%)~~ or more of any class of equity securities;

002.04B Trusts or other estates in which a person has a substantial beneficial interest or for which a person serves as a trustee or in a similar capacity; and

002.04C A person's spouse and relatives, by blood or by marriage, if the person is a promoter of the issuer, its subsidiaries, its affiliates, or its parent.

002.05 Average promotional price means the average per share price paid for promotional shares and other shares issued prior to the public offering ~~which~~ that are of the same class of shares being offered in the public offering as determined by reference to the audited financial statements of the issuer included in the prospectus.

002.06 Cash analysis means the issuer's "Net Cash Provided By Operating Activities" as reflected in the Statement of Cash Flows and ~~presented in conformity~~ determined in accordance with generally accepted accounting principles. If the issuer will use the proceeds of the public offering to redeem or retire debt securities, ~~are to be redeemed or retired from the proceeds from the public offering,~~ the issuer must adjust, on a pro forma ~~adjustment~~ basis, for the elimination of the related interest charges, net of applicable income taxes. ~~, must be made.~~

002.07 Control means the power to direct or influence the direction of the management or policies of a person, directly or indirectly, through the ownership of voting securities, by contract or otherwise.

002.08 Director means the Director of Banking and Finance of the State of Nebraska, unless otherwise specified.

002.09 Equity securities include shares of common stock or similar securities and convertible securities, warrants, options or rights that may be converted into or exercised to purchase, shares of common stock or similar securities.

002.10 Escrow agent means:

002.10A A financial institution that is domiciled in, and whose principal place of business is located in, the United States and whose deposits are insured by the Federal Deposit Insurance Corporation ("FDIC").

~~002.10A~~002.10A1 An escrow agent may not be affiliated with the issuer, its promoters, or associates.

~~002.10B~~002.10A2 A financial institution may not be disallowed to act as an escrow agent merely because the issuer, its promoters or associates are customers thereof.

002.10B An attorney or certified public accountant, provided that the attorney or certified public accountant:

002.10B1 Is not affiliated with the issuer, its promoters, or associates of the issuer or promoters;

002.10B2 Is licensed to do business in the state in which the attorney or certified public accountant practices; and

002.10B3 Can demonstrate adequate insurance or can provide a fidelity bond in an amount satisfactory to the Director.

002.11 Impoundment agent means a financial institution that is domiciled in, and whose principal place of business is located in, the United States and whose deposits are insured by the FDIC.

002.12 Independent director means a member of an issuer's board of directors who:

002.12A ~~Is not an officer or employee of the issuer, its subsidiaries, or their affiliates or associates and has not been an officer, or employee of the issuer, its subsidiaries, or their affiliates or associates within the last two years; and~~ Does not receive, other than in his or her capacity as a member of the board of directors or a board committee, any consulting, advisory or other compensatory fee from the issuer, its subsidiaries, or their affiliates or associates;

002.12B Has not received, other than in his or her capacity as a member of the board of directors or a board committee, any consulting, advisory or other compensatory fee from the issuer, its subsidiaries, or their affiliates or associates within the last two years;

~~002.12B~~002.12C Other than serving as a director of the issuer, is ~~Is~~ not a promoter as defined in Section~~s~~ 002.16 ~~A, 002.16B, 002.16C2 or 002.16C3,~~ below; and

~~002.12C~~002.12D Does not have a material business or professional relationship with the issuer or any of its affiliates or associates. For purposes of determining whether or not a business or professional relationship is material, the gross revenue ~~derived by the independent director~~ that the independent director derives from the issuer, its affiliates and associates shall be deemed material per se if it exceeds five percent ~~(5%)~~ of the independent director's:

~~002.12C1~~002.12D1 Annual gross revenue, derived from all sources, during either of the last two years; or

~~002.12C2~~002.12D2 Net worth, on a fair market value basis.

002.13 Lock-in agreement means an agreement between an issuer and a persons ~~who hold promotional shares wherein those persons agree,~~ as a condition of registration~~, not to sell, pledge, hypothecate, assign, grant any option for the sale of, or otherwise transfer or~~ in which the person agrees not to dispose of~~, whether or not for consideration, directly or indirectly, promotional shares and all certificates representing stock dividends, stock splits, recapitalizations, and the like, that are granted to or received by the security holder for the period specified in the lock-in agreement.~~ or otherwise transfer equity securities the person received from the issuer or that the issuer granted to the person.

002.14 Net earnings means the issuer's after-tax earnings, ~~that are derived from its normal operations, exclusive of~~ excluding extraordinary and nonrecurring items, determined ~~according to~~in accordance with generally accepted accounting principles. ~~, consistently applied.~~

002.15 Person means an individual, a corporation, a limited liability company, a partnership, an association, a joint-stock company, a trust in which the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

002.16 Promoter includes:

002.16A A person who, alone or in conjunction with one or more persons, directly or indirectly, took the initiative in founding or organizing the issuer or controls the issuer;

002.16B A person who, directly or indirectly, receives, as consideration for property or for services ~~and/or property~~ rendered, five percent ~~(5%)~~ or more of any class of the issuer's equity securities or five percent ~~(5%)~~ or more of the proceeds from the sale of any class of the issuer's equity securities; or

002.16C A person who:

002.16C1 Is an officer or director ~~for~~ of the issuer;

002.16C2 Is the legal or beneficial owner, directly or indirectly, of five percent ~~(5%)~~ or more of any class of the issuer's equity securities; or

002.16C3 Is an affiliate or an associate of a person specified in this subsection~~Section 002.16 above~~.

002.16D Promoter does not include:

002.16D1 A person who receives securities or proceeds solely as underwriting compensation ~~if~~ unless that person ~~falls outside~~ otherwise comes within the definition of Section 002.16, above~~,~~; or

002.16D2 An unaffiliated institutional investor, who purchased the issuer's equity securities more than one year prior to the filing date of the issuer's registration statement. An unaffiliated institutional investor, who purchased the issuer's equity securities on an arm's-length basis within one year prior to the filing date of the issuer's registration statement may, at the Director's discretion, be excluded from the definition of promoter.

002.17 Promoters' equity investment means the total of cash and ~~tangible~~ assets ~~that has been~~ contributed by the promoters to the issuer, provided that the Director accepts the value of the tangible or intangible assets~~. is accepted by the Director.~~

~~002.17A Promoters' contributions of intangible assets may be considered as promoters' equity investment, provided that the value thereof has been accepted by the Director.~~

~~002.17AB~~002.17A ~~Promoters'~~ The Director may require the issuer to adjust promoters' equity investment ~~may be adjusted~~ by the issuer's earned surplus immediately prior to the public offering.

002.18 A promotional or development stage company includes an issuer~~: who is not listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq National Market System, or whose annual net earnings for each of the last two consecutive fiscal years or whose average, annual net earnings for the last five fiscal years prior to the public offering have been less than five percent of the aggregate public offering.~~

002.18A That is not listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq Global Market or a securities exchange that the Securities and Exchange Commission determines under Section 18(b)(1) of the Securities Act of 1933 (15 U.S.C. §77r(b)(1)) has substantially similar listing standards;

002.18B That has had annual net earnings in each of the two fiscal years immediately preceding the public offering which do not exceed five percent of the aggregate public offering; or

002.18C That has had average, annual net earnings for the five fiscal years immediately preceding the public offering which do not exceed five percent of the aggregate public offering.

002.19 Promotional shares means equity securities that~~: are to be issued or were issued:~~

002.19A ~~By an issuer, which is a~~ A promotional or development stage company has issued within five years before filing of the registration

statement or will issue ~~,~~ to promoters for cash or other consideration, including services rendered, patents, copyrights, and other intangibles; ~~(provided that the value thereof has been accepted by the Director), that will be or was less than eighty-five percent (85%) of the proposed public offering price;~~ or

002.19B ~~Within three years prior to the filing of the registration statement by an~~ An issuer~~,~~ which is not a promotional or development stage company~~,~~ has issued within three years before the filing of the registration statement or will issue to promoters for cash or other consideration, including services rendered, patents, copyrights and other intangibles. ~~(provided that the value thereof has been accepted by the Director), that will be or was less than eighty-five percent (85%) of the proposed public offering price.~~

002.20 Public offering price means the per share price at which a promotional or development stage company proposes to offer equity securities to the public.

~~002.21 Unaffiliated institutional investor means:~~

~~002.21A An unaffiliated bank or unaffiliated savings and loan company;~~

~~002.21B An unaffiliated investment company registered under the Investment Company Act of 1940;~~

~~002.21C An unaffiliated business development Company as defined in Section 2(a)(48) of the Investment Company Act of 1940;~~

~~002.21D An unaffiliated small business investment company licensed by the U.S. Small Business Administration under Section 301 of the Small Business Investment Act of 1958;~~

~~002.21E An unaffiliated employee benefit plan, within the meaning of Title I of the Employee Retirement Income Security Act of 1974, and state and local government employees retirement and pension plans;~~

~~002.21F An unaffiliated insurance company;~~

~~002.21G An unaffiliated trust company;~~

~~002.21H An unaffiliated private business development company, as defined in Section 202(a)(22) of the Investment Advisors Act of 1940, or a comparable business entity, that is engaged as a substantial part of its business in the purchase and sale of securities, and which will own less than twenty percent (20%) of the issuer's securities upon completion of the public offering; or~~

~~002.21I An unaffiliated qualified purchaser to be defined under the National Securities Markets Improvement Act of 1996.~~

002.21 Unaffiliated institutional investor means the following investors if not affiliated with the issuer:

002.21A A depository institution or international banking institution;

002.21B An insurance company;

002.21C A separate account of an insurance company;

002.21D An investment company as defined in the Investment Company Act of 1940;

002.21E A broker-dealer registered under the Securities Exchange Act of 1934;

002.21F An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of ten million dollars ($10,000,000.00) or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Act, a depository institution, or an insurance company;

002.21G A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees, if the plan has total assets in excess of ten million dollars ($10,000,000.00) or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Act, a depository institution, or an insurance company;

002.21H A trust, if it has total assets in excess of ten million dollars ($10,000,000.00), its trustee is a depository institution, and its participants are exclusively plans of the types identified in subsections 002.21F and 002.21G, above, regardless of the size of their assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

002.21I An organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)), corporation, Massachusetts trust or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of ten million dollars ($10,000,000.00);

002.21J A small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. § 681(c)) with total assets in excess of ten million dollars ($10,000,000.00);

002.21K A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(22)) with total assets in excess of ten million dollars ($10,000,000.00);

002.21L A federal covered investment adviser acting for its own account;

002.21M A "qualified institutional buyer" as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(i)(H), adopted under the Securities Act of 1933 (17 C.F.R. 230.144A);

002.21N A "major U.S. institutional investor" as defined in Rule 15a-6(b)(4)(i) adopted under the Securities Exchange Act of 1934 (17 C.F.R. 240.15a-6);

002.21O Any other person, other than an individual, of institutional character with total assets in excess of ten million dollars ($10,000,000.00) not organized for the specific purpose of evading the Act; and

002.21P A business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. § 80a-2(a)(48)).

002.22 Underwriter means any person who has agreed with the issuer or other person on whose behalf a distribution is to be made:

002.22A To purchase securities for distribution;

002.22B To distribute securities ~~for or~~ on behalf of the issuer or other person; or

002.22C To manage or supervise a distribution of securities ~~for or~~ on behalf of the issuer or other person.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 3 - DEFINITION OF AN OFFER

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the definition of an offer is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the statutes or rules referenced in this Rule is available as an appendix to this rule at http://www.ndbf.ne.gov/legal/title48.shtml.

002 OFFERINGS REGISTERED IN NEBRASKA. For the purposes of Section 8-1101(13) of the Act, the term "offer" shall not include the circulation of a preliminary offering document provided.

002.01 The document is circulated by a broker-dealer registered in Nebraska;

002.02 The document is filed with the Director as part of an application to register the securities by qualification prior to its circulation.

002.03 The preliminary offering document is in the form of a prospectus which contains substantially the information required to be included in a prospectus meeting the requirements of Section 8-1107 of the Act for the securities being registered by qualification; and

002.04 The outside front page of the document bears in red ink, the caption "Preliminary Offering Document," the date of its issuance, and the following statement printed in bold type:

"A REGISTRATION STATEMENT RELATING TO THESE SECURITIES HAS BEEN FILED WITH THE DIRECTOR OF THE DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, BUT HAS NOT YET BECOME EFFECTIVE. INFORMATION CONTAINED HEREIN IS SUBJECT TO COMPLETION OR AMENDMENT. THESE SECURITIES MAY NOT BE SOLD NOR MAY OFFERS TO BUY BE ACCEPTED PRIOR TO THE TIME THE

REGISTRATION STATEMENT BECOMES EFFECTIVE. THIS PRELIMINARY DOCUMENT SHALL NOT CONSTITUTE AN OFFER TO SELL OR THE SOLICITATION OF AN OFFER TO BUY; NOR SHALL THERE BE ANY SALE OF THESE SECURITIES IN NEBRASKA SINCE SUCH OFFER, SOLICITATION, OR SALE WOULD BE UNLAWFUL PRIOR TO QUALIFICATION UNDER SECTION 8-1107 OF THE SECURITIES ACT OF NEBRASKA."

003 OFFERINGS OF FEDERAL COVERED SECURITIES. For purposes of Section 8-1101(13) of the Act, the term "offer" shall not include the circulation of a preliminary offering document for a federal covered security provided:

003.01 The document complies with the provisions of Regulation S-K, 17 CFR ~~Ch. 11,~~ Part 229; and

003.02 The document is circulated by a broker-dealer registered in Nebraska or by an issuer exempt from such registration pursuant to Section 8-1101(2)(b).

NEBRASKA ADMINISTRATIVE CODE

Title 48 - ~~Department of Banking and Finance~~DEPARTMENT OF BANKING AND FINANCE

Chapter 4 - BROKER-DEALERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to broker-dealers is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the statutes or rules referenced in this Rule is available as an appendix to this rule at http://www.ndbf.ne.gov/legal/title48.shtml.

002 APPLICATION. The application for initial registration as a broker-dealer pursuant to Section 8-1103(1) of the Act shall be filed as directed in Section 007, below, and shall contain the following:

002.01 A copy of Uniform Application for Broker-Dealer Registration ("Form BD"), together with all applicable schedules and exhibits specified therein, complete, accurate and current;

002.02 A completed "Affidavit of Broker-Dealer Activity in Nebraska";

002.03 A copy of the firm's most recent audited financial statements, and, if the date of the financial statements ~~are~~ is not within ninety ~~90~~ days of the date the application is filed, the firm's most recent quarterly Focus Report Part II(A);

002.04 A fee in the amount of two hundred fifty dollars ($250.00); and

002.05 Any other information the Director may require.

002.06 A broker-dealer which is not a member of the ~~National Association of Securities Dealers, Inc. ("NASD")~~ Financial Industry Regulatory Authority ("FINRA") shall submit the following additional information for an initial application for registration as a broker-dealer pursuant to the Act:

002.06A An original manual signature on the Form BD;

002.06B A current and correct copy of the firm's articles of incorporation, partnership, or organization, and any amendments thereto, if applicable; and

002.06C A corporate resolution, Form U-2A, if applicable.

003 RENEWAL. All broker-dealer registrations automatically expire annually on December 31. All broker-dealer registrations must be renewed on or prior to that date.

004 AMENDMENT AND CORRECTION OF DOCUMENTS. If a material change in operations occurs, or if the information contained in any document filed with the Director is or becomes inaccurate or incomplete in any material respect, the broker-dealer shall file a correcting amendment on Form BD within the time period specified in the instructions to that form relating to filings made with the SEC ~~Securities and Exchange Commission ("SEC")~~.

005 WITHDRAWAL. A broker-dealer desiring to withdraw its registration as a broker-dealer pursuant to Section 8-1103(9)(d) of the Act shall file ~~Form BDW,~~ a Notice of Withdrawal from Registration as a Broker-Dealer ("Form BDW"), with the Director or with a ~~central~~ registration depository system designated by the Director.

006 FORMS SUBMISSIONS.

006.01 A broker-dealer which is a member of FINRA shall file the forms necessary for registration, renewal or withdrawal of its registration or the registration or termination of its agents in Nebraska with, and shall pay all applicable fees for such registrations through, the Central Registration Depository/Investment Advisor Registration Depository System ("CRD/IARD"). All mail for CRD/IARD processing must be sent to:

FINRA
P.O. Box 9495
Gaithersburg, MD 20898-9495

For purposes of Section 8-1103(4) of the Act, a form submitted through CRD/IARD shall be deemed filed with the Department when the record is transmitted to the Department for review.

006.02 A broker-dealer which is not a member of FINRA shall file the forms necessary for registration, renewal, or withdrawal of its registration or the registration or termination of its agents in Nebraska directly with the Department. All applicable fees shall be paid by corporate check or money order, payable to the Nebraska Department of Banking and Finance.

006.03 With respect to any document filed electronically through CRD/IARD, when a signature or signatures are required by the particular instructions of any filing to be made through CRD/IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to CRD/IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individual whose name is typed on the filing.

~~006~~007 SUPERVISORS AND COMPLIANCE ~~PRINCIPAL~~ PRINCIPALS.

007.01 A broker-dealer, which is not a member of ~~the NASD~~ FINRA, shall designate in writing a compliance principal and shall conform with this section during all registration periods.

~~006.01~~ 007.01A The compliance principal will be responsible for supervising the compliance of the broker-dealer and its registered agents and other associated persons with the Act and the rules and regulations promulgated thereunder.

~~006.02~~ 007.01B If the designated compliance principal ceases to act in that capacity, the broker-dealer must designate in writing a qualified replacement principal within sixty ~~(60)~~ days after such change has occurred.

~~006.03~~ 007.01C Failure to designate a compliance principal shall be grounds for denial or suspension of a broker-dealer registration.

~~006.04~~ 007.01D The designated compliance principal for Nebraska shall be registered as an agent of the broker-dealer in Nebraska and shall have taken and passed a qualifying examination, as set forth below:

~~006.04A~~ 007.01D1 The Uniform Securities Agent State Law Examination (Series 63) or the Uniform Combined State Law Examination (Series 66); and

~~006.04B~~ 007.01D2 One of the following examinations:

~~006.04B1~~ 007.01D2a The General Securities Principal Examination (Series 24 examination);

~~006.04B2~~ 007.01D2b The Investment Company Products Principal Examination (Series 26 examination), if the broker-dealer's registration is or will be limited to investment company products;

~~006.04B3~~ 007.01D2c The Direct Participation Programs Principal Examination (Series 39 examination) if the broker-dealer's registration is or will be limited to direct participation programs; or

~~006.04B4~~ 007.01D2d The General Securities Representative Examination (Series 7 examination), if the broker-dealer's registration is or will be limited to:

~~006.04B4a~~ 007.01D2d(i) Securities of one issuer or associated issuers (other than mutual funds),

~~006.04B4b~~ 007.01D2d(ii) Interests in mortgages or other receivables, or

~~006.04B4c~~ 007.01D2d(iii) Securities of non-profit organizations, provided that the Director may waive the requirement of this section ~~006.04B~~ for principals of a broker-dealer whose registration is limited to securities of non-profit organizations if the ~~director~~ Director finds the waiver is consistent with investor protection and is in the public interest.

007.02 Every registered broker-dealer must designate at least one registered agent located at its principal office and one registered agent located at each office of supervisory jurisdiction ("OSJ") that is located in this state to act in a supervisory capacity.

007.02A Such supervisor shall have taken and passed the appropriate supervisory examination administered by FINRA.

007.02B For any office located in this state not designated as an OSJ, the broker-dealer must designate a supervisor for the office. The designated supervisor need not be located in this state, but must be registered in this state as an agent and shall have taken and passed the appropriate supervisory examination administered by FINRA.

007.02.C For purposes of this subsection "office of supervisory jurisdiction" shall mean any office of a broker-dealer at which any one or more of the following functions take place:

007.02C1 Order execution or market making;

007.02C2 Structuring of public offerings or private placements;

007.02C3 Maintaining custody of customers' funds or securities;

007.02C4 Final acceptance (approval) of new accounts on behalf of the member;

007.02C5 Review and endorsement of customer orders;

007.02C6 Final approval of retail communications for use by persons associated with the broker-dealer, except for an office that solely conducts final approval of research reports; or

007.02C7 Responsibility for supervising the activities of persons associated with the broker-dealer located at one or more other offices of the broker-dealer.

~~007 FORMS SUBMISSIONS.~~

~~007.01 A broker-dealer which is a member of the NASD, shall file the forms necessary for registration, renewal or withdrawal of its registration or the registration or termination of its agents in Nebraska with, and shall pay all applicable fees for such registrations through, the NASAA/NASD Central Registration Depository System ("CRD") in Washington, D.C. All mail for CRD processing must be sent to:~~

~~NASAA/NASD Central Registration Depository~~
~~P.O. Box 9401~~
~~Gaithersburg, MD 20898-9401~~

~~For purposes of Section 8-1103(4) of the Act, a form submitted through the CRD shall be deemed filed with the Department when the record is transmitted to the Department for review.~~

~~007.02 A broker-dealer which is not a member of the NASD shall file the forms necessary for registration renewal or withdrawal of its registration or the registration or termination of its agents in Nebraska directly with the Department. All applicable fees shall be paid by corporate check or money order, payable to the Nebraska Department of Banking and Finance.~~

008 SUPERVISION. A broker-dealer is ultimately responsible for the acts of its agents and other associated persons and must maintain reasonable supervision and control at all times.

009 CLEARING BROKER-DEALER REGISTRATION. If a broker-dealer utilizes a clearing broker-dealer to clear trades with Nebraska customers, the clearing broker-dealer must be registered in Nebraska.

010 BOOKS AND RECORDS. Unless otherwise provided by order of the SEC, ~~each~~ all broker-dealers registered or required to be registered under the Act shall make, maintain and preserve books and records in compliance with SEC Rules 17a-3 (17 C.F.R. 240.17a-3), 17a-4 (17 C.F.R. 240.17a-4), ~~15c3-2 (17 C.F.R. 240.15c3-2),~~ and 15c3-3 (17 C.F.R. 240.15c3-3).

~~010.01 All SEC Rules referenced herein shall apply to all broker-dealers registered under the Act, regardless of registration with the SEC.~~

~~010.02 All SEC Rules referenced herein shall mean those rules as amended on or before the effective date of this Rule.~~

011 MINIMUM FINANCIAL REQUIREMENTS AND FINANCIAL REPORTING REQUIREMENTS.

011.01 Each broker-dealer which is a member ~~of the NASD~~ FINRA registered or required to be registered under the Act shall:

011.01A Comply with the financial requirements established in SEC Rule 15c3-1 (17 C.F.R. 240.15c3-1), ~~15c3-2 (17 C.F.R. 240.15c30-2),~~ and 15c3-3 (17 C.F.R. 240.15c3-3), and

011.01B Comply with the financial reporting requirements established in SEC Rule 17a-11 (17 C.F.R. 240.17a-11) and shall provide copies of notices and reports required by such SEC ~~rules~~ Rules to the Director upon request.

~~011.01C All SEC Rules referenced herein shall mean those rules as amended on or before the effective date of this Rule.~~

011.02 Each broker-dealer which is not a member of the ~~NASD~~ FINRA registered or required to be registered under the Act shall:

011.02A Maintain a net capital of not less than twenty-five thousand dollars ($25,000.00).

011.02A1 A broker-dealer which has a net capital which is less than required by this Section shall submit a surety bond in the amount of twenty-five thousand dollars ($25,000.00) with its application.

011.02A2 Net capital means total assets minus total liabilities.

011.02B File with the Director audited financial statements showing the assets, liabilities and net capital of the broker-dealer within ninety ~~(90)~~ days of the end of the broker-dealer's fiscal year, which shall be:

011.02B1 Examined in accordance with generally accepted auditing standards and prepared in conformity with generally accepted accounting principles;

011.02B2 Audited by an independent public accountant or an independent certified public accountant; and

011.02B3 Accompanied by an opinion of the accountant as to the report of financial position, and by a note stating the principles used to prepare it, the basis of included securities, and any other explanations required for clarity.

012 REGISTRATION OF SUCCESSOR TO REGISTERED BROKER-DEALER. In the event that a broker-dealer succeeds to and continues the business of a broker-dealer registered pursuant to Section 8-1103 of the Act, the registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within thirty ~~(30)~~ days after such succession, files an application for registration on Form BD, and the predecessor files a notice of withdrawal from registration on Form BDW.

012.01 The registration of the predecessor broker-dealer will cease to be effective as the registration of the successor broker-dealer forty-five ~~(45)~~ days after the application for registration on Form BD is filed by such successor.

012.02 Notwithstanding any other provision of this Rule, if a broker-dealer succeeds to and continues the business of a registered broker-dealer, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within thirty ~~(30)~~ days after the succession, amend the registration of the predecessor on Form BD to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor.

~~013 DISHONEST AND UNETHICAL BUSINESS PRACTICES.~~

~~013.01 The conduct set forth in 48 NAC 12.002 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by a broker-dealer for purposes of Section 8-1102(1)(c) of the Act.~~

~~013.02 The conduct set forth in 48 NAC 12.003 and 48 NAC 12.004 shall constitute a "dishonest or unethical business practice" by a broker-dealer for purposes of Section 8-1103(9)(a)(vii) of the Act.~~

~~013.03 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated in 48 NAC 12.002 and 48 NAC 12.003 may also be deemed fraudulent and dishonest.~~

013 VERIFICATION OF IMMIGRATION STATUS. Every broker-dealer who registers agents to transact business in Nebraska must verify the citizenship and immigration status of each agent registered to transact business on its behalf in Nebraska and submit such verification to the Department.

013.01 For each agent identified as a qualified legal alien, the broker-dealer must submit a completed United States Citizenship Attestation Form, and a legible, current and unexpired copy of the front and back of one of the currently acceptable forms of documentation required by the Systematic Alien Verification for Entitlements Program and the Department of Homeland Security.

013.02 The broker-dealer shall maintain, as a required record, a copy of the completed United States Citizenship Attestation Form for each agent registered in Nebraska, regardless of citizenship or immigration status.

014 USING THE INTERNET FOR GENERAL DISSEMINATION OF INFORMATION ON PRODUCTS AND SERVICES. Broker-dealers shall not be deemed to be "transacting business" in this state for purposes of Section 8-1103 of the Act based solely on the use of the Internet, world wide web, and similar proprietary or common carrier electronic systems (hereinafter the "Internet"") to distribute information on available products and services through certain communications made on the Internet directed generally to anyone having access to the Internet, and transmitted through postings on bulletin boards, social networking sites, blogs or similar sites, displays on "Home Pages" or similar methods (hereinafter, "Internet Communications") if the following conditions are observed:

014.01 The Internet Communications contain a disclosure statement in which it is clearly stated that:

014.01A The broker-dealer in question may only transact business in this state if first registered or excluded or exempted from the broker-dealer registration requirements of the Act; and

014.01B The broker-dealer will not make follow-up, individualized responses to persons in this state, that involve either the effecting or attempting to effect transactions in securities, unless the broker-dealer has complied with, or has qualified for an applicable exemption or exclusion from, the broker-dealer registration requirements of the Act.

014.02 The Internet Communications contain a mechanism, including and without limitation, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that prior to any subsequent, direct communication with prospective customers or clients in this state, said broker-dealer is first registered in this state or qualifies for an exemption or exclusion from such requirement.

014.02A Nothing in this paragraph shall be construed to relieve a broker-dealer from any applicable securities registration requirement in this state.

014.03 The Internet Communications do not involve either effecting or attempting to effect transactions in securities in this state over the Internet, but are limited to the dissemination of general information on products and services.

015 DISHONEST AND UNETHICAL BUSINESS PRACTICES.

015.01 The conduct set forth in 48 NAC 12.002 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by a broker-dealer for purposes of Section 8-1102(1)(c) of the Act.

015.02 The conduct set forth in 48 NAC 12.003 and 48 NAC 12.004 shall constitute a "dishonest or unethical business practice" by a broker-dealer for purposes of Section 8-1103(9)(a)(vii) of the Act.

015.03 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated in 48 NAC 12.002 and 48 NAC 12.003 may also be deemed fraudulent and dishonest.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 5 - ISSUER-DEALERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to issuer-dealers is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 ELIGIBILITY. An issuer may be licensed to sell its own securities if the issuer is located in Nebraska, or if the issuer registers its securities by qualification and proposes to sell its securities in this state without the benefit of a registered broker-dealer.

003 APPLICATION. Applications for initial registration as an issuer-dealer shall be filed with the Director and shall consist of the following:

003.01 A copy of an Application for Registration as Issuer-Dealer ("Application"), together with all applicable schedules and exhibits specified therein complete, accurate and current, executed with an original manual signature;

003.02 A copy of the issuer's most recent financial statements, either audited or signed, under penalty of perjury, by an officer, director, trustee, general partner, or limited liability company managing member attesting that the statements are true and accurate to the best of the signer's knowledge and belief;

003.03 A corporate surety bond in the amount of twenty-five thousand dollars ($25,000.00), if the issuer's net capital is less than twenty-five thousand dollars ($25,000.00~~;~~).

003.03A An issuer-dealer's net worth shall be computed on the basis of total assets minus total liabilities.

003.03B An issuer-dealer may request a signature bond in lieu of the net worth or surety bond requirement and the Director may allow the issuer-dealer to post the signature bond, if the Director finds that the net worth or the surety bond requirement causes an undue burden upon the issuer-dealer.

003.04 A check or money order in the amount of one hundred dollars ($100.00) payable to "Nebraska Department of Banking and Finance"; and

003.05 Any other information the Director may require.

004 QUALIFICATIONS.

004.01 The issuer-dealer shall be of good repute, shall be knowledgeable of the Act, and must meet the requirements of the Act and rules adopted thereunder.

004.02 The issuer-dealer shall not conduct a general securities business and shall not normally be engaged in the business of selling securities.

005 POST-REGISTRATION FILINGS. An issuer-dealer shall file quarterly reports with the Director indicating the amount of securities sold during the period.

006 RENEWAL. The issuer-dealer licensing period shall run concurrently with the registration of said issuer-dealer's securities in this state. An issuer-dealer's registration may be renewed by filing the information specified in Section 003, above, before the expiration of its registration.

007 AMENDMENT. Whenever a material change in operations occurs or is discovered, a registered issuer-dealer shall promptly file an amendment to its Application with the ~~Department~~ Director. Material changes include, but are not ~~be~~ limited to:

007.01 A change in the name or ~~name(s)~~ names under which business is conducted in Nebraska and the firm's business address;

007.02 A change in the ownership, management or control of the firm;

007.03 A change in type of entity, general plan or character of its business, or method of operation;

007.04 Insolvency, dissolution, liquidation, receivership, bankruptcy, or a material adverse change or impairment of working capital, or non-compliance with the minimum net capital or bond requirements;

007.05 The termination of business; or

007.06 The filing of any of the following actions against the firm; a partner, limited liability company member, officer, or director of the firm, or any person in a similar position; or an agent:

007.06A A criminal charge alleging a misdemeanor involving a security or commodity or any aspect of the securities or commodities business, or any felony;

007.06B Any civil action in which a fraudulent, dishonest, or unethical act is alleged or any violation of a securities law is involved; or

007.06C The entry of an order or proceeding by any court or administrative agency against the firm denying, suspending, or revoking its license, or threatening to do so, or enjoining it from engaging in or continuing any conduct or practice in the securities business.

008 CORRECTION OF DOCUMENTS. If the information contained in any document filed with the Director is, or becomes, inaccurate or incomplete in any material respect, the issuer-dealer shall file a correcting amendment on the Application within thirty ~~(30)~~ days of the date that information becomes inaccurate or incomplete.

009 AGENTS. Any person who is involved directly or indirectly in the sale of securities of the issuer-dealer must be licensed as an agent of the issuer-dealer by the Department.

009.01 An agent must have sufficient training and knowledge of the securities business, and must meet the requirements of the Act and this Rule.

009.02 Partners, officers, directors and managing members of an issuer-dealer may effect sales of securities of the issuer-dealer without registration as agents, provided two partners, officers, directors, or managing members shall have taken and passed either the Nebraska Securities Law Exam, administered by the Department or a securities examination administered by the ~~National Association of Securities Dealers~~ Financial Industry Regulatory Authority ("FINRA"), acceptable to the Director.

009.03 An application for initial registration as an agent of an issuer-dealer shall be filed with the Director and shall consist of the following:

009.03A A copy of an Application for Registration as Agent of Issuer-Dealer, together with all applicable schedules and exhibits specified therein, complete, accurate and current, executed with an original manual signature;

009.03B A check in the amount of forty dollars ($40.00) payable to the "Nebraska Department of Banking and Finance"; and

009.03C Any other information the Director may require.

009.04 Agents are required to pass the Nebraska Securities Law Exam, unless the Director determines, in his or her discretion, that the nature of the offering indicates an examination administered by ~~the National Association of Securities Dealers~~ FINRA is appropriate.

009.04A The Nebraska Securities Law Exam will be administered by appointment and upon payment of an examination fee of five dollars ($5.00), payable to the "Nebraska Department of Banking and Finance" by company draft.

009.04B The Nebraska Securities Law Exam will be based upon the Act, rules adopted thereunder, and information contained in the prospectus and registration statement for the securities of the issuer-dealer.

009.05 ~~Application for registration~~Agent registration must be renewed annually on the anniversary date of the employing issuer-dealer's registration.

009.06 An issuer-dealer shall notify the Director within ten ~~(10)~~ days after the termination of any agent or principal.

010 DENIAL, SUSPENSION OR REVOCATION OF LICENSE.

010.01 An issuer-dealer's license may be denied, suspended, or revoked if it, or any partner, limited liability company member, officer, or director of the issuer-dealer, or any person occupying a similar status or performing similar functions for the issuer-dealer, has engaged in violations of the Act or rules adopted thereunder, or has engaged in dishonest or unethical practices in the securities business.

010.02 An agent's license can be denied, suspended, or revoked by the Director if the agent has engaged in violations of the Act, or rules adopted thereunder, or otherwise engaged in dishonest or unethical practices in the securities business.

~~010.03 The conduct set forth in 48 NAC 12.002 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by an issuer-dealer or its agent for purposes of Section 8-1102(1)(c) of the Act.~~

~~010.04 The conduct set forth in 48 NAC 12.003 shall constitute "dishonest or unethical business practices" by an issuer-dealer or its agent for purposes of Section 8-1103(9)(a)(vii) of the Act.~~

~~010.05 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated in 48 NAC 12.002 may also be deemed fraudulent and dishonest.~~

011 ADVERTISING RESTRICTION. No advertising may be used in connection with the sale of securities by the issuer-dealer or agent, unless the advertising material has received the prior approval of the Director.

012 SUITABILITY.

012.01 No issuer-dealer or agent of an issuer-dealer may sell securities of the issuer-dealer unless he or she has reasonable grounds to believe that the investment is suitable for the investor, based upon the investor's other securities holdings, and the investor's financial situation and needs.

012.02 The issuer-dealer must keep written records which establish the basis for the issuer-dealer or agent's determination that the securities of the issuer-dealer are suitable for each investor.

013 REGISTRATION REPRESENTATIONS. No issuer-dealer or agent shall make material representations to a prospective investor in connection with the sale of securities of the issuer-dealer that are not contained in the prospectus or registration statement which has been registered or filed as an exemption with the Department.

014 SALES LITERATURE. No sales literature, other than the prospectus which has been registered or filed as an exemption with the Department, may be used by the issuer-dealer or agent in connection with the sale of securities of the issuer-dealer.

015 SUPERVISION. An issuer-dealer is responsible for the acts of its agents and must maintain reasonable supervision and control over its employees.

016 DISHONEST AND UNETHICAL BUSINESS PRACTICES.

016.01 The conduct set forth in 48 NAC 12.002 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by an issuer-dealer or its agent for purposes of Section 8-1102(1)(c) of the Act.

016.02 The conduct set forth in 48 NAC 12.003 shall constitute "dishonest or unethical business practices" by an issuer-dealer or its agent for purposes of Section 8-1103(9)(a)(vii) of the Act.

016.03 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated in 48 NAC 12.002 may also be deemed fraudulent and dishonest.

017 VERIFICATION OF IMMIGRATION STATUS. Every issuer-dealer who registers issuer-dealer agents to transact business in Nebraska must verify the citizenship or immigration status of each issuer-dealer agent registered to transact business on its behalf in Nebraska and submit such verification to the Department.

017.01 For each issuer-dealer agent identified as a qualified legal alien, the issuer-dealer must submit a completed United States Citizenship Attestation Form, and one of the currently acceptable forms of documentation required by the Systematic Alien Verification for Entitlements Program and the Department of Homeland Security.

017.02 The issuer shall maintain, as a required record, a copy of the completed United States Citizenship Attestation Form for each issuer-dealer agent registered in Nebraska, regardless of citizenship or immigration status. Such records shall be maintained for a period of five years.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 6 - AGENTS OF BROKER-DEALERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to agents of broker-dealers is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 REGISTRATION. An agent may be registered to transact business in Nebraska if he or she complies with the Act and the rules promulgated thereunder.

003 CENTRAL REGISTRATION DEPOSITORY. The Department utilizes the Central Registration Depository/Investment Advisor Registration Depository ("CRD/IARD") ~~system~~ to register agents, and to terminate, renew, and transfer agent registrations.

004 APPLICATION. An agent's application for registration must be submitted to the Director by the employing broker-dealer.

004.01 Broker-dealers that are affiliated with the ~~National Association of Securities Dealers (NASD broker-dealers)~~ Financial Industry Regulatory Authority ("FINRA broker-dealers") must submit ~~the agent's~~ a Uniform Application for Securities Industry Registration or Transfer ("Form ~~U-4~~U4") and application fee of forty dollars ($40.00) to the Director through ~~the~~ CRD/IARD. ~~system.~~ For purposes of Section 8-1103(4)(a) of the Act, a form submitted through ~~the~~ CRD/IARD shall be deemed filed with the ~~Department~~ Director when the record is transmitted to the ~~Department~~ Director for review.

004.02 Broker-dealers that are not affiliated with ~~the National Association of Securities Dealers~~ FINRA ("~~non-NASD~~ non-FINRA broker-dealers") must submit the agent's Form U4 ~~U-4~~ and application fee of forty dollars ($40.00) directly to the Director.

005 RENEWAL. An agent's registration must be renewed annually by the employing broker-dealer prior to the broker-dealer's December 31 renewal date.

005.01 ~~NASD~~ FINRA broker-dealers must submit the agent's renewal fee to the Director through ~~the~~ CRD/IARD. ~~system.~~

005.02 Non-~~NASD~~ FINRA broker-dealers must submit the agent's renewal fee directly to the Director.

006 TERMINATION. ~~An~~ To terminate an agent's ~~termination notice~~ registration under the Act, a Uniform Termination Notice For Securities Industry Registration ("Form ~~U-5~~U5") must be submitted by the former employing broker-dealer within thirty ~~(30)~~ days after the agent's termination.

006.01 ~~NASD~~ FINRA broker-dealers must submit the agent's Form ~~U-5~~ U5 to the Director through the CRD/IARD system.

006.02 Non-~~NASD~~ FINRA broker-dealers must submit the agent's Form ~~U-5~~ U5 directly to the Director.

007 DUAL AND MULTIPLE REGISTRATION. Dual and multiple registration is prohibited in Nebraska except when an agent is in the process of transferring his or her registration or when the broker-dealers involved are affiliates.

007.01 Dual registration pending transfer is permitted only if the following conditions are satisfied:

007.01A The agent's new broker-dealer notifies the Director about the transfer within seven ~~(7)~~ days after the agent's termination with his or her former broker-dealer.

007.01B The agent's new broker-dealer submits the agent's Form U4 ~~U-4~~ to the Director within twenty-one ~~(21)~~ days after the notice of termination has been submitted.

007.01C The agent does not have a disciplinary history that must be disclosed on Form U4. ~~U-4.~~

~~007.01D Transfers by agents of broker-dealers which are members of the NASD must be accomplished pursuant to the Temporary Agent Transfer Program, adopted by the North American Securities Administrators Association and attached hereto.~~

007.02 An agent can be registered with more than one broker-dealer if the broker-dealers involved are affiliates.

007.02A Affiliate means a person who, directly or indirectly, controls, is controlled by, or is under common control with, another person.

007.02B For purposes of this section, control is defined as ownership, directly or beneficially, of eighty percent ~~(80%)~~ or more of the outstanding voting securities of another company.

008 QUALIFYING EXAMINATIONS. An agent is required to take and pass the following examinations administered by ~~the NASD~~FINRA:

008.01 The Uniform Securities Agent State Law Examination (Series 63 examination) ~~or the Uniform Combined State Law Examination (Series 66 examination)~~; and

008.02 One of the following examinations or any predecessor examination:

008.02A The General Securities Representative Examination (Series 7 examination);

008.02B The Investment Company/Variable Contracts Limited Representative Examination (Series 6 examination) if the agent's registration will be limited to investment company products or if the agent will sell interests in viatical settlement contracts; ~~or~~

008.02C The Direct Participation Programs Limited Representative Examination (Series 22 examination), if the agent's registration will be limited to direct participation programs; or~~.~~

008.02D Investment Banking Representative Qualification Examination (Series 79 examination), if the agent's registration will be limited to investment banking activities.

~~008.02D The Director may waive the requirement of this section for agents of a broker-dealer whose registration is limited to securities of non-profit organizations if the director Director finds the waiver is consistent with investor protection and is in the public interest.~~

008.03 The Uniform Combined State Law Examination (Series 66 examination) may be taken in lieu of the Series 63 examination by any agent who also takes and passes the Series 7 examination.

008.04 This examination requirement shall be waived for an applicant who has previously passed the required written examinations provided that such applicant does not have a gap in registration longer than two years before the date of the filing of the present registration application.

008.05 The Director may waive the requirement of this subsection if the Director finds the waiver is consistent with investor protection and is in the public interest.

009 CORRECTION OF DOCUMENTS. If the information contained in any document filed with the Director is or becomes inaccurate or incomplete in any material respect, the agent shall file a correcting amendment on Form ~~U-4~~ U4 within the time period specified in the instructions to that form.

~~010 DISHONEST AND UNETHICAL BUSINESS PRACTICES.~~

~~010.01 The conduct set forth in 48 NAC 12.002 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by an agent for purposes of Section 8-1102(1)(c) of the Act.~~

~~010.02 The conduct set forth in 48 NAC 12.003 and 48 NAC 12.004 shall constitute "dishonest or unethical business practices" by an agent for purposes of Section 8-1103(9)(a)(vii) of the Act.~~

~~010.03 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated therein may also be deemed fraudulent and dishonest.~~

010 USING THE INTERNET FOR GENERAL DISSEMINATION OF INFORMATION ON PRODUCTS AND SERVICES. Agents shall not be deemed to be "transacting business" in this state for purposes of Section 8-1103 of the Act based solely on the use of the Internet, world wide web, and similar proprietary or common carrier electronic systems (hereinafter the "Internet") to distribute information on available products and services through certain communications made on the Internet directed generally to anyone having access to the Internet, and transmitted through postings on bulletin boards, social networking sites, blogs or similar sites, displays on "Home Pages" or similar methods (hereinafter, "Internet Communications") if the following conditions are observed:

010.01 The Internet Communications contain a disclosure statement which clearly states that:

010.01A The agent in question may only transact business in this state if first registered or excluded or exempted from the agent registration requirements of the Act; and

010.01B The agent will not make follow-up, individualized responses to persons in this state that involve either the effecting or attempting to effect transactions in securities, unless the agent has complied with, or has qualified for an applicable exemption or exclusion from, the agent registration requirements of the Act.

010.02 The Internet Communications contain a mechanism, including and without limitation, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that prior to any subsequent, direct communication with prospective customers or clients in this state, said agent is first registered in this state or qualifies for an exemption or exclusion from such requirement.

010.02A Nothing in this paragraph shall be construed to relieve an agent from any applicable securities registration requirement in this state;

010.03 The Internet Communications do not involve either effecting or attempting to effect transactions in securities in this state over the Internet, but is limited to the dissemination of general information on products and services.

010.04 The Internet Communications meet the following requirements:

010.04A The affiliation with the broker-dealer of the agent is disclosed in a non-italicized font, of at least ten points, within the Internet Communications;

010.04B The broker-dealer with whom the agent is associated retains responsibility for reviewing and approving the content of any Internet Communication by the agent;

010.04C The broker-dealer with whom the agent is associated first authorizes the distribution of information on the particular products through the Internet Communications; and

010.04D In disseminating information through the Internet Communications, the agent acts within the scope of the authority granted by the broker-dealer.

011 DISHONEST AND UNETHICAL BUSINESS PRACTICES.

011.01 The conduct set forth in 48 NAC 12.002 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by an agent for purposes of Section 8-1102(1)(c) of the Act.

011.02 The conduct set forth in 48 NAC 12.003, 48 NAC 12.004 and 48 NAC 12.005 shall constitute "dishonest or unethical business practices" by an agent for purposes of Section 8-1103(9)(a)(vii) of the Act.

011.03 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated therein may also be deemed fraudulent and dishonest.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 7 - INVESTMENT ADVISERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to investment advisers is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards and policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), or the Financial Accounting Standards Board ("FASB") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

002 APPLICATION. The application for initial registration as an investment adviser pursuant to Section 8-1103(3) of the Act shall be filed as directed in Section 005, below, and shall contain the following information:

002.01 ~~Form ADV,~~ Uniform Application for Investment Adviser Registration, ~~17 C.F.R. 279.1~~ ("Form ADV"), together with all applicable schedules and exhibits specified therein, complete, accurate and current;

~~002.02 Designation of Investment Adviser Representatives ("Form IAR"); for designation of investment adviser representatives to be registered in Nebraska;~~

~~002.03~~ .002.02 A current and correct copy of the firm's articles of incorporation, partnership or organization, and any amendments thereto, if applicable;

~~002.04~~ 002.03 A corporate resolution ~~(Form U-2A),~~ if applicable;

~~002.05~~ 002.04 A completed "Affidavit of Investment Advisory Activity in Nebraska";

~~002.06~~ 002.05 Financial statements as required by Section 009, below;

~~002.07~~ 002.06 Specimen contracts or agreements relating to Nebraska clients;

~~002.08~~ 002.07 ~~Promotional~~ Form ADV, Part 2 for the firm, the brochure supplement for each investment adviser representative ~~identified on Form IAR~~, and any other promotional or disclosure literature to be furnished or disseminated to any client or prospective client in Nebraska;

~~002.09~~ 002.08 ~~I~~A fee in the amount of two hundred dollars ($200.00); and

~~002.10~~ 002.09 Any other information the Director may require.

003 RENEWAL AND UPDATES.

003.01 An investment adviser's registration automatically expires annually on December 31. An investment adviser's registration must be renewed on or prior to that date.

003.02 An application for renewal of registration as an investment adviser pursuant to Section 8-1103(5) of the Act shall be filed annually as directed in Section 005, below, and shall contain the following information:

~~003.02A Form ADV, together with all applicable schedules and exhibits specified therein, complete, accurate and current;~~

~~003.02B~~ ~~003.02A~~ ~~Form IAR for designation of investment adviser representatives to be registered in Nebraska;~~

~~003.02C~~ 003.02A Financial statements as required by Section 009, below;

~~003.02D~~ 003.02B Specimen contracts or agreements relating to Nebraska clients;

~~003.02E Promotional or disclosure literature to be furnished or disseminated to any client or prospective client in Nebraska;~~

~~003.02F~~ 003.02C A fee in the amount of two hundred dollars ($200.00)~~,~~; and

~~003.02G~~ 003.02D Any other information the Director may require.

003.03 An investment adviser shall amend Form ADV, Parts 1 and 2, including all applicable schedules and exhibits:

003.03A Annually within ninety days of the end of its fiscal year; and

003.03B Any time required by the instructions to Form ADV.

004 WITHDRAWAL. An application for withdrawal of registration as an investment adviser pursuant to Section 8-1103(9)(d) of the Act shall be filed on ~~Form ADV-W,~~ Notice of Withdrawal from Registration as Investment Adviser, ~~17 C.F.R. 279.2~~ ("Form ADV-W"), as directed in Section 005, below.

005 FORMS SUBMISSION.

005.01 All investment adviser applications, amendments, and fees required to be filed with the Director pursuant to the rules promulgated under the Act, shall be filed electronically with, ~~,~~and transmitted to, the Central Registration Depository/Investment ~~Advisers~~ Adviser Registration Depository ("CRD/IARD"). All other documents required by this Rule shall be filed directly with the Director.

~~005.01A An investment adviser registered pursuant to the Act shall transition their registration on to the IARD no later than December 1, 2003.~~

005.02 When a signature or signatures are required by the particular instructions of any filing, forms filed directly with the Director shall contain a manual signature.

005.03 With respect to any document filed electronically through CRD/IARD, when a signature or signatures are required by the particular instructions of any filing to be made through CRD/IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to CRD/IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any ~~individuals~~ individual whose ~~names~~ name ~~are~~ is typed on the filing.

005.04 A form submitted through ~~the~~ CRD/IARD shall be deemed filed with the Department when the record is transmitted to the Department for review.

006 SUPERVISION. An investment adviser is ultimately responsible for the acts of its investment adviser representatives and other associated persons and must maintain reasonable supervision and control over such persons at all times.

007 AMENDMENT AND CORRECTION OF DOCUMENTS. If a material change in operations occurs, or if the information contained in any document filed with the Director is or becomes inaccurate or incomplete in any material respect, the investment adviser shall promptly file a correcting amendment on the appropriate form within the time period specified in the instructions to that form. Such amendments and corrections shall be filed as directed in Section 005, above.

008 FINANCIAL REQUIREMENTS.

008.01 An investment adviser registered or required to be registered under the Act shall:

008.01A Maintain at all times a minimum net capital of twenty-five thousand dollars ($25,000.00); or

008.01B Post a surety bond on a form acceptable to the Director in the amount of twenty-five thousand dollars ($25,000.00).

008.02 Unless otherwise exempted, as a condition of the right to continue to transact business in this state, every investment adviser registered or required to be registered under the Act shall notify the Director if such investment adviser's net

capital is less than the minimum required by the close of business on the next business day. After transmitting such notice, the investment adviser shall file a report with the Director of its financial condition by the close of business on the next business day. The report shall include:

008.02A A trial balance of all ledger accounts;

008.02B A statement of all client funds or securities which are not segregated;

008.02C A computation of the aggregate amount of debit balances in the client ledger;

008.02D A statement as to the number of client accounts; and

008.02E Any other information the Director may require.

008.03 For purposes of this Section, net capital shall mean total assets less total liabilities.

008.03A In determining net capital, the following items shall not be included as assets:

008.03A1 Prepaid expenses, except items properly classified as current assets under generally accepted accounting principles, deferred charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, and all other assets of intangible nature;

008.03A2 Home, home furnishings, automobile(s), and any other personal items not readily marketable in the case of an individual;

008.03A3 Advances or loans to stockholders or officers in the case of a corporation;

008.03A4 Advances or loans to partners in the case of a partnership; and

008.03A5 Advances or loans to members in the case of a limited liability company.

008.03B The Director may require that a current appraisal be submitted in order to establish the worth of any asset.

008.04 This Section shall not apply to an investment adviser whose principal place of business is not located in this state, provided:

008.04A Such investment adviser is registered in the state in which its principal place of business is located; and

008.04B Such investment adviser is in compliance with the minimum financial requirements established by the state in which its principal place of business is located.

008.04C For purposes of this Section, principal place of business 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.

009 FINANCIAL REPORTING REQUIREMENTS.

009.01 Every registered investment adviser who has custody of client funds or securities or who requires payment of advisory fees six months or more in advance and in excess of ~~$500~~ ~~of~~ twelve hundred dollars ($1,200.00) per client, shall file with the Director audited financial statements showing at a minimum the assets, liabilities and net capital of the investment adviser as of the end of the investment adviser's fiscal year. This requirement shall not apply to an investment adviser having custody solely as a consequence of its authority to make withdrawals from client accounts to pay its advisory fee and who complies with the safekeeping requirements in subsections 012.02C2 through 012.02C4, below.

009.01A The financial statements must be:

009.01A1 Examined in accordance with generally accepted auditing standards and prepared in conformity with generally accepted accounting principles;

009.01A2 Audited by an independent public accountant or an independent certified public accountant; and

009.01A3 Accompanied by an opinion of the accountant as to the report of financial position, and by a note stating the principles used to prepare it, the basis of included securities, and any other explanations required for clarity.

009.01B If the date of the audited financial statements is not within ninety ~~(90)~~ days of the date of the initial application or the expiration of the current registration, the investment adviser must also submit a financial statement showing at a minimum the assets, liabilities and net capital of the investment adviser as of a date within ninety ~~(90)~~ days of the date of the initial application or within ninety ~~(90)~~ days of the expiration of the current registration, as the case may be, and signed by an officer, director, partner or member, of the investment adviser, or by the person who prepared the statement, attesting that the statement is true and ~~correct~~ accurate.

009.02 All other investment advisers registered or required to be registered shall file with the Director financial statements showing at a minimum the assets, liabilities and net capital of the investment adviser, prepared in accordance with generally accepted accounting principles. The financial statements need not be audited but must be signed by the investment adviser, by an officer, director, partner, or member

of the investment adviser, or by the person who prepared the statement attesting that the statement is true and accurate, as of a date within ninety ~~(90)~~ days of the date of initial application, or within ninety ~~(90)~~ days of the expiration of a current registration, as the case may be.

009.03 The financial statements required by this Section shall be filed as part of the investment adviser's initial or renewal application.

009.04 This Section shall not apply to an investment adviser whose principal place of business is not located in this state, provided:

009.04A Such investment adviser is registered in the state in which its principal place of business is located; and

009.04B Such investment adviser is in compliance with the minimum financial requirements established by the state in which its principal place of business is located, if any.

009.04C For purposes of this Section, principal place of business 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.

010 INVESTMENT ADVISER BROCHURE.

~~010.01 Unless otherwise provided, an investment adviser, registered or required to be registered pursuant to Section 8-1103(2) of the Act, shall furnish each advisory client and prospective advisory client with a written disclosure statement. The disclosure statement may be a copy of Part II of its Form ADV or written documents containing at least the information then required by Part II of Form ADV, or such other information as the Director may require.~~

~~010.02 Except as provided in Section 010.02C below, an investment adviser shall deliver the written disclosure statement to an advisory client or prospective advisory client as follows:~~

~~010.02A Not less than 48 hours prior to entering into any investment advisory contract with such client or prospective client; or~~

~~010.02B 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.~~

~~010.02C The disclosure statement need not be delivered in connection with entering into a contract for impersonal advisory services.~~

~~010.03 Except as provided in Section 010.03A below, an investment adviser shall annually deliver, or offer in writing to deliver upon written request, the written disclosure statement to each of its advisory clients without charge.~~

~~010.03A The disclosure statement need not be delivered or offered to advisory clients receiving services solely pursuant a contract for impersonal advisory services requiring a payment of less than $200.~~

~~010.03B 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 this Section shall also be made at the time of entering into an advisory contract.~~

~~010.03C The investment adviser shall deliver the written statement to the client within seven days of receiving a written request made pursuant to an offer required by this Section.~~

~~010.04 An investment adviser which renders substantially different types of investment advisory services to different advisory clients may omit information required by Part II of Form ADV from the statement furnished to an advisory client or prospective advisory client, if the omitted information applies 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.~~

~~010.05 Nothing in Section 010 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 Section 010.~~

~~010.06 For purposes of this Section:~~

~~010.06A Contract for impersonal advisory services means any contract relating solely to the provision of investment advisory services:~~

~~010.06A1 By means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts;~~

~~010.06A2 Through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or~~

~~010.06A3 Any combination of the foregoing services.~~

~~010.06B 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.~~

010.01 Unless otherwise provided in this Rule, an investment adviser registered or required to be registered pursuant to Section 8-1103 of the Act shall, in accordance with the provisions of this subsection, furnish each advisory client and prospective advisory client with:

010.01A A brochure which may be a copy of Part 2A of its Form ADV or written documents containing the information required by Part 2A of Form ADV;

010.01B A copy of the Form ADV Part 2B brochure supplement for each individual that:

010.01B1 Provides investment advice and has direct contact with clients in this state; or

010.01B2 Exercises discretion over assets of clients in this state, even if no direct contact is involved;

010.01C A copy of the Form ADV Part 2A Appendix 1 wrap fee brochure if the investment adviser sponsors or participates in a wrap fee account;

010.01D A summary of material changes, which may be included in Form ADV Part 2 or given as a separate document; and

010.01E Such other information as the Director may require.

010.01F The brochure must comply with the language, organizational format and filing requirements specified in the instructions to Form ADV Part 2.

010.02 Delivery.

010.02A Initial Delivery. Except as provided in subsection 010.02C, below, an investment adviser shall deliver the Form ADV Part 2A brochure and any- related brochure supplements to a prospective advisory client:

010.02A1 Not less than forty-eight hours prior to entering into any advisory contract with such client or prospective client; or

010.02A2 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.

010.02B Annual Delivery. Except as provided in subsection 010.02C, below, within one hundred twenty days of the end of its fiscal year, an investment adviser must deliver:

010.02B1 A free, updated brochure and related brochure supplements which include or are accompanied by a summary of material changes; or

010.02B2 A summary of material changes that includes an offer to provide a copy of the updated brochure and supplements and information on how the client may obtain a copy of the brochures and supplements.

010.02C Delivery of the brochure and related brochure supplements required by subsections 010.02A and 010.02B need not be made to:

010.02C1 Clients who receive only impersonal advice and who pay less than five hundred dollars ($500.00) in fees per year;

010.02C2 An investment company registered under the Investment Company Act of 1940; or

010.02C3 A business development company as defined in the Investment Company Act of 1940 and whose advisory contract meets the requirements of Section 15c of that Act.

010.02D Delivery of the brochure and related supplements may be made electronically if the investment adviser:

010.02D1 In the case of an initial delivery to a potential client, obtains a verification that a readable copy of the brochure and supplements were received by the client;

010.02D2 In the case of other than initial deliveries, obtains each client's prior consent to provide the brochure and supplements electronically;

010.02D3 Prepares the electronically delivered brochure and supplements in the format prescribed in Section 010.01 and the Instructions to Form ADV Part 2;

010.02D4 Delivers the brochure and supplements in a format that can be retained by the client in either electronic or paper form; and

010.02D5 Establishes written procedures to supervise personnel transmitting the brochure and supplements and to prevent violations of this Rule.

010.03 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, rule, or regulation, to disclose any information to its advisory clients or prospective advisory clients not specifically required by this Rule.

010.04 Definitions. For the purpose of this Rule:

010.04A "Contract for impersonal advisory services" means any contract relating solely to the provision of investment advisory services:

010.04A1 By means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts;

010.04A2 Through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or

010.04A3 Any combination of the foregoing services.

010.04B "Entering into," in reference to an 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.

011 ASSIGNMENTS. For purposes of Section 8-1102(3)(b) of the Act, a transaction which does not result in a change of actual control or management of an investment adviser is not an assignment.

012 CUSTODY OF CLIENT FUNDS OR SECURITIES.

012.01 Safekeeping required. It is unlawful and deemed to be a fraudulent, deceptive, or manipulative act, practice, or course of business for an investment adviser, registered or required to be registered, to have custody of client funds or securities unless:

012.01A Notice to Director. The investment adviser notifies the Director promptly in writing that the investment adviser has or may have custody. Such notification is required to be given on Form ADV.

012.01B Qualified Custodian. A qualified custodian maintains those funds and securities:

012.01B1 In a separate account for each client under that client's name; or

012.01B2 In accounts that contain only the investment adviser's clients' funds and securities, under the investment adviser's name as agent or trustee for the clients, or, in the case of a pooled investment vehicle that the investment adviser manages, in the name of the pooled investment vehicle.

012.01C Notice to Clients. If an investment adviser opens an account with a qualified custodian on its client's behalf, under the client's name, under the name of the investment adviser as agent, or under the name of a pooled investment vehicle, the investment adviser must notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information. If the investment adviser sends account statements to a client to which the investment adviser is required to provide this notice, the investment adviser must include in the notification provided to that client and in any subsequent account statement the investment adviser sends that client a statement urging the client to compare the account statements from the custodian with those from the investment adviser.

012.01D Account Statements. The investment adviser has a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each client for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period.

012.01E Special Rule for Limited Partnerships and Limited Liability Companies. If the investment adviser or a related person is a general partner of a limited partnership, managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle, the account statements required under Section 012.01D, above, must be sent to each limited partner, member or other beneficial owner.

012.01F Independent Verification. The client funds and securities of which the investment adviser has custody are verified by actual examination at least once during each calendar year, by an independent certified public accountant, pursuant to a written agreement between the investment adviser and the independent certified public accountant, at a time that is chosen by the independent certified public accountant without prior notice or announcement to the investment adviser and that is irregular from year to year. The written agreement must provide for the first examination to occur within six months of becoming subject to this paragraph, except that, if the investment adviser maintains client funds or securities pursuant to this Rule as a qualified custodian, the agreement must provide for the first examination to occur no later than six months after obtaining the internal control report. The written agreement must require the independent certified public accountant to:

012.01F1 File a certificate on Form ADV-E with the Director within one hundred twenty days of the time chosen by the independent certified public accountant to verify client funds and securities, stating that it has examined the funds and securities and describing the nature and extent of the examination.

012.01F2 Notify the Director within one business day of the finding of any material discrepancies during the course of the examination, by means of a facsimile transmission or electronic mail, followed by first class mail or overnight delivery, directed to the attention of the Director; and

012.01F3 File within four business days of the resignation or dismissal from, or other termination of, the engagement, or removing itself or being removed from consideration for being reappointed, Form ADV-E accompanied by a statement that includes:

012.01F3a The date of such resignation, dismissal, removal, or other termination, and the name,

address, and contact information of the independent certified public accountant; and

012.01F3b An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

012.01G Investment Advisers Acting as Qualified Custodians. If the investment adviser maintains, or if the investment adviser has custody because a related person maintains, client funds or securities pursuant to this Rule as a qualified custodian in connection with advisory services the investment adviser provides to clients:

012.01G1 The independent certified public accountant that the investment adviser retains to perform the independent verification required by Section 012.01F, above, must be subject to regulation by the Public Company Accounting Oversight Board ("PCAOB") or the Nebraska Board of Public Accountancy ("NBPA"), in accordance with applicable rules; and

012.01G2 The investment adviser must obtain, or receive from its related person, within six months of becoming subject to this paragraph and thereafter no less frequently than once each calendar year, a written internal control report prepared by an independent certified public accountant.

012.01G2a The internal control report must include an opinion of an independent certified public accountant as to whether controls have been placed in operation as of a specific date, and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including the safeguarding of funds and securities held by either the investment adviser or a related person on behalf of the investment adviser's clients, during the year;

012.01G2b The independent certified public accountant must verify that the funds and securities are reconciled to a custodian other than the investment adviser or the investment adviser's related person; and

012.01G2c The independent certified public accountant must be subject to regulation by PCAOB or NBPA in accordance with applicable rules.

012.01H Independent Representatives. A client may designate an independent representative to receive, on his or her behalf, notices and

account statements as required under Sections 012.01C and 012.01D, above.

012.02 Exceptions.

012.02A Shares of Mutual Funds. With respect to shares of an open-end company as defined in Section 5(a)(1) of the Investment Company Act of 1940 ("mutual fund"), the investment adviser may use the transfer agent for the mutual fund in lieu of a qualified custodian for purposes of complying with Section 012.01, above;

012.02B Certain Privately Offered Securities.

012.02B1 The investment adviser is not required to comply with Section 012.01B, above, with respect to securities that are:

012.02B1a Acquired from the issuer in a transaction or chain of transactions not involving any public offering;

012.02B1b Uncertificated and ownership thereof is recorded only on the books of the issuer or its transfer agent in the name of the client; and

012.02B1c Transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

012.02B2 Notwithstanding Section 012.02B1, above, the provisions of this Section are available with respect to securities held for the account of a limited partnership, limited liability company, or other type of pooled investment vehicle only if the limited partnership, limited liability company, or other pooled investment vehicle is audited, and the audited financial statements are distributed, as described in Section 012.02D, below, and the investment adviser notifies the Director in writing that the investment adviser intends to provide audited financial statements, as described above. Such notification is required to be provided on Form ADV.

012.02C Fee Deduction. Notwithstanding Section 012.01F, above, an investment adviser is not required to obtain an independent verification of client funds and securities maintained by a qualified custodian if all of the following are met:

012.02C1 The investment adviser has custody of the funds and securities solely as a consequence of its authority to make withdrawals from client accounts to pay its advisory fee;

012.02C2 The investment adviser has written authorization from the client to deduct advisory fees from the account held with the qualified custodian;

012.02C3 Each time a fee is directly deducted from a client account, the investment adviser concurrently sends:

012.02C3a The qualified custodian an invoice or statement of the amount of the fee to be deducted from the client's account; and

012.02C3b The client an invoice or statement itemizing the fee. Itemization includes the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee.

012.02C4 The investment adviser notifies the Director in writing that the investment adviser intends to use the safeguards provided above. Such notification is required to be given on Form ADV.

012.02D Limited Partnerships, Limited Liability Companies, and other Pooled Investment Vehicles Subject to Annual Audit. An investment adviser is not required to comply with Sections 012.01C and 012.01D, above, and shall be deemed to have complied with Section 012.0.1F, above, with respect to the account of a limited partnership, limited liability company, or another type of pooled investment vehicle if the following conditions are met:

012.02D1 The investment adviser sends to all limited partners, members or other beneficial owners at least quarterly, a statement showing:

012.02D1a The total amount of all additions to and withdrawals from the fund as a whole as well as the opening and closing value of the fund at the end of the quarter based on the custodian's records;

012.02D1b A listing of all long and short positions on the closing date of the statement in accordance with FASB Rule ASC 946-210-50; and

012.02D1c The total amount of additions to and withdrawals from the fund by the investor as well as the total value of the investor's interest in the fund at the end of the quarter.

012.02D2 At least annually, the fund is subject to an audit and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all

limited partners, members or other beneficial owners within one hundred twenty days of the end of its fiscal year;

012.02D3 The audit is performed by an independent certified public accountant that, at the time of the audit, is subject to regulation by PCAOB or NBPA in accordance with applicable rules;

012.02D4 Upon liquidation, the investment adviser distributes the fund's final audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners, members or other beneficial owners, and the Director promptly after the completion of such audit;

012.02D5 The written agreement with the independent certified public accountant must require the independent certified public accountant, upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, to notify the Director within four business days accompanied by a statement that includes:

012.02D5a The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the independent certified public accountant; and

012.02D5b An explanation of any problems relating to audit scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

012.02D6 The investment adviser must also notify the Director in writing that the investment adviser intends to employ the use of the statement delivery and audit safeguards described above. Such notification is required to be given on Form ADV.

012.02E Registered Investment Companies. The investment adviser is not required to comply with this Rule with respect to the account of an investment company registered under the Investment Company Act of 1940.

012.03 Delivery to Related Persons. Sending an account statement under Section 012.01E, above, or distributing audited financial statements under Section 012.02D, above, shall not satisfy the requirements of this Rule if such account statements or financial statements are sent solely to limited partners, members or other beneficial owners that themselves are limited partnerships, limited liability companies, or another type of pooled investment vehicle and are related persons of the investment adviser.

012.04 Definitions. For purposes of this Rule:

012.04A Control means the power, directly or indirectly, to direct the management or policies of a person whether through ownership of securities, by contract, or otherwise. For purposes of determining control:

012.04A1 Each of the investment adviser's officers, partners, or directors exercising executive responsibility, or persons having similar status or functions, is presumed to control the investment adviser;

012.04A2 A person is presumed to control a corporation if the person:

012.04A2a Directly or indirectly has the right to vote twenty five percent or more of a class of the corporation's voting securities; or

012.04A2b Has the power to sell or direct the sale of twenty five percent or more of a class of the corporation's voting securities;

012.04A3 A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, twenty five percent or more of the capital of the partnership;

012.04A4 A person is presumed to control a limited liability company if the person:

012.04A4a Directly or indirectly has the right to vote twenty five percent or more of a class of the interests of the limited liability company;

012.04A4b Has the right to receive upon dissolution, or has contributed, twenty five percent or more of the capital of the limited liability company;

012.04A4c Is an elected manager of the limited liability company; or

012.04A5 A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

012.04B Custody means holding directly or indirectly, client funds or securities, or having any authority to obtain possession of or the ability to appropriate client funds or securities. The investment adviser has custody if a related person holds, directly or indirectly, client funds or securities, or

has any authority to obtain possession of them, in connection with advisory services the investment adviser provides to clients.

012.04B1 Custody includes:

012.04B1a Possession of client funds or securities unless the investment adviser receives them inadvertently and returns them to the sender within three business days of receiving them;

012.04B1b Any arrangement, including a general power of attorney, under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the investment adviser's instruction to the custodian; and

012.04B1c Any capacity, such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust, that gives the investment adviser, its supervised person, or investment adviser representative, legal ownership of or access to client funds or securities.

012.04B2 Receipt of checks drawn by clients and made payable to third parties will not meet the definition of custody if forwarded to the third party within three business days of receipt and the investment adviser maintains the records required under 48 NAC 10.002.22.

012.04C Independent certified public accountant means a certified public accountant that meets the standards of independence described in Rule 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)).

012.04D Independent representative means a person who:

012.04D1 Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners or a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle and by law or contract is obliged to act in the best interest of the advisory client or the limited partners, members, or other beneficial owners;

012.04D2 Does not control, is not controlled by, and is not under common control with the investment adviser; and

012.04D3 Does not have, and has not had within the past two years, a material business relationship with the investment adviser.

012.04E Qualified custodian means the following:

012.04E1 A bank or savings association that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act;

012.04E2 A broker-dealer registered in this jurisdiction and with the Securities and Exchange Commission holding the client assets in customer accounts;

012.04E3 A registered futures commission merchant registered under Section 4f(a) of the Commodity Exchange Act, holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

012.04E4 A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

012.04E5 An investment adviser who has custody of the funds and securities solely as a consequence of its authority to make withdrawals from client accounts to pay its advisory fee is not a qualified custodian.

012.04F Related person means any person, directly or indirectly, controlling or controlled by the investment adviser, and any person that is under common control with the investment adviser.

013 BUSINESS CONTINUITY AND SUCCESSION PLANNING.
Every investment adviser registered or required to be registered under the Act shall establish, implement, and maintain written procedures relating to a business continuity and succession plan. The plan shall be based upon the facts and circumstances of the investment adviser's business model including the size of the firm, type(s) of services provided, and the number of locations of the investment adviser. The plan shall provide for at least the following:

013.01 The protection, backup, and recovery of books and records.

013.02 Alternate means of communication with customers, regulators, key personnel, employees, vendors, and service providers, including third party custodians. Such communications shall include, but not be limited to, providing notice of a significant business interruption or the death or unavailability of key personnel or other disruptions or cessation of business activities.

013.03 Office relocation in the event of temporary or permanent loss of a principal place of business.

013.04 Assignment of duties to qualified responsible persons in the event of the death or unavailability of key personnel.

013.05 Otherwise minimizing service disruptions and client harm that could result from a sudden significant business interruption.

~~012~~ 014 REGISTRATION OF SUCCESSOR TO REGISTERED INVESTMENT ADVISER. In the event that an investment adviser succeeds to and continues the business of an investment adviser registered pursuant to Section 8-1103 of the Act, the registration of the predecessor shall be deemed to remain effective as the registration of the successor if the successor, within thirty (~~30~~) days after such succession, files an application for registration on Form ADV, and the predecessor files a notice of withdrawal from registration on Form ADV-W.

~~012.01~~ 014.01 The registration of the predecessor investment adviser will cease to be effective as the registration of the successor investment adviser forty-five (~~45~~) days after the application for registration on Form ADV is filed by such successor.

~~012.02~~ 014.02 Notwithstanding any other provision of this Section:

~~012.02A~~ 014.02A 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.

~~012.02B~~ 014.02B 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.

~~012.02C~~ 014.02C 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.

015 VERIFICATION OF IMMIGRATION STATUS. Every investment adviser who registers investment adviser representatives to transact business in Nebraska must verify

the citizenship or immigration status of each investment adviser representative registered to transact business on its behalf in Nebraska and submit such verification to the Department.

015.01 For each investment adviser representative identified as a qualified legal alien, the investment adviser must submit a completed United States Citizenship Attestation Form, and one of the currently acceptable forms of documentation required by the Systematic Alien Verification for Entitlements Program and the Department of Homeland Security.

015.02 The investment adviser shall maintain, as a required book or record under 48 NAC 10.002.21, a copy of the completed United States Citizenship Attestation Form for each investment adviser representative registered in Nebraska, regardless of citizenship or immigration status.

~~013 DISHONEST OR UNETHICAL BUSINESS PRACTICES. The conduct set forth in 48 NAC 12.005 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by an investment adviser for purposes of Section 8-1102(2)(b) of the Act and "dishonest or unethical business practices" by an investment adviser for purposes of Section 8-1102(2)(d) and Section 8-1103(9)(a)(vii) of the Act. The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated in 48 NAC 12.005 may also be deemed fraudulent and dishonest.~~

016 COMPLIANCE PROCEDURES AND PRACTICES.

016.01 An investment adviser registered or required to be registered pursuant to Section 8-1103 of the Act shall adopt and implement written policies and procedures reasonably designed to prevent violation of the Act and the rules adopted under the Act by the investment adviser and any investment adviser representative or other employee or agent.

016.02 An investment adviser shall review the adequacy of the policies and procedures established pursuant to this Section and the effectiveness of their implementation on an annual basis and document such review.

016.03 An investment adviser shall designate an investment adviser representative registered with the Department who is responsible for administering the policies and procedures adopted under this Section.

017 USING THE INTERNET FOR GENERAL DISSEMINATION OF INFORMATION ON PRODUCTS AND SERVICES. Investment advisers shall not be deemed to be "transacting business" in this state for purposes of Section 8-1103 of the Act based solely on the use of the Internet, world wide web, and similar proprietary or common carrier electronic systems (hereinafter the "Internet") to distribute information on available products and services through certain communications made on the Internet directed generally to anyone having access to the Internet, and transmitted through postings on bulletin boards, social networking sites, blogs or similar sites, displays on "Home Pages" or similar methods (hereinafter, "Internet Communications") if the following conditions are observed:

017.01 The Internet Communication contains a disclosure statement in which it is clearly stated that:

017.01A The investment adviser in question may only transact business in this state if first registered, excluded or exempted from the investment adviser registration requirements of the Act; and

017.01B The investment adviser will not make follow-up, individualized responses to persons in this state that involve the rendering of personalized investment advice for compensation, unless the investment adviser has complied with, or has qualified for an applicable exemption or exclusion from, the investment adviser registration requirements of the Act.

017.02 The Internet Communication contains a mechanism, including and without limitation, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that prior to any subsequent, direct communication with prospective customers or clients in this state, said investment adviser is first registered in this state or qualifies for an exemption or exclusion from such requirement.

017.02A Nothing in this paragraph shall be construed to relieve an investment adviser from any applicable securities registration requirement in this state;

017.03 The Internet Communication does not involve the rendering of personalized investment advice for compensation in this state over the Internet, but is limited to the dissemination of general information on products and services.

018 DISHONEST OR UNETHICAL BUSINESS PRACTICES.

018.01 The conduct set forth in 48 NAC 12.006 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person" by an investment adviser for purposes of Section 8-1102(2)(b) of the Act and "dishonest or unethical business practices" by an investment adviser for purposes of Section 8-1102(2)(d) and Section 8-1103(9)(a)(vii) of the Act.

018.02 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated in 48 NAC 12.006 may also be deemed fraudulent and dishonest.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER I - INVESTMENT COMPANIES
Sec. 80a-2 - Definitions; applicability; rulemaking considerations
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§80a–2. Definitions; applicability; rulemaking considerations

(a) Definitions

When used in this subchapter, unless the context otherwise requires—

(1) "Advisory board" means a board, whether elected or appointed, which is distinct from the board of directors or board of trustees, of an investment company, and which is composed solely of persons who do not serve such company in any other capacity, whether or not the functions of such board are such as to render its members "directors" within the definition of that term, which board has advisory functions as to investments but has no power to determine that any security or other investment shall be purchased or sold by such company.

(2) "Affiliated company" means a company which is an affiliated person.

(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

(4) "Assignment" includes any direct or indirect transfer or hypothecation of a contract or chose in action by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but does not include an assignment of partnership interests incidental to the death or withdrawal of a minority of the members of the partnership having only a minority interest in the partnership business or to the admission to the partnership of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(5) "Bank" means (A) a depository institution (as defined in section 1813 of title 12) or a branch or agency of a foreign bank (as such terms are defined in section 3101 of title 12), (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(6) The term "broker" has the same meaning as given in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c], except that such term does not include any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

(7) "Commission" means the Securities and Exchange Commission.

(8) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 or similar official or any liquidating agent for any of the foregoing, in his capacity as such.

(9) "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this subchapter. Any such presumption may be rebutted by evidence, but except as hereinafter provided, shall continue until a determination to the contrary made by the Commission by order either on its own motion or on application by an interested person. If an application filed hereunder is not granted or denied by the Commission within sixty days after filing thereof, the determination sought by the application shall be deemed to have been temporarily granted pending final determination of the Commission thereon. The Commission, upon its own motion or upon application, may by order revoke or modify any order issued under this paragraph whenever it shall find that the determination embraced in such original order is no longer consistent with the facts.

(10) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(11) The term "dealer" has the same meaning as given in the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], but does not include an insurance company or investment company.

(12) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated, including any natural person who is a member of a board of trustees of a management company created as a common-law trust.

(13) "Employees' securities company" means any investment company or similar issuer all of the outstanding securities of which (other than short-term paper) are beneficially owned (A) by the employees or persons on retainer of a single employer or of two or more employers each of which is an affiliated company of the other, (B) by former employees of such employer or employers, (C) by members of the immediate family of such employees, persons on retainer, or former employees, (D) by any two or more of the foregoing classes of persons, or (E) by such employer or employers together with any one or more of the foregoing classes of persons.

(14) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(15) "Face-amount certificate" means any certificate, investment contract, or other security which represents an obligation on the part of its issuer to pay a stated or determinable sum or sums at a fixed or determinable date or dates more than twenty-four months after the date of issuance, in consideration of the payment of periodic installments of a stated or determinable amount (which security shall be known as a face-amount certificate of the "installment type"); or any security which represents a similar obligation on the part of a face-amount certificate company, the consideration for which is the payment of a single lump sum (which security shall be known as a "fully paid" face-amount certificate).

(16) "Government security" means any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.

(17) "Insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such a company, in his capacity as such.

(18) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(19) "Interested person" of another person means—

(A) when used with respect to an investment company—

(i) any affiliated person of such company,

(ii) any member of the immediate family of any natural person who is an affiliated person of such company,

(iii) any interested person of any investment adviser of or principal underwriter for such company,

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such company has acted as legal counsel for such company,

(v) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has executed any portfolio transactions for, engaged in any principal transactions with, or distributed shares for—

(I) the investment company;

(II) any other investment company having the same investment adviser as such investment company or holding itself out to investors as a related company for purposes of investment or investor services; or

(III) any account over which the investment company's investment adviser has brokerage placement discretion,

(vi) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has loaned money or other property to—

(I) the investment company;

(II) any other investment company having the same investment adviser as such investment company or holding itself out to investors as a related company for purposes of investment or investor services; or

(III) any account for which the investment company's investment adviser has borrowing authority, and

(vii) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had, at any time since the beginning of the last two completed fiscal years of such company, a material business or professional relationship with such company or with the principal executive officer of such company or with any other investment company having the same investment adviser or principal underwriter or with the principal executive officer of such other investment company:

Provided, That no person shall be deemed to be an interested person of an investment company solely by reason of (aa) his being a member of its board of directors or advisory board or an owner of its securities, or (bb) his membership in the immediate family of any person specified in clause (aa) of this proviso; and

(B) when used with respect to an investment adviser of or principal underwriter for any investment company—

(i) any affiliated person of such investment adviser or principal underwriter,

(ii) any member of the immediate family of any natural person who is an affiliated person of such investment adviser or principal underwriter,

(iii) any person who knowingly has any direct or indirect beneficial interest in, or who is designated as trustee, executor, or guardian of any legal interest in, any security issued either by such investment adviser of principal underwriter or by a controlling person or such investment adviser or principal underwriter,

(iv) any person or partner or employee of any person who at any time since the beginning of the last two completed fiscal years of such investment company has acted as legal counsel for such investment adviser or principal underwriter,

(v) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has executed any portfolio transactions for, engaged in any principal transactions with, or distributed shares for—

(I) any investment company for which the investment adviser or principal underwriter serves as such;

(II) any investment company holding itself out to investors, for purposes of investment or investor services, as a company related to any investment company for which the investment adviser or principal underwriter serves as such; or

(III) any account over which the investment adviser has brokerage placement discretion,

(vi) any person or any affiliated person of a person (other than a registered investment company) that, at any time during the 6-month period preceding the date of the determination of whether that person or affiliated person is an interested person, has loaned money or other property to—

(I) any investment company for which the investment adviser or principal underwriter serves as such;

(II) any investment company holding itself out to investors, for purposes of investment or investor services, as a company related to any investment company for which the investment adviser or principal underwriter serves as such; or

(III) any account for which the investment adviser has borrowing authority, and

(vii) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had at any time since the beginning of the last two completed fiscal years of such investment company a material business or professional relationship with such investment adviser or principal underwriter or with the principal executive officer or any controlling person of such investment adviser or principal underwriter.

For the purposes of this paragraph (19), "member of the immediate family" means any parent, spouse of a parent, child, spouse of a child, spouse, brother, or sister, and includes step and adoptive relationships. The Commission may modify or revoke any order issued under clause (vii) of subparagraph (A) or (B) of this paragraph whenever it finds that such order is no longer consistent with the facts. No order issued pursuant to clause (vii) of subparagraph (A) or (B) of this paragraph shall become effective until at least sixty days after the entry thereof, and no such

order shall affect the status of any person for the purposes of this subchapter or for any other purpose for any period prior to the effective date of such order.

(20) "Investment adviser" of an investment company means (A) any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company, as such) who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company, and (B) any other person who pursuant to contract with a person described in clause (A) of this paragraph regularly performs substantially all of the duties undertaken by such person described in said clause (A); but does not include (i) a person whose advice is furnished solely through uniform publications distributed to subscribers thereto, (ii) a person who furnishes only statistical and other factual information, advice regarding economic factors and trends, or advice as to occasional transactions in specific securities, but without generally furnishing advice or making recommendations regarding the purchase or sale of securities, (iii) a company furnishing such services at cost to one or more investment companies, insurance companies, or other financial institutions, (iv) any person the character and amount of whose compensation for such services must be approved by a court, or (v) such other persons as the Commission may by rules and regulations or order determine not to be within the intent of this definition.

(21) "Investment banker" means any person engaged in the business of underwriting securities issued by other persons, but does not include an investment company, any person who acts as an underwriter in isolated transactions but not as a part of a regular business, or any person solely by reason of the fact that such person is an underwriter for one or more investment companies.

(22) "Issuer" means every person who issues or proposes to issue any security, or has outstanding any security which it has issued.

(23) "Lend" includes a purchase coupled with an agreement by the vendor to repurchase; "borrow" includes a sale coupled with a similar agreement.

(24) "Majority-owned subsidiary" of a person means a company 50 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a majority-owned subsidiary of such person.

(25) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(26) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f].

(27) "Periodic payment plan certificate" means (A) any certificate, investment contract, or other security providing for a series of periodic payments by the holder, and representing an undivided interest in certain specified securities or in a unit or fund of securities purchased wholly or partly with the proceeds of such payments, and (B) any security the issuer of which is also issuing securities of the character described in clause (A) of this paragraph and the holder of which has substantially the same rights and privileges as those which holders of securities of the character described in said clause (A) have upon completing the periodic payments for which such securities provide.

(28) "Person" means a natural person or a company.

(29) "Principal underwriter" of or for any investment company other than a closed-end company, or of any security issued by such a company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company. "Principal underwriter" of or for a closed-end company or any issuer which is not an investment company, or of any security issued by such a company or issuer, means any underwriter who, in connection with a primary distribution of

securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer; (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate; or (C) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution.

(30) "Promoter" of a company or a proposed company means a person who, acting alone or in concert with other persons, is initiating or directing, or has within one year initiated or directed, the organization of such company.

(31) "Prospectus", as used in section 80a–22 of this title, means a written prospectus intended to meet the requirements of section 10(a) of the Securities Act of 1933 [15 U.S.C. 77j(a)] and currently in use. As used elsewhere, "prospectus" means a prospectus as defined in the Securities Act of 1933 [15 U.S.C. 77a et seq.].

(32) "Redeemable security" means any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer or to a person designated by the issuer, is entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

(33) "Reorganization" means (A) a reorganization under the supervision of a court of competent jurisdiction; (B) a merger or consolidation; (C) a sale of 75 per centum or more in value of the assets of a company; (D) a restatement of the capital of a company, or an exchange of securities issued by a company for any of its own outstanding securities; (E) a voluntary dissolution or liquidation of a company; (F) a recapitalization or other procedure or transaction which has for its purpose the alteration, modification, or elimination of any of the rights, preferences, or privileges of any class of securities issued by a company, as provided in its charter or other instrument creating or defining such rights, preferences, and privileges; (G) an exchange of securities issued by a company for outstanding securities issued by another company or companies, preliminary to and for the purpose of effecting or consummating any of the foregoing; or (H) any exchange of securities by a company which is not an investment company for securities issued by a registered investment company.

(34) "Sale", "sell", "offer to sell", or "offer for sale" includes every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value.

(35) "Sales load" means the difference between the price of a security to the public and that portion of the proceeds from its sale which is received and invested or held for investment by the issuer (or in the case of a unit investment trust, by the depositor or trustee), less any portion of such difference deducted for trustee's or custodian's fees, insurance premiums, issue taxes, or administrative expenses or fees which are not properly chargeable to sales or promotional activities. In the case of a periodic payment plan certificate, "sales load" includes the sales load on any investment company securities in which the payments made on such certificate are invested, as well as the sales load on the certificate itself.

(36) "Security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(37) "Separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(38) "Short-term paper" means any note, draft, bill of exchange, or banker's acceptance payable on demand or having a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof payable on demand or having a maturity likewise limited; and such other classes of securities, of a commercial rather than an investment character, as the Commission may designate by rules and regulations.

(39) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(40) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer. When the distribution of the securities in respect of which any person is an underwriter is completed such person shall cease to be an underwriter in respect of such securities or the issuer thereof.

(41) "Value", with respect to assets of registered investment companies, except as provided in subsection (b) of section 80a–28 of this title, means—

(A) as used in sections 80a–3, 80a–5, and 80a–12 of this title, (i) with respect to securities owned at the end of the last preceding fiscal quarter for which market quotations are readily available, the market value at the end of such quarter; (ii) with respect to other securities and assets owned at the end of the last preceding fiscal quarter, fair value at the end of such quarter, as determined in good faith by the board of directors; and (iii) with respect to securities and other assets acquired after the end of the last preceding fiscal quarter, the cost thereof; and

(B) as used elsewhere in this subchapter, (i) with respect to securities for which market quotations are readily available, the market value of such securities; and (ii) with respect to other securities and assets, fair value as determined in good faith by the board of directors;

in each case as of such time or times as determined pursuant to this subchapter, and the rules and regulations issued by the Commission hereunder. Notwithstanding the fact that market quotations for securities issued by controlled companies are available, the board of directors may in good faith determine the value of such securities: *Provided*, That the value so determined is not in excess of the higher of market value or asset value of such securities in the case of majority-owned subsidiaries, and is not in excess of market value in the case of other controlled companies.

For purposes of the valuation of those assets of a registered diversified company which are not subject to the limitations provided for in section 80a–5(b)(1) of this title, the Commission may, by rules and regulations or orders, permit any security to be carried at cost, if it shall determine that such procedure is consistent with the general intent and purposes of this subchapter. For purposes of sections 80a–5 and 80a–12 of this title in lieu of values determined as provided in clause (A) above, the Commission shall by rules and regulations permit valuation of securities at cost or other basis in cases where it may be more convenient for such company to make its computations on such basis by reason of the necessity or desirability of complying with the provisions of any United States revenue laws or rules and regulations issued thereunder, or the laws or the rules and regulations issued thereunder of any State in which the securities of such company may be qualified for sale.

The foregoing definition shall not derogate from the authority of the Commission with respect to the reports, information, and documents to be filed with the Commission by any registered company, or with respect to the accounting policies and principles to be followed by any such company, as provided in sections 80a–8, 80a–29, and 80a–30 of this title.

(42) "Voting security" means any security presently entitling the owner or holder thereof to vote for the election of directors of a company. A specified percentage of the outstanding voting securities of a company means such amount of its outstanding voting securities as entitles the holder or holders thereof to cast said specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such company are entitled to cast. The vote of a majority of the outstanding voting securities of a company means the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less.

(43) "Wholly-owned subsidiary" of a person means a company 95 per centum or more of the outstanding voting securities of which are owned by such person, or by a company which, within the meaning of this paragraph, is a wholly-owned subsidiary of such person.

(44) "Securities Act of 1933" [15 U.S.C. 77a et seq.], "Securities Exchange Act of 1934" [15 U.S.C. 78a et seq.], and "Trust Indenture Act of 1939" [15 U.S.C. 77aaa et seq.] mean those acts, respectively, as heretofore or hereafter amended.

(45) "Savings and loan association" means a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution, and a receiver, conservator, or other liquidating agent of any such institution.

(46) "Eligible portfolio company" means any issuer which—

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is neither an investment company as defined in section 80a–3 of this title (other than a small business investment company which is licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.] and which is a wholly-owned subsidiary of the business development company) nor a company which would be an investment company except for the exclusion from the definition of investment company in section 80a–3(c) of this title; and

(C) satisfies one of the following:

(i) it does not have any class of securities with respect to which a member of a national securities exchange, broker, or dealer may extend or maintain credit to or for a customer pursuant to rules or regulations adopted by the Board of Governors of the Federal Reserve System under section 7 of the Securities Exchange Act of 1934 [15 U.S.C. 78g];

(ii) it is controlled by a business development company, either alone or as part of a group acting together, and such business development company in fact exercises a controlling influence over the management or policies of such eligible portfolio company and, as a result of such control, has an affiliated person who is a director of such eligible portfolio company;

(iii) it has total assets of not more than $4,000,000, and capital and surplus (shareholders' equity less retained earnings) of not less than $2,000,000, except that the Commission may adjust such amounts by rule, regulation, or order to reflect changes in 1 or more generally accepted indices or other indicators for small businesses; or

(iv) it meets such other criteria as the Commission may, by rule, establish as consistent with the public interest, the protection of investors, and the purposes fairly intended by the policy and provisions of this subchapter.

(47) "Making available significant managerial assistance" by a business development company means—

(A) any arrangement whereby a business development company, through its directors, officers, employees, or general partners, offers to provide, and, if accepted, does so provide, significant guidance and counsel concerning the management, operations, or business objectives and policies of a portfolio company;

(B) the exercise by a business development company of a controlling influence over the management or policies of a portfolio company by the business development company acting individually or as part of a group acting together which controls such portfolio company; or

(C) with respect to a small business investment company licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.], the making of loans to a portfolio company.

For purposes of subparagraph (A), the requirement that a business development company make available significant managerial assistance shall be deemed to be satisfied with respect to any particular portfolio company where the business development company purchases securities of such portfolio company in conjunction with one or more other persons acting together, and at least one of the persons in the group makes available significant managerial assistance to such portfolio company, except that such requirement will not be deemed to be satisfied if the business development company, in all cases, makes available significant managerial assistance solely in the manner described in this sentence.

(48) "Business development company" means any closed-end company which—

(A) is organized under the laws of, and has its principal place of business in, any State or States;

(B) is operated for the purpose of making investments in securities described in paragraphs (1) through (3) of section 80a–54(a) of this title, and makes available significant managerial assistance with respect to the issuers of such securities, provided that a business development company must make available significant managerial assistance only with respect to the companies which are treated by such business development company as satisfying the 70 per centum of the value of its total assets condition of section 80a–54 of this title; and provided further that a business development company need not make available significant managerial assistance with respect to any company described in paragraph (46)(C)(iii), or with respect to any other company that meets such criteria as the Commission may by rule, regulation, or order permit, as consistent with the public interest, the protection of investors, and the purposes of this subchapter; and

(C) has elected pursuant to section 80a–53(a) of this title to be subject to the provisions of sections 80a–54 through 80a–64 of this title.

(49) "Foreign securities authority" means any foreign government or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(50) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(51)(A) "Qualified purchaser" means—

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 80a–3(c)(7) of this

title with that person's qualified purchaser spouse) who owns not less than $5,000,000 in investments, as defined by the Commission;

(ii) any company that owns not less than $5,000,000 in investments and that is owned directly or indirectly by or for 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons;

(iii) any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv); or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments.

(B) The Commission may adopt such rules and regulations applicable to the persons and trusts specified in clauses (i) through (iv) of subparagraph (A) as it determines are necessary or appropriate in the public interest or for the protection of investors.

(C) The term "qualified purchaser" does not include a company that, but for the exceptions provided for in paragraph (1) or (7) of section 80a–3(c) of this title, would be an investment company (hereafter in this paragraph referred to as an "excepted investment company"), unless all beneficial owners of its outstanding securities (other than short-term paper), determined in accordance with section 80a–3(c)(1)(A) of this title, that acquired such securities on or before April 30, 1996 (hereafter in this paragraph referred to as "pre-amendment beneficial owners"), and all pre-amendment beneficial owners of the outstanding securities (other than short-term paper) of any excepted investment company that, directly or indirectly, owns any outstanding securities of such excepted investment company, have consented to its treatment as a qualified purchaser. Unanimous consent of all trustees, directors, or general partners of a company or trust referred to in clause (ii) or (iii) of subparagraph (A) shall constitute consent for purposes of this subparagraph.

(52) The terms "security future" and "narrow-based security index" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(55)].

(53) The term "credit rating agency" has the same meaning as in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c].

(54) The terms "commodity pool", "commodity pool operator", "commodity trading advisor", "major swap participant", "swap", "swap dealer", and "swap execution facility" have the same meanings as in section 1a of title 7.

(b) Applicability to government

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(c) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(Aug. 22, 1940, ch. 686, title I, §2, 54 Stat. 790; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Aug. 10, 1954, ch. 667, title IV, §401, 68 Stat. 688; Pub. L. 86–70, §12(d), June 25, 1959,

73 Stat. 143; Pub. L. 86–624, §7(c), July 12, 1960, 74 Stat. 412; Pub. L. 91–547, §2(a), Dec. 14, 1970, 84 Stat. 1413; Pub. L. 95–598, title III, §310(a), Nov. 6, 1978, 92 Stat. 2676; Pub. L. 96–477, title I, §101, Oct. 21, 1980, 94 Stat. 2275; Pub. L. 97–303, §5, Oct. 13, 1982, 96 Stat. 1409; Pub. L. 100–181, title VI, §§601–603, Dec. 4, 1987, 101 Stat. 1260; Pub. L. 101–550, title II, §206(a), Nov. 15, 1990, 104 Stat. 2720; Pub. L. 104–290, title I, §106(c), title II, §209(b), title V, §§503, 504, Oct. 11, 1996, 110 Stat. 3425, 3434, 3445; Pub. L. 105–353, title III, §301(c)(1), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–102, title II, §§213(a), (b), 215, 216, 223, Nov. 12, 1999, 113 Stat. 1397, 1399, 1401; Pub. L. 106–554, §1(a)(5) [title II, §209(a)(1), (3)], Dec. 21, 2000, 114 Stat. 2763, 2763A –435, 2763A–436; Pub. L. 109–291, §4(b)(2)(A), Sept. 29, 2006, 120 Stat. 1337; Pub. L. 111–203, title VII, §769, title IX, §§985(d)(1), 986(c)(1), July 21, 2010, 124 Stat. 1801, 1934, 1936.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle B (§§761–774) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in subsec. (a)(11), (44), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

The Securities Act of 1933, referred to in subsec. (a)(31), (44), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, which is classified generally to subchapter I (§77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Trust Indenture Act of 1939, referred to in subsec. (a)(44), is title III of act May 27, 1933, ch. 38, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149, which is classified generally to subchapter III (§77aaa et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77aaa of this title and Tables.

The Small Business Investment Act of 1958, referred to in subsec. (a)(46)(B), (47)(C), is Pub. L. 85–699, Aug. 21, 1958, 72 Stat. 689, which is classified principally to chapter 14B (§661 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

CODIFICATION

Words "Philippine Islands" deleted from definition of term "State" under authority of Proc. No. 2695, which granted independence to the Philippine Islands. Proc. No. 2695 was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and is set out as a note under that section.

AMENDMENTS

2010—Subsec. (a)(19). Pub. L. 111–203, §985(d)(1)(A), substituted "clause (vii)" for "clause (vi)" in two places in concluding provisions.

Subsec. (a)(19)(A)(vi)(III), (B)(vi)(III). Pub. L. 111–203, §985(d)(1)(B), inserted "and" at end.

Subsec. (a)(44). Pub. L. 111–203, §986(c)(1), struck out " 'Public Utility Holding Company Act of 1935'," after " 'Securities Exchange Act of 1934',".

Subsec. (a)(54). Pub. L. 111–203, §769, added par. (54).

2006—Subsec. (a)(53). Pub. L. 109–291 added par. (53).

2000—Subsec. (a)(36). Pub. L. 106–554, §1(a)(5) [title II, §209(a)(1)], inserted "security future," after "treasury stock,".

Subsec. (a)(52). Pub. L. 106–554, §1(a)(5) [title II, §209(a)(3)], added par. (52).

1999—Subsec. (a)(5)(A). Pub. L. 106–102, §223, substituted "a depository institution (as defined in section 1813 of title 12) or a branch or agency of a foreign bank (as such terms are defined in section 3101 of title 12)" for "a banking institution organized under the laws of the United States".

Subsec. (a)(6). Pub. L. 106–102, §215, amended par. (6) generally. Prior to amendment, par. (6) read as follows: " 'Broker' means any person engaged in the business of effecting transactions in securities for the

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER I - INVESTMENT COMPANIES
Sec. 80a-15 - Contracts of advisers and underwriters
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§80a–15. Contracts of advisers and underwriters

(a) Written contract to serve or act as investment adviser; contents

It shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company, and—

(1) precisely describes all compensation to be paid thereunder;

(2) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company;

(3) provides, in substance, that it may be terminated at any time, without the payment of any penalty, by the board of directors of such registered company or by vote of a majority of the outstanding voting securities of such company on not more than sixty days' written notice to the investment adviser; and

(4) provides, in substance, for its automatic termination in the event of its assignment.

(b) Written contract with company for sale by principal underwriter of security of which company is issuer; contents

It shall be unlawful for any principal underwriter for a registered open-end company to offer for sale, sell, or deliver after sale any security of which such company is the issuer, except pursuant to a written contract with such company, which contract—

(1) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company; and

(2) provides, in substance, for its automatic termination in the event of its assignment.

(c) Approval of contract to undertake service as investment adviser or principal underwriter by majority of noninterested directors

In addition to the requirements of subsections (a) and (b) of this section, it shall be unlawful for any registered investment company having a board of directors to enter into, renew, or perform any contract or agreement, written or oral, whereby a person undertakes regularly to serve or act as investment adviser of or principal underwriter for such company, unless the terms of such contract or agreement and any renewal thereof have been approved by the vote of a majority of directors, who are not parties to such contract or agreement or interested persons of any such party, cast in person at a meeting called for the purpose of voting on such approval. It shall be the duty of the directors of a registered investment company to request and evaluate, and the duty of an investment adviser to such company to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company. It shall be unlawful for the directors of a registered investment company, in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other

consideration any person may have paid in connection with a transaction of the type referred to in paragraph (1), (3), or (4) of subsection (f) of this section.

(d) Equivalent of vote of majority of outstanding voting securities in case of common-law trust

In the case of a common-law trust of the character described in section 80a–16(c) of this title, either written approval by holders of a majority of the outstanding shares of beneficial interest or the vote of a majority of such outstanding shares cast in person or by proxy at a meeting called for the purpose shall for the purposes of this section be deemed the equivalent of the vote of a majority of the outstanding voting securities, and the provisions of paragraph (42) of section 80a–2(a) of this title as to a majority shall be applicable to the vote cast at such a meeting.

(e) Exemption of advisory boards or members from provisions of this section

Nothing contained in this section shall be deemed to require or contemplate any action by an advisory board of any registered company or by any of the members of such a board.

(f) Receipt of benefits by investment adviser from sale of securities or other interest in such investment adviser resulting in assignment of investment advisory contract

(1) An investment adviser, or a corporate trustee performing the functions of an investment adviser, of a registered investment company or an affiliated person of such investment adviser or corporate trustee may receive any amount or benefit in connection with a sale of securities of, or a sale of any other interest in, such investment adviser or corporate trustee which results in an assignment of an investment advisory contract with such company or the change in control of or identity of such corporate trustee, if—

(A) for a period of three years after the time of such action, at least 75 per centum of the members of the board of directors of such registered company or such corporate trustee (or successor thereto, by reorganization or otherwise) are not (i) interested persons of the investment adviser of such company or such corporate trustee, or (ii) interested persons of the predecessor investment adviser or such corporate trustee; and

(B) there is not imposed an unfair burden on such company as a result of such transaction or any express or implied terms, conditions, or understandings applicable thereto.

(2)(A) For the purpose of paragraph (1)(A) of this subsection, interested persons of a corporate trustee shall be determined in accordance with section 80a–2(a)(19)(B) of this title: *Provided*, That no person shall be deemed to be an interested person of a corporate trustee solely by reason of (i) his being a member of its board of directors or advisory board or (ii) his membership in the immediate family of any person specified in clause (i) of this subparagraph.

(B) For the purpose of paragraph (1)(B) of this subsection, an unfair burden on a registered investment company includes any arrangement, during the two-year period after the date on which any such transaction occurs, whereby the investment adviser or corporate trustee or predecessor or successor investment advisers or corporate trustee or any interested person of any such adviser or any such corporate trustee receives or is entitled to receive any compensation directly or indirectly (i) from any person in connection with the purchase or sale of securities or other property to, from, or on behalf of such company, other than bona fide ordinary compensation as principal underwriter for such company, or (ii) from such company or its security holders for other than bona fide investment advisory or other services.

(3) If—

(A) an assignment of an investment advisory contract with a registered investment company results in a successor investment adviser to such company, or if there is a change in control of or identity of a corporate trustee of a registered investment company, and such adviser or trustee is then an investment adviser or corporate trustee with respect to other assets substantially greater in amount than the amount of assets of such company, or

(B) as a result of a merger of, or a sale of substantially all the assets by, a registered investment company with or to another registered investment company with assets substantially greater in amount, a transaction occurs which would be subject to paragraph (1)(A) of this subsection,

such discrepancy in size of assets shall be considered by the Commission in determining whether or to what extent an application under section 80a–6(c) of this title for exemption from the provisions of paragraph (1)(A) of this subsection should be granted.

(4) Paragraph (1)(A) of this subsection shall not apply to a transaction in which a controlling block of outstanding voting securities of an investment adviser to a registered investment company or of a corporate trustee performing the functions of an investment adviser to a registered investment company is—

(A) distributed to the public and in which there is, in fact, no change in the identity of the persons who control such investment adviser or corporate trustee, or

(B) transferred to the investment adviser or the corporate trustee, or an affiliated person or persons of such investment adviser or corporate trustee, or is transferred from the investment adviser or corporate trustee to an affiliated person or persons of the investment adviser or corporate trustee: *Provided*, That (i) each transferee (other than such adviser or trustee) is a natural person and (ii) the transferees (other than such adviser or trustee) owned in the aggregate more than 25 per centum of such voting securities for a period of at least six months prior to such transfer.

(Aug. 22, 1940, ch. 686, title I, §15, 54 Stat. 812; Pub. L. 91–547, §8, Dec. 14, 1970, 84 Stat. 1419; Pub. L. 94–29, §28(1), (2), (4), June 4, 1975, 89 Stat. 164, 165; Pub. L. 100–181, title VI, §611, Dec. 4, 1987, 101 Stat. 1261.)

AMENDMENTS

1987—Subsec. (d). Pub. L. 100–181, §611(1), substituted "paragraph (42)" for "paragraph (40)".

Subsec. (f)(3)(B). Pub. L. 100–181, §611(2), substituted a comma for the period at end.

1975—Subsec. (c). Pub. L. 94–29, §28(2), inserted provisions making it unlawful for the directors of a registered investment company, in connection with their evaluation of the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, to take into account the purchase price or other consideration any person may have paid in connection with a transaction of the type referred to in paragraph (1), (3), or (4) of subsec. (f).

Subsec. (d). Pub. L. 94–29, §28(4), substituted "section 80a–16(c) of this title" for "subsection (b) of section 80a–16 of this title".

Subsec. (f). Pub. L. 94–29, §28(1), added subsec. (f).

1970—Subsec. (a). Pub. L. 91–547, §8(a), struck out introductory phrase "After one year from the effective date of this subchapter" and "unless in effect prior to March 15, 1940," before "has been approved", and "by the investment adviser" after "assignment" in item (4), and substituted "It" for "it".

Subsec. (b). Pub. L. 91–547, §8(b), struck out introductory phrase "After one year from the effective date of this subchapter," and concluding phrase ", unless in effect prior to March 15, 1940" after "which contract" before item (1), struck out "by such underwriter" after "assignment" in item (2), and substituted "It" for "it".

Subsec. (c). Pub. L. 91–547, §8(c), made it the duty of the directors of a registered investment company to request and evaluate, and the duty of an investment adviser to such company to furnish, such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such company, substituted "interested persons" for "affiliated persons", and struck out "except a written agreement which was in effect prior to March 15, 1940," after "written or oral,", item (1) designation following "have been approved" and item "or (2) by the vote of a majority of the outstanding voting securities of such company" after "any such party,", and inserted "the vote" in phrase "by the vote of a majority", and provision respecting voting "cast in person at a meeting called for the purpose of voting on such approval".

Subsecs. (d) to (f). Pub. L. 91–547, §8(d), redesignated subsecs. (e) and (f) as (d) and (e), respectively, and struck out former subsec. (d) which prohibited any person after March 15, 1945, from acting as investment adviser to, or principal underwriter for, any registered investment company pursuant to a written contract in

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER I - INVESTMENT COMPANIES
Sec. 80a-5 - Subclassification of management companies
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§80a–5. Subclassification of management companies

(a) Open-end and closed-end companies

For the purposes of this subchapter, management companies are divided into open-end and closed-end companies, defined as follows:

(1) "Open-end company" means a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.

(2) "Closed-end company" means any management company other than an open-end company.

(b) Diversified and non-diversified companies

Management companies are further divided into diversified companies and non-diversified companies, defined as follows:

(1) "Diversified company" means a management company which meets the following requirements: At least 75 per centum of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities for the purposes of this calculation limited in respect of any one issuer to an amount not greater in value than 5 per centum of the value of the total assets of such management company and to not more than 10 per centum of the outstanding voting securities of such issuer.

(2) "Non-diversified company" means any management company other than a diversified company.

(c) Loss of status as diversified company

A registered diversified company which at the time of its qualification as such meets the requirements of paragraph (1) of subsection (b) of this section shall not lose its status as a diversified company because of any subsequent discrepancy between the value of its various investments and the requirements of said paragraph, so long as any such discrepancy existing immediately after its acquisition of any security or other property is neither wholly nor partly the result of such acquisition.

(Aug. 22, 1940, ch. 686, title I, §5, 54 Stat. 800; Pub. L. 100–181, title VI, §607, Dec. 4, 1987, 101 Stat. 1261.)

AMENDMENTS

1987—Subsec. (a)(2). Pub. L. 100–181 substituted "Closed-end" for "Close-end".

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

946 Financial Services—Investment Companies
210 Balance Sheet
50 Disclosure

General Note: The Disclosure Section provides guidance regarding the disclosure in the notes to financial statements. In some cases, disclosure may relate to disclosure on the face of the financial statements.

General

> Schedule of Investments

> > Investment Companies Other than Nonregistered Investment Partnerships

946-210-50-1 In the absence of regulatory requirements, investment companies other than nonregistered investment partnerships shall do all of the following:

a. Disclose the name, number of shares, or principal amount of all of the following:

1. Each investment (including short sales, written options, futures contracts, forward contracts, and other investment-related liabilities) whose **fair value** constitutes more than 1 percent of net assets. In applying the 1-percent test, total long and total short positions in any one issuer should be considered separately.

2. All investments in any one issuer whose fair values aggregate more than 1 percent of net assets. In applying the 1-percent test, total long and total short positions in any one issuer should be considered separately.

3. At a minimum, the 50 largest investments.

b. Categorize investments by both of the following characteristics:

1. The type of investment (such as common stocks, preferred stocks, convertible securities, fixed income securities, government securities, options purchased, options written, warrants, futures contracts, loan participations and assignments, short-term securities, repurchase agreements, short sales, forward contracts, other investment companies, and so forth)

2. The related industry, country, or geographic region of the investment.

c. Disclose the aggregate other investments (each of which is not required to be disclosed by (a)) without specifically identifying the issuers of such investments, and categorize as required by (b). The disclosure shall include both of the following:

1. The percent of net assets that each such category represents

2. The total value for category in (b)(1) and (b)(2).

946-210-50-2 For required disclosures about any other significant concentration of credit risk, see Section 825-10-50. For example, an international fund that categorizes its investments by industry or geographic region should also report a summary of its investments by country, if such concentration is significant.

946-210-50-3 For required disclosures about certain significant estimates, such as use of estimates by directors, general partners, or others in an equivalent capacity to value securities, see Subtopic 275-10.

>> Investment Companies That Are Nonregistered Investment Partnerships

946-210-50-4 Except as noted in the following paragraph, the guidance in paragraph 946-210-50-6 applies to investment partnerships that are exempt from Securities and Exchange Commission (SEC) registration under the Investment Company Act of 1940, which include all of the following:

a. Hedge funds

b. Limited liability companies

c. Limited liability partnerships

d. Limited duration companies

e. Offshore investment companies with similar characteristics

f. Commodity pools subject to regulation under the Commodity Exchange Act of 1974.

946-210-50-5 The guidance in the following paragraph does not apply to investment partnerships that are brokers and dealers in securities subject to regulation under the Securities Exchange Act of 1934 (registered broker-dealers) and that manage funds only for those who are officers, directors, or employees of the general partner. For guidance applicable to those entities, see Topic 940.

946-210-50-6 The financial statements of an investment partnership meeting the condition in paragraph 946-210-50-4 shall, at a minimum, include a condensed schedule of investments in securities owned by the partnership at the close of the most recent period. Such a schedule shall do all of the following:

a. Categorize investments by all of the following:

1. Type (such as common stocks, preferred stocks, convertible securities, fixed-income securities, government securities, options purchased, options written, warrants, futures, loan participations, short sales, other investment companies, and so forth)

2. Country or geographic region, except for derivative instruments for which the **underlying** is not a security (see (a)(4))

3. Industry, except for derivative instruments for which the underlying is not a security (see (a)(4))

4. For derivative instruments for which the underlying is not a security, by broad category of underlying (for example, grains and feeds, fibers and textiles, foreign currency, or equity indexes) in place of the categories in (a)(2) and (a)(3).

b. Report the percent of net assets that each such category represents and the total fair value and cost for each category in (a)(1) and (a)(2).

c. Disclose the name, number of shares or principal amount, fair value, and type of both of the following:

1. Each investment (including short sales) constituting more than 5 percent of net assets, except for derivative instruments (see (e) and (f)). In applying the 5-percent test, total long and total short positions in any one issuer should be considered separately.

2. All investments in any one issuer aggregating more than 5 percent of net assets, except for derivative instruments (see (e) and (f)). In applying the 5-percent test, total long and total short positions in any one issuer shall be considered separately.

d. Aggregate other investments (each of which is 5 percent or less of net assets) without specifically identifying the issuers of such investments, and categorize them in accordance with the guidance in (a). In applying the 5-percent test, total long and total short positions in any one issuer shall be considered separately.

e. Disclose the number of contracts, range of expiration dates, and cumulative appreciation (depreciation) for open futures contracts of a particular underlying (such as wheat, cotton, specified equity index, or U.S. Treasury Bonds), regardless of exchange, delivery location, or delivery date, if cumulative appreciation (depreciation) on the open contracts exceeds 5 percent of net assets. In applying the 5-percent test, total long and total short positions in any one issuer shall be considered separately.

f. Disclose the range of expiration dates and fair value for all other derivative instruments of a particular underlying (such as foreign currency, wheat, specified equity index, or U.S. Treasury Bonds) regardless of counterparty, exchange, or delivery date, if fair value exceeds 5 percent of net assets. In applying the 5-percent test, total long and total short positions in any one issuer shall be considered separately.

g. Provide both of the following additional qualitative descriptions for each investment in another nonregistered investment partnership whose fair value constitutes more than 5 percent of net assets:

1. The investment objective

2. Restrictions on redemption (that is, liquidity provisions).

> > Investments in Other Investment Companies

946-210-50-7 This guidance applies to all investment companies.

946-210-50-8 Investments in other investment companies (investees), such as investment partnerships, limited liability companies, and funds of funds, shall be considered investments for purposes of applying paragraph 946-210-50-1(a) through (b) and 946-210-50-6.

946-210-50-9 If the reporting investment company's proportional share of any investment owned by any individual investee exceeds 5 percent of the reporting investment company's net assets at the reporting date, each such investment shall be named and categorized as discussed in paragraph 946-

210-50-6. These investee disclosures shall be made either in the condensed schedule of investments (as components of the investment in the investee) or in a note to that schedule.

946-210-50-10 If information about the investee's portfolio is not available, that fact shall be disclosed.

> > Credit Enhancements

946-210-50-11 The terms, conditions, and other arrangements relating to a credit enhancement shall be disclosed in the notes to financial statements.

946-210-50-12 For a put option provided by an affiliate, the schedule of investments shall describe the put as from an affiliate and the notes to financial statements shall include the name and relationship of the affiliate.

946-210-50-13 For a letter of credit, the name of the entity issuing the letter of credit shall be disclosed separately.

> Fully Benefit-Responsive Investment Contracts

946-210-50-14 Investment companies identified in paragraph 946-210-45-11 shall disclose all of the following in connection with **fully benefit-responsive investment contracts**, in the aggregate:

a. A description of the nature of those investment contracts.

b. A description of how those investment contracts operate.

c. A description of the methodology for calculating the interest crediting for those investment contracts, including all of the following:

1. The key factors that could influence future average interest crediting rates

2. The basis for and frequency of determining interest crediting rate resets

3. Any minimum interest crediting rate under the terms of the contracts.

d. An explanation of the relationship between future interest crediting rates and the amount reported on the statement of assets and liabilities representing the adjustment for the portion of net assets attributable to fully benefit-responsive investment contracts from fair value to contract value.

e. A reconciliation between the beginning and ending balance of the amount presented on the statement of assets and liabilities that represents the difference between net assets reflecting all investments at fair value and net assets for each period in which a statement of changes in net assets is presented. This reconciliation shall include both of the following:

1. The change in the difference between the fair value and contract value of all fully benefit-responsive investment contracts

2. The increase or decrease due to changes in the fully benefit-responsive status of the fund's investment contracts.

f. The average yield earned by the entire fund (which may differ from the interest rate credited to participants in the fund) for each period for which a statement of assets and liabilities is presented. This average yield shall be calculated by dividing the annualized earnings of all investments in the fund (irrespective of the interest rate credited to participants in the fund) by the fair value of all

investments in the fund.

g. The average yield earned by the entire fund with an adjustment to reflect the actual interest rate credited to participants in the fund for each period for which a statement of assets and liabilities is presented. This average yield shall be calculated by dividing the annualized earnings credited to participants in the fund (irrespective of the actual earnings of the investments in the fund) by the fair value of all investments in the fund.

h. Both of the following sensitivity analyses:

1. The weighted average interest crediting rate (that is, the contract value yield) as of the date of the latest statement of assets and liabilities and the effect on this weighted average interest crediting rate, calculated as of the date of the latest statement of assets and liabilities and the end of the next four quarterly periods, under two or more scenarios where there is an immediate hypothetical increase or decrease in market yields, with no change to the duration of the underlying investment portfolio and no contributions or withdrawals. Those scenarios should include, at a minimum, immediate hypothetical increases and decreases in market yields equal to one-quarter and one-half of the current yield.

2. The effect on the weighted average interest crediting rate calculated as of the date of the latest statement of assets and liabilities and the next four quarterly reset dates, under two or more scenarios where there are the same immediate hypothetical changes in market yields in the first analysis, combined with an immediate, one-time, hypothetical 10 percent decrease in the net assets of the fund due to participant transfers, with no change to the duration of the portfolio.

i. A description of the events that limit the ability of the fund to transact at contract value with the issuer (for example, premature termination of the contracts by the fund, plant closings, layoffs, plan termination, bankruptcy, mergers, and early retirement incentives), including a statement as to whether the occurrence of those events that would limit the fund's ability to transact at contract value with the participants in the fund is probable or not probable.

j. A description of the events and circumstances that would allow issuers to terminate fully benefit-responsive investment contracts with the fund and settle at an amount different from contract value.

Example 2 (see paragraph 946-210-55-2) illustrates the application of this guidance.

Securities and Exchange Commission (SEC)

General Note: The Disclosure Section provides guidance regarding the disclosure in the notes to financial statements. In some cases, disclosure may relate to disclosure on the face of the financial statements.

General

> **Cash**

946-210-S50-1 See paragraph 946-210-S99-1, Regulation S-X Rule 6-04.5, for the required disclosures pertaining to cash.

> **Notes Payable, Bonds, and Similar Debt**

946-210-S50-2 See paragraph 946-210-S99-1, Regulation S-X Rule 6-04.13(b), for the required disclosures pertaining to notes payable, bonds, and similar debt.

> **Units of Capital**

946-210-S50-3 See paragraph 946-210-S99-1, Regulation S-X Rule 6-04.16(b), for the required disclosures pertaining to unit investment trusts.

> **Statement of Net Assets**

946-210-S50-4 See paragraph 946-210-S99-2, Regulation S-X Rule 6-05, for the required disclosures related to the statement of net assets.

> **Balance Sheets Filed by Issuers of Face-Amount Certificates**

946-210-S50-5 See paragraph 946-210-S99-3, Regulation S-X Rule 6-06, for the required disclosures related to face-amount certificate issuers.

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Title 17 → Chapter II → Part 210 → §210.2-01

Title 17: Commodity and Securities Exchanges
PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

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§210.2-01 Qualifications of accountants.

Preliminary Note to §210.2-01

1. Section 210.2-01 is designed to ensure that auditors are qualified and independent of their audit clients both in fact and in appearance. Accordingly, the rule sets forth restrictions on financial, employment, and business relationships between an accountant and an audit client and restrictions on an accountant providing certain non-audit services to an audit client.

2. Section 210.2-01(b) sets forth the general standard of auditor independence. Paragraphs (c)(1) to (c)(5) reflect the application of the general standard to particular circumstances. The rule does not purport to, and the Commission could not, consider all circumstances that raise independence concerns, and these are subject to the general standard in §210.2-01(b). In considering this standard, the Commission looks in the first instance to whether a relationship or the provision of a service: creates a mutual or conflicting interest between the accountant and the audit client; places the accountant in the position of auditing his or her own work; results in the accountant acting as management or an employee of the audit client; or places the accountant in a position of being an advocate for the audit client.

3. These factors are general guidance only and their application may depend on particular facts and circumstances. For that reason, §210.2-01 provides that, in determining whether an accountant is independent, the Commission will consider all relevant facts and circumstances. For the same reason, registrants and accountants are encouraged to consult with the Commission's Office of the Chief Accountant before entering into relationships, including relationships involving the provision of services, that are not explicitly described in the rule.

(a) The Commission will not recognize any person as a certified public accountant who is not duly registered and in good standing as such under the laws of the place of his residence or principal office. The Commission will not recognize any person as a public accountant who is not in good standing and entitled to practice as such under the laws of the place of his residence or principal office.

(b) The Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement. In determining whether an accountant is independent, the Commission will consider all relevant circumstances, including all relationships between the accountant and the audit client, and not just those relating to reports filed with the Commission.

(c) This paragraph sets forth a non-exclusive specification of circumstances inconsistent with paragraph (b) of this section.

(1) *Financial relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has a direct financial interest or a material indirect financial interest in the accountant's audit client, such as:

(i) *Investments in audit clients.* An accountant is not independent when:

(A) The accounting firm, any covered person in the firm, or any of his or her immediate family members, has any direct investment in an audit client, such as stocks, bonds, notes, options, or other securities. The term *direct investment* includes an investment in an audit client through an intermediary if:

(*1*) The accounting firm, covered person, or immediate family member, alone or together with other persons, supervises or participates in the intermediary's investment decisions or has control over the intermediary; or

(*2*) The intermediary is not a diversified management investment company, as defined by section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-5(b)(1), and has an investment in the audit client that amounts to 20% or more of the value of the intermediary's total investments.

(B) Any partner, principal, shareholder, or professional employee of the accounting firm, any of his or her immediate family members, any close family member of a covered person in the firm, or any group of the above persons has filed a Schedule 13D or 13G (17 CFR 240.13d-101 or 240.13d-102) with the Commission indicating beneficial ownership of more than five percent of an audit client's equity securities or controls an audit client, or a close family member of a partner, principal, or shareholder of the accounting firm controls an audit client.

(C) The accounting firm, any covered person in the firm, or any of his or her immediate family members, serves as voting trustee of a trust, or executor of an estate, containing the securities of an audit client, unless the accounting firm, covered person in the firm, or immediate family member has no authority to make investment decisions for the trust or estate.

(D) The accounting firm, any covered person in the firm, any of his or her immediate family members, or any group of the above persons has any material indirect investment in an audit client. For purposes of this paragraph, the term *material indirect investment* does not include ownership by any covered person in the firm, any of his or her immediate family members, or any group of the above persons of 5% or less of the outstanding shares of a diversified management investment company, as defined by section 5(b)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-5(b)(1), that invests in an audit client.

(E) The accounting firm, any covered person in the firm, or any of his or her immediate family members:

(*1*) Has any direct or material indirect investment in an entity where:

(*i*) An audit client has an investment in that entity that is material to the audit client and has the ability to exercise significant influence over that entity; or

(*ii*) The entity has an investment in an audit client that is material to that entity and has the ability to exercise significant influence over that audit client;

(*2*) Has any material investment in an entity over which an audit client has the ability to exercise significant influence; or

(*3*) Has the ability to exercise significant influence over an entity that has the ability to exercise significant influence over an audit client.

(ii) *Other financial interests in audit client.* An accountant is not independent when the accounting firm, any covered person in the firm, or any of his or her immediate family members has:

(A) *Loans/debtor-creditor relationship.* Any loan (including any margin loan) to or from an audit client, or an audit client's officers, directors, or record or beneficial owners of more than ten percent of the audit client's equity securities, except for the following loans obtained from a financial institution under its normal lending procedures, terms, and requirements:

(*1*) Automobile loans and leases collateralized by the automobile;

(*2*) Loans fully collateralized by the cash surrender value of an insurance policy;

(*3*) Loans fully collateralized by cash deposits at the same financial institution; and

(*4*) A mortgage loan collateralized by the borrower's primary residence provided the loan was not obtained while the covered person in the firm was a covered person.

(B) *Savings and checking accounts.* Any savings, checking, or similar account at a bank, savings and loan, or similar institution that is an audit client, if the account has a balance that exceeds the amount insured by the Federal Deposit Insurance Corporation or any similar insurer, except that an accounting firm account may have an uninsured balance provided that the likelihood of the bank, savings and loan, or similar institution experiencing financial difficulties is remote.

(C) *Broker-dealer accounts.* Brokerage or similar accounts maintained with a broker-dealer that is an audit client, if:

(*1*) Any such account includes any asset other than cash or securities (within the meaning of "security" provided in the Securities Investor Protection Act of 1970 ("SIPA") (15 U.S.C. 78aaa *et seq.*));

(*2*) The value of assets in the accounts exceeds the amount that is subject to a Securities Investor Protection Corporation advance, for those accounts, under Section 9 of SIPA (15 U.S.C. 78fff-3); or

(*3*) With respect to non-U.S. accounts not subject to SIPA protection, the value of assets in the accounts exceeds the amount insured or protected by a program similar to SIPA.

(D) *Futures commission merchant accounts.* Any futures, commodity, or similar account maintained with a futures commission merchant that is an audit client.

(E) *Credit cards.* Any aggregate outstanding credit card balance owed to a lender that is an audit client that is not reduced to $10,000 or less on a current basis taking into consideration the payment due date and any available grace period.

(F) *Insurance products.* Any individual policy issued by an insurer that is an audit client unless:

(*1*) The policy was obtained at a time when the covered person in the firm was not a covered person in the firm; and

(*2*) The likelihood of the insurer becoming insolvent is remote.

(G) *Investment companies.* Any financial interest in an entity that is part of an investment company complex that includes an audit client.

(iii) *Exceptions.* Notwithstanding paragraphs (c)(1)(i) and (c)(1)(ii) of this section, an accountant will not be deemed not independent if:

(A) *Inheritance and gift.* Any person acquires an unsolicited financial interest, such as through an unsolicited gift or inheritance, that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and the financial interest is disposed of as soon as practicable, but no later than 30 days after the person has knowledge of and the right to dispose of the financial interest.

(B) *New audit engagement.* Any person has a financial interest that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and:

(*1*) The accountant did not audit the client's financial statements for the immediately preceding fiscal year; and

(*2*) The accountant is independent under paragraph (c)(1)(i) and (c)(1)(ii) of this section before the earlier of:

(*i*) Signing an initial engagement letter or other agreement to provide audit, review, or attest services to the audit client; or

(*ii*) Commencing any audit, review, or attest procedures (including planning the audit of the client's financial statements).

(C) *Employee compensation and benefit plans.* An immediate family member of a person who is a covered person in the firm only by virtue of paragraphs (f)(11)(iii) or (f)(11)(iv) of this section has a financial interest that would cause an accountant to be not independent under paragraph (c)(1)(i) or (c)(1)(ii) of this section, and the acquisition of the financial interest was an unavoidable consequence of participation in his or her employer's employee compensation or benefits program, provided that the financial interest, other than unexercised employee stock options, is disposed of as soon as practicable, but no later than 30 days after the person has the right to dispose of the financial interest.

(iv) *Audit clients' financial relationships.* An accountant is not independent when:

(A) *Investments by the audit client in the accounting firm.* An audit client has, or has agreed to acquire, any direct investment in the accounting firm, such as stocks, bonds, notes, options, or other securities, or the audit client's officers or directors are record or beneficial owners of more than 5% of the equity securities of the accounting firm.

(B) *Underwriting.* An accounting firm engages an audit client to act as an underwriter, broker-dealer, market-maker, promoter, or analyst with respect to securities issued by the accounting firm.

(2) *Employment relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has an employment relationship with an audit client, such as:

(i) *Employment at audit client of accountant.* A current partner, principal, shareholder, or professional employee of the accounting firm is employed by the audit client or serves as a member of the board of directors or similar management or governing body of the audit client.

(ii) *Employment at audit client of certain relatives of accountant.* A close family member of a covered person in the firm is in an accounting role or financial reporting oversight role at an audit client, or was in such a role during any period covered by an audit for which the covered person in the firm is a covered person.

(iii) *Employment at audit client of former employee of accounting firm.* (A) A former partner, principal, shareholder, or professional employee of an accounting firm is in an accounting role or financial reporting oversight role at an audit client, unless the individual:

(*1*) Does not influence the accounting firm's operations or financial policies;

(*2*) Has no capital balances in the accounting firm; and

(*3*) Has no financial arrangement with the accounting firm other than one providing for regular payment of a fixed dollar amount (which is not dependent on the revenues, profits, or earnings of the accounting firm):

(*i*) Pursuant to a fully funded retirement plan, rabbi trust, or, in jurisdictions in which a rabbi trust does not exist, a similar vehicle; or

(*ii*) In the case of a former professional employee who was not a partner, principal, or shareholder of the accounting firm and who has been disassociated from the accounting firm for more than five years, that is immaterial to the former professional employee; and

(B) A former partner, principal, shareholder, or professional employee of an accounting firm is in a financial reporting oversight role at an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f)), except an issuer that is an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), unless the individual:

(*1*) Employed by the issuer was not a member of the audit engagement team of the issuer during the one year period preceding the date that audit procedures commenced for the fiscal period that included the date of initial employment of the audit engagement team member by the issuer;

(*2*) For purposes of paragraph (c)(2)(iii)(B)(*1*) of this section, the following individuals are not considered to be members of the audit engagement team:

(*i*) Persons, other than the lead partner and the concurring partner, who provided ten or fewer hours of audit, review, or attest services during the period covered by paragraph (c)(2)(iii)(B)(*1*) of this section;

(*ii*) Individuals employed by the issuer as a result of a business combination between an issuer that is an audit client and the employing entity, provided employment was not in contemplation of the business combination and the audit committee of the successor issuer is aware of the prior employment relationship; and

(*iii*) Individuals that are employed by the issuer due to an emergency or other unusual situation provided that the audit committee determines that the relationship is in the interest of investors;

(*3*) For purposes of paragraph (c)(2)(iii)(B)(*1*) of this section, audit procedures are deemed to have commenced for a fiscal period the day following the filing of the issuer's periodic annual report with the Commission covering the previous fiscal period; or

(C) A former partner, principal, shareholder, or professional employee of an accounting firm is in a financial reporting oversight role with respect to an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), if:

(*1*) The former partner, principal, shareholder, or professional employee of an accounting firm is employed in a financial reporting oversight role related to the operations and financial reporting of the registered investment company at an entity in the investment company complex, as defined in (f)(14) of this section, that includes the registered investment company; and

(*2*) The former partner, principal, shareholder, or professional employee of an accounting firm employed by the registered investment company or any entity in the investment company complex was a member of the audit engagement team of the registered investment company or any other registered investment company in the investment company complex during the one year period preceding the date that audit procedures commenced that included the date of initial employment of the audit engagement team member by the registered investment company or any entity in the investment company complex.

(*3*) For purposes of paragraph (c)(2)(iii)(C)(*2*) of this section, the following individuals are not considered to be members of the audit engagement team:

(*i*) Persons, other than the lead partner and concurring partner, who provided ten or fewer hours of audit, review or attest services during the period covered by paragraph (c)(2)(iii)(C)(*2*) of this section;

(*ii*) Individuals employed by the registered investment company or any entity in the investment company complex as a result of a business combination between a registered investment company or any entity in the investment company complex that is an audit client and the employing entity, provided employment was not in contemplation of the business combination and the audit committee of the registered investment company is aware of the prior employment relationship; and

(*iii*) Individuals that are employed by the registered investment company or any entity in the investment company complex due to an emergency or other unusual situation provided that the audit committee determines that the relationship is in the interest of investors.

(*4*) For purposes of paragraph (c)(2)(iii)(C)(*2*) of this section, audit procedures are deemed to have commenced the day following the filing of the registered investment company's periodic annual report with the Commission.

(iv) *Employment at accounting firm of former employee of audit client.* A former officer, director, or employee of an audit client becomes a partner, principal, shareholder, or professional employee of the accounting firm, unless the

individual does not participate in, and is not in a position to influence, the audit of the financial statements of the audit client covering any period during which he or she was employed by or associated with that audit client.

(3) *Business relationships.* An accountant is not independent if, at any point during the audit and professional engagement period, the accounting firm or any covered person in the firm has any direct or material indirect business relationship with an audit client, or with persons associated with the audit client in a decision-making capacity, such as an audit client's officers, directors, or substantial stockholders. The relationships described in this paragraph do not include a relationship in which the accounting firm or covered person in the firm provides professional services to an audit client or is a consumer in the ordinary course of business.

(4) *Non-audit services.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides the following non-audit services to an audit client:

(i) *Bookkeeping or other services related to the accounting records or financial statements of the audit client.* Any service, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements, including:

(A) Maintaining or preparing the audit client's accounting records;

(B) Preparing the audit client's financial statements that are filed with the Commission or that form the basis of financial statements filed with the Commission; or

(C) Preparing or originating source data underlying the audit client's financial statements.

(ii) *Financial information systems design and implementation.* Any service, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements, including:

(A) Directly or indirectly operating, or supervising the operation of, the audit client's information system or managing the audit client's local area network; or

(B) Designing or implementing a hardware or software system that aggregates source data underlying the financial statements or generates information that is significant to the audit client's financial statements or other financial information systems taken as a whole.

(iii) *Appraisal or valuation services, fairness opinions, or contribution-in-kind reports.* Any appraisal service, valuation service, or any service involving a fairness opinion or contribution-in-kind report for an audit client, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

(iv) *Actuarial services.* Any actuarially-oriented advisory service involving the determination of amounts recorded in the financial statements and related accounts for the audit client other than assisting a client in understanding the methods, models, assumptions, and inputs used in computing an amount, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

(v) *Internal audit outsourcing services.* Any internal audit service that has been outsourced by the audit client that relates to the audit client's internal accounting controls, financial systems, or financial statements, for an audit client unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

(vi) *Management functions.* Acting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client.

(vii) *Human resources.* (A) Searching for or seeking out prospective candidates for managerial, executive, or director positions;

(B) Engaging in psychological testing, or other formal testing or evaluation programs;

(C) Undertaking reference checks of prospective candidates for an executive or director position;

(D) Acting as a negotiator on the audit client's behalf, such as determining position, status or title, compensation, fringe benefits, or other conditions of employment; or

(E) Recommending, or advising the audit client to hire, a specific candidate for a specific job (except that an accounting firm may, upon request by the audit client, interview candidates and advise the audit client on the candidate's competence for financial accounting, administrative, or control positions).

(viii) *Broker-dealer, investment adviser, or investment banking services.* Acting as a broker-dealer (registered or unregistered), promoter, or underwriter, on behalf of an audit client, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, executing a transaction to buy or sell

an audit client's investment, or having custody of assets of the audit client, such as taking temporary possession of securities purchased by the audit client.

(ix) *Legal services.* Providing any service to an audit client that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted, or otherwise qualified to practice law in the jurisdiction in which the service is provided.

(x) *Expert services unrelated to the audit.* Providing an expert opinion or other expert service for an audit client, or an audit client's legal representative, for the purpose of advocating an audit client's interests in litigation or in a regulatory or administrative proceeding or investigation. In any litigation or regulatory or administrative proceeding or investigation, an accountant's independence shall not be deemed to be impaired if the accountant provides factual accounts, including in testimony, of work performed or explains the positions taken or conclusions reached during the performance of any service provided by the accountant for the audit client.

(5) *Contingent fees.* An accountant is not independent if, at any point during the audit and professional engagement period, the accountant provides any service or product to an audit client for a contingent fee or a commission, or receives a contingent fee or commission from an audit client.

(6) *Partner rotation.* (i) Except as provided in paragraph (c)(6)(ii) of this section, an accountant is not independent of an audit client when:

(A) Any audit partner as defined in paragraph (f)(7)(ii) of this section performs:

(*1*) The services of a lead partner, as defined in paragraph (f)(7)(ii)(A) of this section, or concurring partner, as defined in paragraph (f)(7)(ii)(B) of this section, for more than five consecutive years; or

(*2*) One or more of the services defined in paragraphs (f)(7)(ii)(C) and (D) of this section for more than seven consecutive years;

(B) Any audit partner:

(*1*) Within the five consecutive year period following the performance of services for the maximum period permitted under paragraph (c)(6)(i)(A)(*1*) of this section, performs for that audit client the services of a lead partner, as defined in paragraph (f)(7)(ii)(A) of this section, or concurring partner, as defined in paragraph (f)(7)(ii)(B) of this section, or a combination of those services, or

(*2*) Within the two consecutive year period following the performance of services for the maximum period permitted under paragraph (c)(6)(i)(A)(*2*) of this section, performs one or more of the services defined in paragraph (f)(7)(ii) of this section.

(ii) Any accounting firm with less than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f))) and less than ten partners shall be exempt from paragraph (c)(6)(i) of this section *provided* the Public Company Accounting Oversight Board conducts a review at least once every three years of each of the audit client engagements that would result in a lack of auditor independence under this paragraph.

(iii) For purposes of paragraph (c)(6)(i) of this section, an audit client that is an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), does not include an affiliate of the audit client that is an entity in the same investment company complex, as defined in paragraph (f)(14) of this section, except for another registered investment company in the same investment company complex. For purposes of calculating consecutive years of service under paragraph (c)(6)(i) of this section with respect to investment companies in an investment company complex, audits of registered investment companies with different fiscal year-ends that are performed in a continuous 12-month period count as a single consecutive year.

(7) *Audit committee administration of the engagement.* An accountant is not independent of an issuer (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f))), other than an issuer that is an Asset-Backed Issuer as defined in §229.1101 of this chapter, or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), other than a unit investment trust as defined by section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a-4(2)), unless:

(i) In accordance with Section 10A(i) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(i)) either:

(A) Before the accountant is engaged by the issuer or its subsidiaries, or the registered investment company or its subsidiaries, to render audit or non-audit services, the engagement is approved by the issuer's or registered investment company's audit committee; or

(B) The engagement to render the service is entered into pursuant to pre-approval policies and procedures established by the audit committee of the issuer or registered investment company, *provided* the policies and procedures are detailed as to the particular service and the audit committee is informed of each service and such policies and procedures do not include delegation of the audit committees responsibilities under the Securities Exchange Act of 1934 to management; or

(C) With respect to the provision of services other than audit, review or attest services the pre-approval requirement is waived if:

(*1*) The aggregate amount of all such services provided constitutes no more than five percent of the total amount of revenues paid by the audit client to its accountant during the fiscal year in which the services are provided;

(*2*) Such services were not recognized by the issuer or registered investment company at the time of the engagement to be non-audit services; and

(*3*) Such services are promptly brought to the attention of the audit committee of the issuer or registered investment company and approved prior to the completion of the audit by the audit committee or by one or more members of the audit committee who are members of the board of directors to whom authority to grant such approvals has been delegated by the audit committee.

(ii) A registered investment company's audit committee also must pre-approve its accountant's engagements for non-audit services with the registered investment company's investment adviser (not including a sub-adviser whose role is primarily portfolio management and is sub-contracted or overseen by another investment adviser) and any entity controlling, controlled by, or under common control with the investment adviser that provides ongoing services to the registered investment company in accordance with paragraph (c)(7)(i) of this section, if the engagement relates directly to the operations and financial reporting of the registered investment company, except that with respect to the waiver of the pre-approval requirement under paragraph (c)(7)(i)(C) of this section, the aggregate amount of all services provided constitutes no more than five percent of the total amount of revenues paid to the registered investment company's accountant by the registered investment company, its investment adviser and any entity controlling, controlled by, or under common control with the investment adviser that provides ongoing services to the registered investment company during the fiscal year in which the services are provided that would have to be pre-approved by the registered investment company's audit committee pursuant to this section.

(8) *Compensation.* An accountant is not independent of an audit client if, at any point during the audit and professional engagement period, any audit partner earns or receives compensation based on the audit partner procuring engagements with that audit client to provide any products or services other than audit, review or attest services. Any accounting firm with fewer than ten partners and fewer than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f))) shall be exempt from the requirement stated in the previous sentence.

(d) *Quality controls.* An accounting firm's independence will not be impaired solely because a covered person in the firm is not independent of an audit client provided:

(1) The covered person did not know of the circumstances giving rise to the lack of independence;

(2) The covered person's lack of independence was corrected as promptly as possible under the relevant circumstances after the covered person or accounting firm became aware of it; and

(3) The accounting firm has a quality control system in place that provides reasonable assurance, taking into account the size and nature of the accounting firm's practice, that the accounting firm and its employees do not lack independence, and that covers at least all employees and associated entities of the accounting firm participating in the engagement, including employees and associated entities located outside of the United States.

(4) For an accounting firm that annually provides audit, review, or attest services to more than 500 companies with a class of securities registered with the Commission under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), a quality control system will not provide such reasonable assurance unless it has at least the following features:

(i) Written independence policies and procedures;

(ii) With respect to partners and managerial employees, an automated system to identify their investments in securities that might impair the accountant's independence;

(iii) With respect to all professionals, a system that provides timely information about entities from which the accountant is required to maintain independence;

(iv) An annual or on-going firm-wide training program about auditor independence;

(v) An annual internal inspection and testing program to monitor adherence to independence requirements;

(vi) Notification to all accounting firm members, officers, directors, and employees of the name and title of the member of senior management responsible for compliance with auditor independence requirements;

(vii) Written policies and procedures requiring all partners and covered persons to report promptly to the accounting firm when they are engaged in employment negotiations with an audit client, and requiring the firm to remove immediately any such professional from that audit client's engagement and to review promptly all work the professional performed related to that audit client's engagement; and

(viii) A disciplinary mechanism to ensure compliance with this section.

(e)(1) *Transition and grandfathering.* Provided the following relationships did not impair the accountant's independence under pre-existing requirements of the Commission, the Independence Standards, Board, or the accounting profession in the United States, the existence of the relationship on May 6, 2003 will not be deemed to impair an accountant's independence:

(i) Employment relationships that commenced at the issuer prior to May 6, 2003 as described in paragraph (c)(2)(iii)(B) of this section.

(ii) Compensation earned or received, as described in paragraph (c)(8) of this section during the fiscal year of the accounting firm that includes the effective date of this section.

(iii) Until May 6, 2004, the provision of services described in paragraph (c)(4) of this section provided those services are pursuant to contracts in existence on May 6, 2003.

(iv) The provision of services by the accountant under contracts in existence on May 6, 2003 that have not been pre-approved by the audit committee as described in paragraph (c)(7) of this section.

(v) Until the first day of the issuer's fiscal year beginning after May 6, 2003 by a "lead" partner and other audit partner (other than the "concurring" partner) providing services in excess of those permitted under paragraph (c)(6) of this section. An accountant's independence will not be deemed to be impaired until the first day of the issuer's fiscal year beginning after May 6, 2004 by a "concurring" partner providing services in excess of those permitted under paragraph (c)(6) of this section. For the purposes of calculating periods of service under paragraph (c)(6) of this section:

(A) For the "lead" and "concurring" partner, the period of service includes time served as the "lead" or "concurring" partner prior to May 6, 2003; and

(B) For audit partners other than the "lead" partner or "concurring" partner, and for audit partners in foreign firms, the period of service does not include time served on the audit engagement team prior to the first day of issuer's fiscal year beginning on or after May 6, 2003.

(2) *Settling financial arrangements with former professionals.* To the extent not required by pre-existing requirements of the Commission, the Independence Standards Board, or the accounting profession in the United States, the requirement in paragraph (c)(2)(iii) of this section to settle financial arrangements with former professionals applies to situations that arise after the effective date of this section.

(f) *Definitions of terms.* For purposes of this section:

(1) *Accountant,* as used in paragraphs (b) through (e) of this section, means a registered public accounting firm, certified public accountant or public accountant performing services in connection with an engagement for which independence is required. References to the accountant include any accounting firm with which the certified public accountant or public accountant is affiliated.

(2) *Accounting firm* means an organization (whether it is a sole proprietorship, incorporated association, partnership, corporation, limited liability company, limited liability partnership, or other legal entity) that is engaged in the practice of public accounting and furnishes reports or other documents filed with the Commission or otherwise prepared under the securities laws, and all of the organization's departments, divisions, parents, subsidiaries, and associated entities, including those located outside of the United States. Accounting firm also includes the organization's pension, retirement, investment, or similar plans.

(3)(i) *Accounting role* means a role in which a person is in a position to or does exercise more than minimal influence over the contents of the accounting records or anyone who prepares them.

(ii) *Financial reporting oversight role* means a role in which a person is in a position to or does exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, or any equivalent position.

(4) *Affiliate of the audit client* means:

(i) An entity that has control over the audit client, or over which the audit client has control, or which is under common control with the audit client, including the audit client's parents and subsidiaries;

(ii) An entity over which the audit client has significant influence, unless the entity is not material to the audit client;

(iii) An entity that has significant influence over the audit client, unless the audit client is not material to the entity; and

(iv) Each entity in the investment company complex when the audit client is an entity that is part of an investment company complex.

(5) *Audit and professional engagement period* includes both:

(i) The period covered by any financial statements being audited or reviewed (the "audit period"); and

(ii) The period of the engagement to audit or review the audit client's financial statements or to prepare a report filed with the Commission (the "professional engagement period"):

(A) The professional engagement period begins when the accountant either signs an initial engagement letter (or other agreement to review or audit a client's financial statements) or begins audit, review, or attest procedures, whichever is earlier; and

(B) The professional engagement period ends when the audit client or the accountant notifies the Commission that the client is no longer that accountant's audit client.

(iii) For audits of the financial statements of foreign private issuers, the "audit and professional engagement period" does not include periods ended prior to the first day of the last fiscal year before the foreign private issuer first filed, or was required to file, a registration statement or report with the Commission, provided there has been full compliance with home country independence standards in all prior periods covered by any registration statement or report filed with the Commission.

(6) *Audit client* means the entity whose financial statements or other information is being audited, reviewed, or attested and any affiliates of the audit client, other than, for purposes of paragraph (c)(1)(i) of this section, entities that are affiliates of the audit client only by virtue of paragraph (f)(4)(ii) or (f)(4)(iii) of this section.

(7)(i) *Audit engagement team* means all partners, principals, shareholders and professional employees participating in an audit, review, or attestation engagement of an audit client, including audit partners and all persons who consult with others on the audit engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events.

(ii) *Audit partner* means a partner or persons in an equivalent position, other than a partner who consults with others on the audit engagement team during the audit, review, or attestation engagement regarding technical or industry-specific issues, transactions, or events, who is a member of the audit engagement team who has responsibility for decision-making on significant auditing, accounting, and reporting matters that affect the financial statements, or who maintains regular contact with management and the audit committee and includes the following:

(A) The lead or coordinating audit partner having primary responsibility for the audit or review (the "lead partner");

(B) The partner performing a second level of review to provide additional assurance that the financial statements subject to the audit or review are in conformity with generally accepted accounting principles and the audit or review and any associated report are in accordance with generally accepted auditing standards and rules promulgated by the Commission or the Public Company Accounting Oversight Board (the "concurring or reviewing partner");

(C) Other audit engagement team partners who provide more than ten hours of audit, review, or attest services in connection with the annual or interim consolidated financial statements of the issuer or an investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8); and

(D) Other audit engagement team partners who serve as the "lead partner" in connection with any audit or review related to the annual or interim financial statements of a subsidiary of the issuer whose assets or revenues constitute 20% or more of the assets or revenues of the issuer's respective consolidated assets or revenues.

(8) *Chain of command* means all persons who:

(i) Supervise or have direct management responsibility for the audit, including at all successively senior levels through the accounting firm's chief executive;

(ii) Evaluate the performance or recommend the compensation of the audit engagement partner; or

(iii) Provide quality control or other oversight of the audit.

(9) *Close family members* means a person's spouse, spousal equivalent, parent, dependent, nondependent child, and sibling.

(10) *Contingent fee* means, except as stated in the next sentence, any fee established for the sale of a product or the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such product or service. Solely for the purposes of this section, a fee is not a "contingent fee" if it is fixed by courts or other public authorities, or, in

tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies. Fees may vary depending, for example, on the complexity of services rendered.

(11) *Covered persons in the firm* means the following partners, principals, shareholders, and employees of an accounting firm:

(i) The "audit engagement team";

(ii) The "chain of command";

(iii) Any other partner, principal, shareholder, or managerial employee of the accounting firm who has provided ten or more hours of non-audit services to the audit client for the period beginning on the date such services are provided and ending on the date the accounting firm signs the report on the financial statements for the fiscal year during which those services are provided, or who expects to provide ten or more hours of non-audit services to the audit client on a recurring basis; and

(iv) Any other partner, principal, or shareholder from an "office" of the accounting firm in which the lead audit engagement partner primarily practices in connection with the audit.

(12) *Group* means two or more persons who act together for the purposes of acquiring, holding, voting, or disposing of securities of a registrant.

(13) *Immediate family members* means a person's spouse, spousal equivalent, and dependents.

(14) *Investment company complex*. (i) "Investment company complex" includes:

(A) An investment company and its investment adviser or sponsor;

(B) Any entity controlled by or controlling an investment adviser or sponsor in paragraph (f)(14)(i)(A) of this section, or any entity under common control with an investment adviser or sponsor in paragraph (f)(14)(i)(A) of this section if the entity:

(*1*) Is an investment adviser or sponsor; or

(*2*) Is engaged in the business of providing administrative, custodian, underwriting, or transfer agent services to any investment company, investment adviser, or sponsor; and

(C) Any investment company or entity that would be an investment company but for the exclusions provided by section 3(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(c)) that has an investment adviser or sponsor included in this definition by either paragraph (f)(14)(i)(A) or (f)(14)(i)(B) of this section.

(ii) An investment adviser, for purposes of this definition, does not include a sub-adviser whose role is primarily portfolio management and is subcontracted with or overseen by another investment adviser.

(iii) Sponsor, for purposes of this definition, is an entity that establishes a unit investment trust.

(15) *Office* means a distinct sub-group within an accounting firm, whether distinguished along geographic or practice lines.

(16) *Rabbi trust* means an irrevocable trust whose assets are not accessible to the accounting firm until all benefit obligations have been met, but are subject to the claims of creditors in bankruptcy or insolvency.

(17) *Audit committee* means a committee (or equivalent body) as defined in section 3(a)(58) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(58)).

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Title 7 - AGRICULTURE
CHAPTER 1 - COMMODITY EXCHANGES
Sec. 6f - Registration and financial requirements; risk assessment
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§6f. Registration and financial requirements; risk assessment

(a) Registration of futures commission merchants, introducing brokers, and floor brokers and traders

(1) Any person desiring to register as a futures commission merchant, introducing broker, floor broker, or floor trader hereunder shall be registered upon application to the Commission. The application shall be made in such form and manner as prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the business in which the applicant is or will be engaged, including in the case of an application of a futures commission merchant or an introducing broker, the names and addresses of the managers of all branch offices, and the names of such officers and partners, if a partnership, and of such officers, directors, and stockholders, if a corporation, as the Commission may direct. Such person, when registered hereunder, shall likewise continue to report and furnish to the Commission the above-mentioned information and such other information pertaining to such person's business as the Commission may require. Each registration shall expire on December 31 of the year for which issued or at such other time, not less than one year from the date of issuance, as the Commission may by rule, regulation, or order prescribe, and shall be renewed upon application therefor unless the registration has been suspended (and the period of such suspension has not expired) or revoked pursuant to the provisions of this chapter.

(2) Notwithstanding paragraph (1), and except as provided in paragraph (3), any broker or dealer that is registered with the Securities and Exchange Commission shall be registered as a futures commission merchant or introducing broker, as applicable, if—

(A) the broker or dealer limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market or registered derivatives transaction execution facility to security futures products;

(B) the broker or dealer files written notice with the Commission in such form as the Commission, by rule, may prescribe containing such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors;

(C) the registration of the broker or dealer is not suspended pursuant to an order of the Securities and Exchange Commission; and

(D) the broker or dealer is a member of a national securities association registered pursuant to section 78o–3(a) of title 15.

The registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission.

(3) A floor broker or floor trader shall be exempt from the registration requirements of section 6e of this title and paragraph (1) of this subsection if—

(A) the floor broker or floor trader is a broker or dealer registered with the Securities and Exchange Commission;

(B) the floor broker or floor trader limits its solicitation of orders, acceptance of orders, or execution of orders, or placing of orders on behalf of others involving any contracts of sale of any

commodity for future delivery, on or subject to the rules of any contract market to security futures products; and

(C) the registration of the floor broker or floor trader is not suspended pursuant to an order of the Securities and Exchange Commission.

(4)(A) A broker or dealer that is registered as a futures commission merchant or introducing broker pursuant to paragraph (2), or that is a floor broker or floor trader exempt from registration pursuant to paragraph (3), shall be exempt from the following provisions of this chapter and the rules thereunder:

(i) Subsections (b), (d), (e), and (g) of section 6c of this title.
(ii) Sections 6d, 6e, and 6h of this title.
(iii) Subsections (b) and (c) of this section.
(iv) Section 6j of this title.
(v) Section 6k(1) of this title.
(vi) Section 6p of this title.
(vii) Section 13a–2 of this title.
(viii) Subsections (d) and (g) of section 12 of this title.
(ix) Section 20 of this title.

(B)(i) Except as provided in clause (ii) of this subparagraph, but notwithstanding any other provision of this chapter, the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any broker or dealer subject to the registration requirement of paragraph (2), or any broker or dealer exempt from registration pursuant to paragraph (3), from any provision of this chapter or of any rule or regulation thereunder, to the extent the exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.

(ii) The Commission shall, by rule or regulation, determine the procedures under which an exemptive order under this section shall be granted and may, in its sole discretion, decline to entertain any application for an order of exemption under this section.

(C)(i) A broker or dealer that is registered as a futures commission merchant or introducing broker pursuant to paragraph (2) or an associated person thereof, or that is a floor broker or floor trader exempt from registration pursuant to paragraph (3), shall not be required to become a member of any futures association registered under section 21 of this title.

(ii) No futures association registered under section 21 of this title shall limit its members from carrying an account, accepting an order, or transacting business with a broker or dealer that is registered as a futures commission merchant or introducing broker pursuant to paragraph (2) or an associated person thereof, or that is a floor broker or floor trader exempt from registration pursuant to paragraph (3).

(b) Financial requirements for futures commission merchants and introducing brokers

Notwithstanding any other provisions of this chapter, no person desiring to register as futures commission merchant or as introducing broker shall be so registered unless he meets such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligation as a registrant, and each person so registered shall at all times continue to meet such prescribed minimum financial requirements: *Provided*, That such minimum financial requirements will be considered met if the applicant for registration or registrant is a member of a contract market or derivatives transaction execution facility and conforms to minimum financial standards and related reporting requirements set by such contract market or derivatives transaction execution facility in its bylaws, rules, regulations, or resolutions and approved by the Commission as adequate to effectuate the purposes of this subsection.

(c) Risk assessment for holding company systems

(1) As used in this subsection:

(i) The term "affiliated person" means any person directly or indirectly controlling, controlled by, or under common control with a futures commission merchant, as the Commission, by rule or regulation, may determine will effectuate the purposes of this subsection.

(ii) The term "Federal banking agency" shall have the same meaning as the term "appropriate Federal banking agency" in section 1813(q) of title 12.

(2)(A) Each registered futures commission merchant shall obtain such information and make and keep such records as the Commission, by rule or regulation, prescribes concerning the registered futures commission merchant's policies, procedures, or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons, other than a natural person.

(B) The records required under subparagraph (A) shall describe, in the aggregate, each of the futures and other financial activities conducted by, and the customary sources of capital and funding of, those of its affiliated persons whose business activities are reasonably likely to have a material impact on the financial or operational condition of the futures commission merchant, including its adjusted net capital, its liquidity, or its ability to conduct or finance its operations.

(C) The Commission, by rule or regulation, may require summary reports of such information to be filed by the futures commission merchant with the Commission no more frequently than quarterly.

(3)(A),[1] If, as a result of adverse market conditions or based on reports provided to the Commission pursuant to paragraph (2) or other available information, the Commission reasonably concludes that the Commission has concerns regarding the financial or operational condition of any registered futures commission merchant, the Commission may require the futures commission merchant to make reports concerning the futures and other financial activities of any of such person's affiliated persons, other than a natural person, whose business activities are reasonably likely to have a material impact on the financial or operational condition of the futures commission merchant.

(B) The Commission, in requiring reports pursuant to this paragraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission or to a contract market or derivatives transaction execution facility or other self-regulatory organization with primary responsibility for examining the registered futures commission merchant's financial and operational condition.

(4)(A) in [2] developing and implementing reporting requirements pursuant to paragraph (2) with respect to affiliated persons subject to examination by or reporting requirements of a Federal banking agency, the Commission shall consult with and consider the views of each such Federal banking agency. If a Federal banking agency comments in writing on a proposed rule of the Commission under this subsection that has been published for comment, the Commission shall respond in writing to the written comment before adopting the proposed rule. The Commission shall, at the request of the Federal banking agency, publish the comment and response in the Federal Register at the time of publishing the adopted rule.

(B)(i) Except as provided in clause (ii), a registered futures commission merchant shall be considered to have complied with a recordkeeping or reporting requirement adopted pursuant to paragraph (2) concerning an affiliated person that is subject to examination by, or reporting requirements of, a Federal banking agency if the futures commission merchant utilizes for the recordkeeping or reporting requirement copies of reports filed by the affiliated person with the Federal banking agency pursuant to section 161 of title 12, section 9 of the Federal Reserve Act (12 U.S.C. 321 et seq.), section 1817(a) of title 12, section 1467a(b) of title 12, or section 1844 of title 12.

(ii) The Commission may, by rule adopted pursuant to paragraph (2), require any futures commission merchant filing the reports with the Commission to obtain, maintain, or report supplemental information if the Commission makes an explicit finding that the supplemental information is necessary to inform the Commission regarding potential risks to the futures

commission merchant. Prior to requiring any such supplemental information, the Commission shall first request the Federal banking agency to expand its reporting requirements to include the information.

(5) Prior to making a request pursuant to paragraph (3) for information with respect to an affiliated person that is subject to examination by or reporting requirements of a Federal banking agency, the Commission shall—

(A) notify the agency of the information required with respect to the affiliated person; and

(B) consult with the agency to determine whether the information required is available from the agency and for other purposes, unless the Commission determines that any delay resulting from the consultation would be inconsistent with ensuring the financial and operational condition of the futures commission merchant or the stability or integrity of the futures markets.

(6) Nothing in this subsection shall be construed to permit the Commission to require any futures commission merchant to obtain, maintain, or furnish any examination report of any Federal banking agency or any supervisory recommendations or analysis contained in the report.

(7) No information provided to or obtained by the Commission from any Federal banking agency pursuant to a request under paragraph (5) regarding any affiliated person that is subject to examination by or reporting requirements of a Federal banking agency may be disclosed to any other person (other than as provided in section 12 of this title or section 12a(6) of this title), without the prior written approval of the Federal banking agency.

(8) The Commission shall notify a Federal banking agency of any concerns of the Commission regarding significant financial or operational risks resulting from the activities of any futures commission merchant to any affiliated person thereof that is subject to examination by or reporting requirements of the Federal banking agency.

(9) The Commission, by rule, regulation, or order, may exempt any person or class of persons under such terms and conditions and for such periods as the Commission shall provide in the rule, regulation, or order, from this subsection and the rules and regulations issued under this subsection. In granting the exemption, the Commission shall consider, among other factors—

(A) whether information of the type required under this subsection is available from a supervisory agency (as defined in section 3401(7) of title 12), a State insurance commission or similar State agency, the Securities and Exchange Commission, or a similar foreign regulator;

(B) the primary business of any affiliated person;

(C) the nature and extent of domestic or foreign regulation of the affiliated person's activities;

(D) the nature and extent of the registered futures commission merchant's commodity futures and options activities; and

(E) with respect to the registered futures commission merchant and its affiliated persons, on a consolidated basis, the amount and proportion of assets devoted to, and revenues derived from activities in the United States futures markets.

(10) Information required to be provided pursuant to this subsection shall be subject to section 12 of this title. Except as specifically provided in section 12 of this title and notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be reported under this subsection, or any information supplied to the Commission by any domestic or foreign regulatory agency that relates to the financial or operational condition of any affiliated person of a registered futures commission merchant.

(11) Nothing in paragraphs (1) through (10) shall be construed to supersede or to limit in any way the authority or powers of the Commission pursuant to any other provision of this chapter or regulations issued under this chapter.

(Sept. 21, 1922, ch. 369, §4f, as added June 15, 1936, ch. 545, §5, 49 Stat. 1495; amended Pub. L. 90–258, §7, Feb. 19, 1968, 82 Stat. 28; Pub. L. 93–463, title I, §103(a), Oct. 23, 1974, 88 Stat. 1392; Pub. L. 95–405, §5, Sept. 30, 1978, 92 Stat. 869; Pub. L. 97–444, title II, §208, Jan. 11, 1983, 96

NEBRASKA ADMINISTRATIVE CODE

Title 48 - ~~Department of Banking and Finance~~DEPARTMENT OF BANKING AND FINANCE

Chapter 8 - FEDERAL COVERED ADVISERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to federal covered advisers is consistent with investor protection and is in the public interest.

001.03 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.04 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

002 NOTICE FILING. Every federal covered adviser doing business in Nebraska shall, pursuant to Section 8-1103(3) of the Act, file with the Central Registry Depository/ Investment Adviser Registration Depository ("CRD/IARD") a notice containing the following information:

002.01 A copy of Application for Investment Adviser Registration ("Form ADV"), Part 1A and Part 2, together with all applicable schedules, as filed with the Securities and Exchange Commission ("SEC") for registration as an investment adviser pursuant to Section 203 of the Investment Advisers Act of 1940;

002.02 Either a consent to service of process in Nebraska or a signed and fully executed page 1 of Form ADV, ~~containing an original manual signature,~~ that consents to the appointment of the Director of the Department of Banking and Finance as the agent of the federal covered adviser for service of process in Nebraska.

002.02A With respect to any document filed electronically through CRD/IARD, when a signature or signatures are required by the particular instructions of any filing to be made through CRD/IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to CRD/IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individual whose name is typed on the filing.

002.03 A fee in the amount of two hundred dollars ($200.00) to be paid through the CRD/IARD; and

002.04 Any other information the Director may require.

002.05 A notice filing of a federal covered adviser shall be deemed filed with the Director when the filing fee and ~~the~~ Form ADV are transmitted to and accepted by CRD/IARD on behalf of Nebraska.

003 RENEWAL.

003.01 Federal covered adviser notice filings automatically expire annually on December 31. Notice filings by federal covered advisers must be renewed on or prior to that date.

003.02 The notice filing may be renewed annually by filing the following information with ~~the~~ CRD/IARD:

003.02A A copy of all amendments to Form ADV, ~~including amendments to all applicable schedules and exhibits,~~ Part 1A and Part 2, together with all applicable schedules, that have not previously been filed with the Director; and

003.02B A fee in the amount of two hundred dollars ($200.00) to be paid through ~~the~~ CRD/IARD.

003.02C A notice filing of a federal covered adviser shall be deemed filed when the filing fee and ~~the~~ Form ADV are filed with, and accepted by, CRD/IARD on behalf of ~~the state~~ Nebraska.

004 WITHDRAWAL. If a federal covered adviser is no longer conducting business in the state, the federal covered adviser shall notify the Director, through ~~the~~ CRD/IARD, by filing ~~Form ADV-W,~~ Notice of Withdrawal from Registration as Investment Adviser, ~~17 C.F.R. § 279.2~~ ("Form ADV-W"). A notice of withdrawal is deemed effective when filed with, and accepted by, CRD/IARD on behalf of Nebraska.

005 CORRECTION OF DOCUMENTS.

005.01 If the information contained in any document filed pursuant to this Rule is or becomes inaccurate or incomplete in any material respect, the federal covered adviser shall file a correcting amendment.

005.02 Any amendment required by Section 005.01, above, for a federal covered adviser shall be made on Form ADV in the manner prescribed by that form.

005.03 Any amendment to Form ADV shall be filed within the time period specified in the instructions to that form relating to filings made with the SEC. ~~Securities and Exchange Commission.~~

006 SUPERVISION. A federal covered adviser is ultimately responsible for the acts of its investment adviser representatives and other associated persons and must maintain reasonable supervision and control over such persons at all times.

007 ASSIGNMENTS. For purposes of Section 8-1102(3)(b) of the Act, a transaction which does not result in a change of actual control or management of a federal covered adviser is not an assignment.

~~008 DISHONEST OR UNETHICAL BUSINESS PRACTICES. The conduct set forth in 48 NAC 12.005 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person," for purposes of Section 8-1102(2)(b) of the Act and "dishonest or unethical business practices" for purposes of Section 8-1102(2)(d) of the Act by a federal covered adviser. The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated therein may also be deemed fraudulent and dishonest.~~

~~009~~ 008 NOTICE FILING BY A SUCCESSOR TO FEDERAL COVERED ADVISER. In the event that a federal covered adviser succeeds to and continues the business of a federal covered adviser for which a notice filing has been made pursuant to Section 8-1103(b) of the Act or succeeds to and continues the business of a registered investment adviser, the notice filing or registration of the predecessor shall be deemed to remain effective as the notice filing of the successor if the successor, within thirty ~~(30)~~ days from such succession, files a copy of its Form ADV, and the predecessor files a copy of ~~the~~ Form ADV-W if and when filed with the ~~Securities and Exchange Commission~~SEC.

009 VERIFICATION OF IMMIGRATION STATUS. Every federal covered adviser who registers investment adviser representatives to transact business in Nebraska must verify the citizenship and immigration status of each investment adviser representative registered to transact business on its behalf in Nebraska and submit such verification to the Department.

009.01 For each investment adviser representative identified as a qualified legal alien, the federal covered adviser must submit a completed United States Citizenship Attestation Form, and a legible, current and unexpired copy of the front and back of one of the currently acceptable forms of documentation required by the Systematic Alien Verification for Entitlements Program and the Department of Homeland Security.

009.02 The federal covered adviser shall maintain a copy of the completed United States Citizenship Attestation Form for each investment adviser representative registered in Nebraska, regardless of citizenship or immigration status.

010 DISHONEST OR UNETHICAL BUSINESS PRACTICES.

010.01 The conduct set forth in 48 NAC 12.005 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person," for purposes of Section 8-1102(2)(b) of the Act and "dishonest or unethical business practices" for purposes of Section 8-1102(2)(d) of the Act by a federal covered adviser.

010.02 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated therein may also be deemed fraudulent and dishonest.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER II - INVESTMENT ADVISERS
Sec. 80b-3 - Registration of investment advisers
From the U.S. Government Publishing Office, www.gpo.gov

§80b–3. Registration of investment advisers

(a) Necessity of registration

Except as provided in subsection (b) of this section and section 80b–3a of this title, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) Investment advisers who need not be registered

The provisions of subsection (a) of this section shall not apply to—

(1) any investment adviser, other than an investment adviser who acts as an investment adviser to any private fund, all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies;

(3) any investment adviser that is a foreign private adviser;

(4) any investment adviser that is a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(D)], or is a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, whose advice, analyses, or reports are provided only to one or more of the following:

(A) any such charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)]; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)], or the trustees, administrators, settlors (or potential settlors), or beneficiaries of any such trust or other instrument;

(5) any plan described in section 414(e) of title 26, any person or entity eligible to establish and maintain such a plan under title 26, or any trustee, director, officer, or employee of or volunteer for any such plan or person, if such person or entity, acting in such capacity, provides investment advice exclusively to, or with respect to, any plan, person, or entity or any company, account, or fund that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)];

(6)(A) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor whose business does not consist primarily of acting as an investment adviser, as defined in section 80b–2(a)(11) of this title, and that does not act as an investment adviser to—

(i) an investment company registered under subchapter I of this chapter; or

(ii) a company which has elected to be a business development company pursuant to section 80a–53 of this title and has not withdrawn its election; or

(B) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor and advises a private fund, provided that, if after July 21, 2010, the business of the advisor should become predominately the provision of securities-related advice, then such adviser shall register with the Commission.[1]

(7) any investment adviser, other than any entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 [15 U.S.C. 80a–53], who solely advises—

(A) small business investment companies that are licensees under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.];

(B) entities that have received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company under the Small Business Investment Act of 1958, which notice or license has not been revoked; or

(C) applicants that are affiliated with 1 or more licensed small business investment companies described in subparagraph (A) and that have applied for another license under the Small Business Investment Act of 1958, which application remains pending.

(c) Procedure for registration; filing of application; effective date of registration; amendment of registration

(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal office, principal place of business, and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied and that the applicant is not prohibited from registering as an investment adviser under section 80b–3a of this title. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

(d) Other acts prohibited by subchapter

Any provision of this subchapter (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(e) Censure, denial, or suspension of registration; notice and hearing

The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, government securities broker, government securities dealer, fiduciary, transfer agent, credit rating agency, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act [7 U.S.C. 1 et seq.] or any substantially equivalent statute or regulation;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, or a violation of [2] substantially equivalent foreign statute.

(3) has been convicted during the 10-year period preceding the date of filing of any application for registration, or at any time thereafter, of—

(A) any crime that is punishable by imprisonment for 1 or more years, and that is not described in paragraph (2); or

(B) a substantially equivalent crime by a foreign court of competent jurisdiction.

(4) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction, including any foreign court of competent jurisdiction, from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, credit rating agency, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act [7 U.S.C. 1 et seq.] or any substantially equivalent statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(5) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], this subchapter, the Commodity Exchange Act [7 U.S.C. 1 et seq.], or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(6) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], this subchapter, the Commodity Exchange Act [7 U.S.C. 1 et seq.], the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(7) is subject to any order of the Commission barring or suspending the right of the person to be associated with an investment adviser;

(8) has been found by a foreign financial regulatory authority to have—

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade; or

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade, or has been found, by the foreign finanical [3] regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of statutory provisions, and rules and regulations promulgated thereunder, another person who commits such a violation, if such other person is subject to his supervision; or

(9) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

(A) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(B) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(f) Bar or suspension from association with investment adviser; notice and hearing

The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), (8), or (9) of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) or (3) of subsection (e) of this section within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (4) of subsection (e) of this section. It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

(g) Registration of successor to business of investment adviser

Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (c) or subsection (e) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(h) Withdrawal of registration

Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person

registered under this section, or who has pending an application for registration filed under this section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from registering as an investment adviser under section 80b–3a of this title, the Commission shall by order cancel the registration of such person.

(i) Money penalties in administrative proceedings

(1) Authority of Commission

(A) In general

In any proceeding instituted pursuant to subsection (e) or (f) of this section against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

(i) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], subchapter I of this chapter, or this subchapter, or the rules or regulations thereunder;

(ii) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(iii) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein; or

(iv) has failed reasonably to supervise, within the meaning of subsection (e)(6) of this section, with a view to preventing violations of the provisions of this subchapter and the rules and regulations thereunder, another person who commits such a violation, if such other person is subject to his supervision; [4]

(B) Cease-and-desist proceedings

In any proceeding instituted pursuant to subsection (k) against any person, the Commission may impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that such person—

(i) is violating or has violated any provision of this subchapter, or any rule or regulation issued under this subchapter; or

(ii) is or was a cause of the violation of any provision of this subchapter, or any rule or regulation issued under this subchapter.

(2) Maximum amount of penalty

(A) First tier

The maximum amount of penalty for each act or omission described in paragraph (1) shall be $5,000 for a natural person or $50,000 for any other person.

(B) Second tier

Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if—

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(3) Determination of public interest

In considering under this section whether a penalty is in the public interest, the Commission may consider—

(A) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(B) the harm to other persons resulting either directly or indirectly from such act or omission;

(C) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(D) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in subsection (e)(2) of this section;

(E) the need to deter such person and other persons from committing such acts or omissions; and

(F) such other matters as justice may require.

(4) Evidence concerning ability to pay

In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(j) Authority to enter order requiring accounting and disgorgement

In any proceeding in which the Commission may impose a penalty under this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(k) Cease-and-desist proceedings

(1) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(2) Hearing

The notice instituting proceedings pursuant to paragraph (1) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(3) Temporary order

(A) In general

Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to paragraph (1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission, notwithstanding section 80b–11(c) of this title, determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(B) Applicability

This paragraph shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(4) Review of temporary orders

(A) Commission review

At any time after the respondent has been served with a temporary cease-and-desist order pursuant to paragraph (3), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(B) Judicial review

Within—

(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal office or place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist

order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.

(C) No automatic stay of temporary order

The commencement of proceedings under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(D) Exclusive review

Section 80b–13 of this title shall not apply to a temporary order entered pursuant to this section.

(5) Authority to enter order requiring accounting and disgorgement

In any cease-and-desist proceeding under paragraph (1), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(l) Exemption of venture capital fund advisers

No investment adviser that acts as an investment adviser solely to 1 or more venture capital funds shall be subject to the registration requirements of this subchapter with respect to the provision of investment advice relating to a venture capital fund. Not later than 1 year after July 21, 2010, the Commission shall issue final rules to define the term "venture capital fund" for purposes of this subsection. The Commission shall require such advisers to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

(m) Exemption of and reporting by certain private fund advisers

(1) In general

The Commission shall provide an exemption from the registration requirements under this section to any investment adviser of private funds, if each of [5] such investment adviser acts solely as an adviser to private funds and has assets under management in the United States of less than $150,000,000.

(2) Reporting

The Commission shall require investment advisers exempted by reason of this subsection to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

(n) Registration and examination of mid-sized private fund advisers

In prescribing regulations to carry out the requirements of this section with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.

(Aug. 22, 1940, ch. 686, title II, §203, 54 Stat. 850; Pub. L. 86–750, §§2–5, Sept. 13, 1960, 74 Stat. 885, 886; Pub. L. 91–547, §24, Dec. 14, 1970, 84 Stat. 1430; Pub. L. 94–29, §29(1)–(4), June 4, 1975, 89 Stat. 166–169; Pub. L. 96–477, title II, §202, Oct. 21, 1980, 94 Stat. 2290; Pub. L. 99–571, title I, §102(m), Oct. 28, 1986, 100 Stat. 3220; Pub. L. 100–181, title VII, §702, Dec. 4, 1987, 101 Stat. 1263; Pub. L. 101–429, title IV, §401, Oct. 15, 1990, 104 Stat. 946; Pub. L. 101–550, title II, §205(b), (c), Nov. 15, 1990, 104 Stat. 2719, 2720; Pub. L. 104–62, §5, Dec. 8, 1995, 109 Stat. 685; Pub. L. 104–290, title III, §§303(b), (d), 305, title V, §508(d), Oct. 11, 1996, 110 Stat. 3438, 3439,

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 9 - INVESTMENT ADVISER REPRESENTATIVES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to investment adviser representatives is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in the Rule is attached hereto.

002 APPLICATION. The application for initial registration as an investment adviser representative pursuant to Section 8-1103(3) of the Act shall be filed as directed in Section ~~009~~008, below, and shall contain the following information:

002.01 ~~Form U-4,~~ Uniform Application for Securities Industry Registration or Transfer ("Form U4"), complete, accurate, and current;

002.02 Proof of passage of a qualifying examination set forth in Section 004, below;

002.03 A copy of Form ADV Part 2B;

002.03A An investment adviser representative affiliated with a federal covered adviser is responsible for ensuring that Form ADV Part 2B is filed with the Director.

~~002.03~~ 002.04 A fee in the amount of forty dollars ($40.00~~),~~; and

~~002.04~~ 002.05 Any other information the Director may require.

003 RENEWAL.

003.01 All investment adviser representative registrations automatically expire annually on December 31. ~~or shall expire on the withdrawal of the registration of the investment adviser or the notice filing of the federal covered adviser with whom the representative is associated.~~ An investment adviser's registration must be renewed on or prior to that date.

003.02 The application for renewal of registration as an investment adviser representative pursuant to Section 8-1103(5) of the Act shall be filed as directed in Section ~~009~~ 008 below, and shall contain the following information:

003.02A Amendments (if any) to the investment adviser representative's Form U4; ~~U-4, Uniform Application for Securities Industry Registration or Transfer;~~

003.02B A copy of Form ADV Part 2B supplement for the investment adviser representative;

003.02B1 An investment adviser representative affiliated with a federal covered adviser is responsible for ensuring that the Form ADV Part 2B is filed with the Director.

~~003.02B~~ 003.02C A fee in the amount of forty dollars ($40.00); and

~~003.02C~~ 003.02D Any other information the Director may require.

004 EXAMINATION REQUIREMENTS.

004.01 The investment adviser representative shall have taken and passed the following qualifying examinations administered by the Financial Industry Regulatory Authority: ~~National Association of Securities Dealers:~~

004.01A The Uniform Investment Adviser Licensing Examination (Series 65 examination) after January 1, 2000; or

004.01B The Uniform Combined State Law Examination (Series 66 examination) after January 1, 2000 and the General Securities Representative Examination (Series 7).

004.02 The examination requirement shall not apply to an individual who currently holds, and who maintains, one of the following professional designations:

004.02A Certified Financial Planner (CFP) awarded by the Certified Financial Planner Board of Standards, Inc.;

004.02B Chartered Financial Consultant (ChFC) awarded by ~~t~~The American College of Financial Services~~, Bryn Mawr, Pennsylvania~~;

004.02C Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants;

004.02D Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts; or

004.02E Chartered Investment Counselor (CIC) awarded by the ~~Investment Counsel Association of America, Inc.~~ Investment Adviser Association.

004.03 Any individual who was registered as an investment adviser or investment adviser representative in any jurisdiction in the United States on January 1, 2000, and who has no subsequent gap in registration longer than two years, shall not be required to satisfy the examination requirements for continued registration.

~~004.03A The Director may require additional examinations for any individual found to have violated any state or federal securities, commodities, banking, insurance or real estate laws.~~

~~004.03B~~ 004.04 An individual who has ~~not~~ a gap in registration of ~~been registered in any jurisdiction within~~ two ~~(2)~~ years ~~of~~ or less between the date of the termination of his or her most recent registration in Nebraska and the date of application for registration shall not be required to comply with the examination requirements of this Rule.

004.05 The Director may require additional examinations for any individual found to have violated any state or federal securities, commodities, banking, insurance or real estate laws.

~~004.05~~ 004.06 The Director may waive the requirements of this section if the Director finds the waiver is consistent with investor protection and is in the public interest.

005 AMENDMENT OF DOCUMENTS.

005.01 If the information contained in any document filed with the Director is or becomes inaccurate or incomplete in any material respect, the investment adviser representative shall file a correcting amendment.

005.02 Any amendment required by this Section for an investment adviser representative shall be made on Form ~~U-4~~ U4 in the manner prescribed by that form, or as otherwise designated by the Director.

005.03 All amendments shall be filed as directed in Section ~~009~~008, below.

006 WITHDRAWAL. The application for withdrawal of registration as an investment adviser representative pursuant to Section 8-1103(9)(d) of the Act shall be filed upon Form ~~U-5~~ U5, Uniform Notice of Withdrawal of Securities Industry Registration, as directed in Section ~~009~~008, below.

007 DUAL REGISTRATION. Registration as an investment adviser representative with more than one investment adviser or federal covered adviser at the same time is prohibited unless the investment advisers are affiliates.

007.01 Affiliate shall mean any person who, directly or indirectly, controls, is controlled by, or is under common control with another person.

007.02 For purposes of this Section, control is defined as ownership, either direct or beneficial, of eighty percent ~~(80%)~~ or more of the outstanding voting securities of another company.

~~008 DISHONEST OR UNETHICAL BUSINESS PRACTICES. The conduct set forth in 48 NAC 12.005 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person," for purposes of Section 8-1102(2)(b) of the Act and "dishonest or unethical business practices" for purposes of Section 8-1102(2)(d) and Section 8-1103(9)(a)(vii) of the Act by an investment adviser representative. The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated therein may also be deemed fraudulent and dishonest.~~

~~009~~008 FORMS SUBMISSION.

~~009.01~~008.01 All investment adviser representative applications, amendments, related filings and fees required to be filed with the Director pursuant to the rules promulgated under this Act, shall be filed electronically with, and transmitted to, the Central Registration Depository/Investment Advisers Registration Depository ("CRD/IARD").

~~009.01A An investment adviser representative registered pursuant to the Act shall transition their registration on to the IARD no later than December 1, 2003.~~

~~009.02~~008.02 With respect to any document filed electronically through CRD/IARD, when a signature or signatures are required by the particular instructions of any filing to be made through CRD/IARD, the applicant shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to CRD/IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individuals whose names are typed on the filing.

~~009.03~~008.03 For purposes of Section 8-1103(4)(a) of the Act, a form submitted through the CRD/IARD shall be deemed filed with the ~~Department~~ Director when the record is transmitted to the ~~Department~~ Director for review.

~~010~~009 REGISTRATION OF INVESTMENT ADVISER REPRESENTATIVES OF FEDERAL COVERED ADVISERS. An investment adviser representative of a federal covered adviser is required to register pursuant to Neb. Rev. Stat. § 8-1103(3) only if he or she satisfies the following conditions:

~~010.01~~009.01 The investment adviser representative has an office in Nebraska at which the investment adviser representative regularly provides, or has a location in Nebraska which the investment adviser holds 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.

~~010.02~~ 009.02 –The investment adviser representative is a partner, officer, director, or other person occupying a similar status or performing similar functions, or employee of a federal covered adviser, or other person who provides investment advice on behalf of the federal covered adviser and is subject to the supervision and control of the federal covered adviser ("supervised person") who:

~~010.02A~~ 009.02A Has more than five clients who are natural persons and more than ten percent ~~10%~~ of whose clients are natural persons (other than excepted persons as defined in Section 009.02C1~~010.02C1~~, below); and

~~010.02B~~ 009.02B On a regular basis solicits, meets with, or otherwise communicates with clients of a federal covered adviser, or does not provide only "impersonal investment advice," as defined in Section 010.02C3, below.

~~010.02C~~ 009.02C For purposes of this Section:

~~010.02C1~~ 009.02C1 –"Excepted person" means a natural person who immediately after entering into the investment advisory contract with the investment adviser has at least seven hundred fifty thousand dollars ($750,000.00) under management with the investment adviser, or who the investment adviser reasonably believes, immediately prior to entering into the advisory contract, has a net worth, ~~(~~together with assets held jointly with a spouse,~~)~~ at the time the contract is entered into of more than one million five hundred thousand dollars ($1,500,000.00).

~~010.02C2~~ 009.02C2 The supervised person may rely on the definition of client in ~~SEC Rule 275.203(b)(3)-1~~ 17 C.F.R. 202(a)(30)-1 to identify clients for purposes of this Section, except that a supervised person need not count clients ~~that~~ who are not residents of the United States.

~~010.02C3~~ 009.02C3 Impersonal investment advice means investment advisory services provided by means of written material or oral statements that do not purport to meet the ~~objections~~ objectives or needs of specific individuals or accounts.

~~010.03~~ 009.03 Notwithstanding Section ~~010.02~~ 009.02, above, a person who solicits, offers or negotiates for the sale of, or sells, investment advisory services on behalf of a federal covered adviser shall register as an investment adviser representative even if he or she is not a supervised person.

010 BROCHURE SUPPLEMENT DELIVERY.

010.01 An investment adviser shall disclose, on the Form ADV Part 2B supplement, any alternate name under which the investment adviser representative conducts business.

010.02 An investment adviser representative of a federal covered adviser shall provide a copy of the investment adviser representative's Form ADV Part 2B supplement in accordance with 48 NAC 7.010.

011 USING THE INTERNET FOR GENERAL DISSEMINATION OF INFORMATION ON PRODUCTS AND SERVICES. Investment adviser representatives shall not be deemed to be "transacting business" in this state for purposes of Section 8-1103 of the Act based solely on the use of the Internet, the world wide web, and similar proprietary or common carrier electronic systems (hereinafter the "Internet") to distribute information on available services through certain communications made on the Internet directed generally to anyone having access to the Internet, and transmitted through postings on bulletin boards~~.~~, social networking sites, blogs or similar sites, displays on "Home Pages" or similar methods (hereinafter, "Internet Communications") if the following conditions are observed:

011.01 –The Internet Communications contain a disclosure statement in which it is clearly stated that:

011.01A The investment adviser representative in question may only transact business in this state if first registered or excluded or exempted from the investment adviser representative registration requirements of the Act; and

011.01B The investment adviser representative will not make follow-up, individualized responses to persons in this state that involve the rendering of personalized investment advice for compensation, unless the investment adviser representative has complied with, or has qualified for an applicable exemption or exclusion from, the investment adviser representative registration requirements of the Act.

011.02 The Internet Communications contain a mechanism, including and without limitation, technical "firewalls" or other implemented policies and procedures, designed reasonably to ensure that prior to any subsequent, direct communication with prospective customers or clients in this state, said investment adviser representative is first registered in this state or qualifies for an exemption or exclusion from such requirement.

011.02A Nothing in this subsection shall be construed to relieve an investment adviser representative from any applicable securities registration requirement in this state;

011.03 The Internet Communications do not involve the rendering of personalized investment advice for compensation in this state over the Internet, but is limited to the dissemination of general information on products and services.

011.04~~.~~ The Internet Communications meet the following requirements:

011.04A The affiliation with the investment adviser or federal covered adviser of the investment adviser representative is disclosed, in a non-italicized font of at least ten points, within the Internet Communications;

011.04B The investment adviser or federal covered adviser with whom the investment adviser representative is associated retains responsibility for reviewing and approving the content of any Internet Communications by the investment adviser representative;

011.04C The investment adviser or federal covered adviser with whom the investment adviser representative is associated first authorizes the distribution of information on the particular products through the Internet Communications; and

011.04D In disseminating information through the Internet Communications, the investment adviser representative acts within the scope of the authority granted by the investment adviser or federal covered adviser.

~~008~~ 012 DISHONEST OR UNETHICAL BUSINESS PRACTICES.

012.01 The conduct set forth in 48 NAC 12.005 shall constitute "an act, practice or course of business which operates, or would operate, as a fraud or deceit upon another person," for purposes of Section 8-1102(2)(b) of the Act and "dishonest or unethical business practices" for purposes of Section 8-1102(2)(d) and Section 8--1103(9)(a)(vii) of the Act by an investment adviser representative.

012.02 The delineation of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated therein may also be deemed fraudulent and dishonest.

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 4
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 275.202(a)(30)-1 - Foreign private advisers.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION (CONTINUED). PART 275 - RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940.

§ 275.202(a) Foreign private advisers.
(30)-1

(a) *Client.* You may deem the following to be a single client for purposes of section 202(a)(30) of the Act (15 U.S.C. 80b-2(a)(30)):

(1) A natural person, and:

(i) Any minor child of the natural person;

(ii) Any relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent 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") to which you provide 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 regarding clients.* For purposes of this section:

(1) You must count an owner as a client if you provide investment advisory services to the owner separate and apart from the investment advisory services you provide 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) You are not required to count an owner as a client solely because you, on behalf of the legal organization, offer, promote, or sell interests in the legal organization to the owner, or report 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 or limited liability company is a client of any general partner, managing member or other person acting as investment adviser to the partnership or limited liability company;

(4) You are not required to count a private fund as a client if you count any investor, as that term is defined in paragraph (c)(2) of this section, in that private fund as an investor in the United States in that private fund; and

(5) You are not required to count a person as an investor, as that term is defined in paragraph (c)(2) of this section, in a private fund you advise if you count such person as a client in the United States.

Note to paragraphs (**a**) and (**b**):
These paragraphs are a safe harbor and are not intended to specify the exclusive method for determining who may be deemed a single client for purposes of section 202(a)(30) of the Act (15 U.S.C. 80b-2(a)(30)).

(c) *Definitions.* For purposes of section 202(a)(30) of the Act (15 U.S.C. 80b-2(a)(30)):

(1) *Assets under management* means the regulatory assets under management as determined under Item 5.F of Form ADV (§ 279.1 of this chapter).

(2) *Investor* means:

(i) Any person who would be included in determining the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(c)(1)), or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(7)); and

(ii) Any beneficial owner of any outstanding short-term paper, as defined in section 2(a)(38) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(38)), issued by the private fund.

Note to paragraph (**c**)(2):
You may treat as a single investor any person who is an investor in two or more private funds you advise.

(3) *In the United States* means with respect to:

(i) Any client or investor, any person who is a U.S. person as defined in § 230.902(k) of this chapter, except that any discretionary account or similar account that is held for the benefit of a person in the United States by a dealer or other professional fiduciary is in the United States if the dealer or professional fiduciary is a related person, as defined in § 275.206(4)-2(d)(7), of the investment adviser relying on this section and is not organized, incorporated, or (if an individual) resident in the United States.

Note to paragraph (**c**)(3)(**i**):
A person who is in the United States may be treated as not being in the United States if such person was not in the United States at the time of becoming a client or, in the case of an investor in a private fund, each time the investor acquires securities issued by the fund.

(ii) Any place of business, *in the United States,* as that term is defined in § 230.902(l) of this chapter; and

(iii) The public, *in the United States,* as that term is defined in § 230.902(l) of this chapter.

(4) *Place of business* has the same meaning as in § 275.222-1(a).

(5) *Spousal equivalent* has the same meaning as in § 275.202(a)(11)(G)-1(d)(9).

(d) *Holding out.* If you are relying on this section, you shall not be deemed to be holding yourself out generally to the public in the United States as an investment adviser, within

the meaning of section 202(a)(30) of the Act (15 U.S.C. 80b-2 (a)(30)), solely because you participate in a non-public offering in the United States of securities issued by a private fund under the Securities Act of 1933 (15 U.S.C. 77a).

[76 FR 39701, July 6, 2011]

NEBRASKA ADMINISTRATIVE CODE

Title 48 - ~~Department of Banking and Finance~~DEPARTMENT OF BANKING AND FINANCE

Chapter 10 - RECORDKEEPING BY INVESTMENT ADVISERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to recordkeeping by investment advisers is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

002 GENERAL RECORD-KEEPING REQUIREMENTS. Every investment adviser registered or required to be registered under the Act shall make and keep true, accurate and current the following books, ledgers and records:

002.01 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.

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

002.03 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 from the client concerning the purchase, sale, receipt, or delivery of a particular security; and of any modification or cancellation of any such order or instruction.

002.03A Such memorandum shall identify:

002.03A1 The terms and conditions of the order, instruction, modification or cancellation;

002.03A2 The person connected with the investment adviser who recommended the transaction to the client and the person who placed such order; and

002.03A3 The account for which entered, the date of entry, and the broker-dealer or other entity by or through whom executed, where appropriate.

002.03B The memorandum shall designate whether the orders were entered pursuant to the exercise of discretionary power.

002.04 All checkbooks, bank statements, canceled checks and cash reconciliations of the investment adviser.

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

002.06 All trial balances, financial statements prepared in accordance with generally accepted accounting principles, and internal audit working papers relating to the investment adviser's business ~~of the investment adviser~~.

002.06A For purposes of this subsection, "financial statements" shall mean a balance sheet prepared in accordance with generally accepted accounting principles, an income statement, a cash flow statement and a net capital computation, as required by 48 NAC 7.008 and 48 NAC 7.009.

002.07 Originals of all written communications received and copies of all written communications sent by the investment adviser relating to:

002.07A The recommendation made or proposed to be made and the advice given or proposed to be given;

002.07B The receipt, disbursement or delivery of funds or securities; or

002.07C The placement or execution of any order to purchase or sell any security.

002.07D The investment adviser shall not be required to keep the following written communications:

002.07D1 Unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser; and

002.07D2 A record of the names and addresses of the persons to whom the investment adviser sent any notice, circular or other advertisement offering any report, analysis, publication or other investment adviser service, which was sent to more than ten persons, except if such notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain a memorandum describing the list and the source thereof with the copy of such notice, circular or advertisement.

002.08 A list or other record ~~of all accounts~~ which identifies the accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client.

002.09 ~~All~~ A copy of all powers of attorney and other ~~evidence~~ evidences of the ~~grant~~ granting of any discretionary authority by any client to the investment adviser ~~or to any third party, or copies thereof~~.

002.10 ~~All~~ A copy of each written agreement~~s, or copies thereof,~~ entered into by the investment adviser with any client, and all other written agreements otherwise relating to the investment adviser's business ~~of such~~ as an investment adviser.

002.11 A file containing 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, including by electronic media, to ~~ten~~ two or more persons, other than persons ~~affiliated~~ connected with such investment adviser and if such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication, including by electronic media, recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, a memorandum of the investment adviser indicating the reasons for the recommendation shall be retained.

~~002.11A If such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication recommends the purchase or sale of a specific security does not state the reasons for the recommendation, a memorandum of the investment adviser indicating the reasons for the recommendation.~~

~~002.11B For purposes of Section 002.11, persons affiliated with an investment adviser include any officer, director, managing member, general partner, or employee of the investment adviser, and individuals registered as its investment adviser representatives.~~

002.12 A record of every transaction in a security in which the investment adviser or any ~~investment adviser~~ advisory representative of such investment adviser has, or by reason of such transaction acquires, any direct or indirect beneficial ownership.

002.12A Such record shall include:

002.12A1 The title and amount of the security involved;

002.12A2 The date and nature of the transaction, such as ~~(i.e.,~~ purchase, sale or other acquisition or disposition~~)~~;

002.12A3 The price at which it was effected; and

002.12A4 The name of the broker-dealer or other entity with or through whom the transaction was effected.

002.12B Such record may 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 ~~investment adviser~~ advisory representative has any direct or indirect beneficial ownership in the security.

002.12C A transaction shall be recorded within ten days after the end of the calendar quarter in which the transaction was effected.

002.12D The investment adviser need not keep records required by ~~Section 002.12 of this Rule~~ this subsection for the following transactions:

002.12D1 Transactions effected in any account over which neither the investment adviser nor any ~~investment adviser~~advisory representative of the investment adviser has any direct or indirect influence or control; and

002.12D2 Transactions in securities which are direct obligations of the United States.

002.12E For purposes of ~~Section 002.12 of this Rule~~ this subsection, "~~investment adviser~~ advisory representative" shall mean:

002.12E1 An investment adviser as defined in the Act;

~~002.12E1~~0012.12E2 Any partner, officer, director or limited liability company member of the investment adviser;

~~002.12E2~~ 002.12E3 Any employee ~~who makes any recommendation,~~ who participates in any way in the determination of which ~~recommendation~~ recommendations shall be made; ~~, or whose functions or duties relate to the determination of which recommendation shall be made;~~

~~002.12E3~~ 002.12E4 Any employee who, in connection with his or her 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

~~002.12E4~~ 002.12E5 Any person in a control relationship to the investment adviser, any affiliated person of such controlling person, and any affiliated person of such affiliated person who obtains information concerning securities recommendations being made by such investment adviser prior to the effective dissemination of such recommendations or of the information concerning such recommendations.

002.12F For purposes of this subsection and subsection 002.13, "Control" shall ~~have the same meaning as that set forth in Section 2(a)(9) of the Investment Company Act of 1940, as amended.~~ mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with

such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty-five percent of the voting securities of a company shall be presumed to control such company.

002.12~~F~~G An investment adviser shall not be deemed to have violated the provisions of ~~Section 002.12 of this Rule~~ this subsection because of its failure to record securities transactions of any ~~investment adviser~~ advisory representative if the investment adviser establishes that adequate procedures were instituted and reasonable diligence was used to promptly obtain reports of all transactions required to be recorded.

002.13 Notwithstanding the provisions of Section 002.12, above, if the investment adviser is primarily engaged in a business or businesses other than advising investment advisory clients, a record must be maintained of every transaction in a security in which the investment adviser or any ~~investment adviser~~ advisory representative of such investment adviser has, or by reason of such transaction acquires, any direct or indirect beneficial ownership.

002.13A Such record shall include:

002.13A1 The title and amount of the security involved;

002.13A2 The date and nature of the transaction, such as ~~(i.e.,~~ purchase, sale or other acquisition or disposition~~)~~;

002.13A3 The price at which it was effected; and

002.13A4 The name of the broker-dealer or other entity with or through whom the transaction was effected.

002.13B Such record may 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 investment adviser representative has any direct or indirect beneficial ownership in the security.

002.13C A transaction shall be recorded within ten days after the end of the calendar quarter in which the transaction was effected.

002.13D The investment adviser is not required to keep records for the following transactions:

002.13D1 Transactions effected in any account over which neither the investment adviser nor ~~any investment adviser~~ advisory representative of the investment adviser has any direct or indirect influence or control; and

002.13D2 Transactions in securities which are direct obligations of the United States.

002.13E An investment adviser is "primarily engaged in a business or businesses other than advising investment advisory clients" when, for each of its most recent three fiscal years or for the period of time since organization, whichever is less, the investment adviser derived, on an unconsolidated basis, more than fifty percent ~~(50%)~~ of its total sales and revenues, and its income ~~(~~or loss~~)~~ before income taxes and extraordinary items, from such other business or businesses.

002.13F For purposes of ~~Section 002.13 of this Rule~~ this subsection, "~~investment adviser~~ advisory representative," when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, means:

002.13F1 Any partner, officer, director, member or employee of the investment adviser:

~~002.13F1a Who makes any recommendation;~~

~~002.13F1b~~ 002.13F1a Who participates in any way in the determination of which recommendation shall be made; or

~~002.13F1c Whose functions or duties relate to the determination of which recommendation shall be made; or~~

~~002.13F1d~~ 002.13F1b Whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of such recommendations; ~~or of the information concerning such recommendations;~~ and

002.13F2 Any person in a control relationship to the investment adviser, any affiliated person of such controlling person and any affiliated person of such affiliated person who obtains information concerning securities recommendations being made by such investment adviser prior to the effective dissemination of such recommendations or of the information concerning such recommendations.

~~002.13F3 "Control" shall have the same meaning as that set forth in Section 2(a)(9) of the Investment Company Act of 1940, as amended.~~

002.13F3 An investment adviser representative.

002.13G An investment adviser shall not be deemed to have violated the provisions of ~~Section 002.13 of this Rule~~ this subsection because of its failure to record securities transactions of any investment adviser representative if the investment adviser establishes that it instituted

adequate procedures ~~were instituted~~ and used reasonable diligence ~~was used~~ to obtain reports of all transactions required to be recorded. ~~promptly.~~

002.14 A copy of each written statement, including supplements for each investment adviser representative, and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of 48 NAC 7.010, and a record of the dates that each written statement, and each amendment or revision, was given, or offered to be given, to any client or prospective client who subsequently becomes a client. ~~In connection with the written statement required by 48 NAC 7.010:~~

~~002.14A A copy of such written statement and each amendment or revision to the written statement, given or sent to any client or prospective client of the investment adviser;~~

~~002.14B Any summary of material changes that is required by, but is not contained in, the written statement;~~

~~002.14C A record of the dates that each written statement, each amendment or revision thereto, and each summary of material changes was given or offered to any client or to any prospective client who subsequently becomes a client; and~~

~~002.14D A memorandum describing any legal or disciplinary event listed in Form ADV and presumed to be material, if the event involved the investment adviser or any of its supervised persons and is not disclosed in the written statements described in Section 002.14A, above. The memorandum must explain the investment adviser's determination that the presumption of materiality is overcome and must discuss the factors described in those items.~~

002.15 For each client that was obtained by the investment adviser by means of a solicitor to whom a cash fee was paid by the investment adviser:

002.15A Evidence of a written agreement to which the investment adviser is a party related to the payment of such fee;

002.15B A signed and dated acknowledgment of receipt from the client evidencing the client's receipt of the investment adviser's disclosure statement and a written disclosure statement of the solicitor; and,

002.15C A copy of the solicitor's written disclosure statement.

002.15D The written agreement, acknowledgment and solicitor disclosure statement will be considered to be in compliance if such documents are in compliance with Rule 275.206(4)-3 of the Investment Advisers Act of 1940.

002.15E For purposes of this subsection, the term "solicitor" shall mean any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients.

~~002.15~~ 002.16 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 of securities recommendations ~~contained~~ in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication, including, but not limited to, electronic ~~messages~~ media that the investment adviser circulates or distributes, directly or indirectly, to ~~ten~~ two or more persons, other than persons affiliated with such investment adviser.

~~002.15A~~ 002.16A With respect to the performance of managed accounts, the retention of all account statements, which 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 subsection ~~Section 002.15 of this Rule~~.

~~002.15B~~ 002.16B For purposes of ~~Section 002.15 of this Rule~~ this subsection, persons affiliated with an investment adviser include any officer, director, managing member, general partner, or employee of the investment adviser, and individuals registered as its investment adviser representatives.

002.17 A file containing a copy of all written communications received or sent regarding any litigation involving the investment adviser or any investment adviser representative or employee, and regarding any written customer or client complaint.

002.18 Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.

002.19 Written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

002.20 A file containing a copy of each document, other than any notices of general dissemination, that was filed with or received from any state or federal agency or self-regulatory organization and that pertains to the registrant or its advisory representatives as that term is defined in Section 002.12E of this Rule, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

~~002.16~~ 002.21 Copies, with original signatures of the investment adviser's appropriate signatory and the investment adviser representative, of each initial Uniform Application for Securities Industry Registration or Transfer (Form U4) ~~U-4~~ and each amendment to Disclosure Reporting Pages ~~(DRPs U-4)~~ must be retained by the investment adviser, ~~(~~filing on behalf of the investment adviser representative,~~)~~ and must be made available for inspection upon regulatory request.

002.22 An investment adviser who inadvertently holds or obtains securities or funds of a client, and who returns such securities or funds to the client within three business days of receiving them or forwards checks drawn by clients and made payable to third parties within three business days of receipt, will not be considered as having custody but shall keep a ledger or other listing of all securities or funds held or obtained, relating to the inadvertent custody, which ledger shall include the

name of the issuer of the securities; the type of security and series; the date of issue of the securities; the denomination, interest rate and maturity date of any debt instruments; the certificate number, including alphabetical prefix or suffix; the name in which the security is registered; the date given to the adviser; the date sent to client or sender; the form of delivery to client or sender, or copy of the form of delivery to client or sender; the mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return; and the date that each check was received by the adviser.

002.23 If an investment adviser obtains possession of securities that are acquired from the issuer in a transaction or chain of transactions not involving any public offering that comply with the exception from custody under 48 NAC 7.012.02B, the adviser shall keep the following records;

002.23A A record showing the issuer or current transfer agent's name, address, telephone number and other applicable contract information pertaining to the party responsible for recording client interests in the securities; and

002.23B A copy of any legend, shareholder agreement or other agreement showing that those securities that are transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

003 RECORDKEEPING BY INVESTMENT ADVISERS WITH CUSTODY OF CLIENT SECURITIES OR FUNDS. In addition to the records required by Section 002, above, an investment adviser which has custody or possession of securities or funds of any client as that term is defined in 48 NAC 7.012.04B shall be required to make and keep the following records:

003.01 A copy of any and all documents executed by the client, ~~(~~including a limited power of attorney, under which the adviser is authorized or permitted to withdraw a client's funds or securities maintained with a custodian upon the adviser's instruction to the custodian.

~~003.01~~ 003.02 A journal or other record showing all purchases, sales, receipts and deliveries of securities, ~~(~~including certificate numbers,~~)~~ for ~~such~~ all accounts and all other debits and credits to ~~such~~ the accounts.

~~003.02~~ 003.03 A separate ledger account for each ~~such~~ client showing all purchases, sales, receipts, and deliveries of securities, the date and price of each such purchase and sale, and all debits and credits.

~~003.03~~ 003.04 Copies of confirmations of all transactions effected by or for the account of any such client.

~~003.04~~ 003.05 A record for each security in which any ~~such~~ client has an interest, showing the name of each client having any interest in that security, the amount or interest of each client, and the location of that security.

003.06 A copy of each of the client's quarterly account statements, as generated and delivered by the qualified custodian. If the investment adviser also generates a statement that is delivered to the client, the investment adviser shall also maintain copies of such statements along with the date such statements were sent to the clients.

003.07 If applicable to the investment adviser's situation, a copy of the special examination report verifying the completion of the examination by an independent certified public accountant and describing the nature and extent of the examination.

003.08 A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.

003.09 If applicable, evidence of the client's designation of an independent representative.

003.10 If an investment adviser has custody because it advises a pooled investment vehicle, as defined in 48 NAC 7.012.04B1c, the investment adviser shall also keep the following records:

003.10A True, accurate and current account statements;

003.10B Where the adviser complies with 48 NAC 7.012.02D the records required to be made and kept shall include:

003.10B1 The date(s) of the audit;

003.10B2 A copy of the audited financial statements; and

003.10B3 Evidence of the mailing of the audited financial statements to all limited partners, members or other beneficial owners within one hundred twenty days of the end of its fiscal year.

004 RECORDKEEPING BY INVESTMENT ADVISERS WHICH RENDER INVESTMENT SUPERVISORY OR MANAGEMENT SERVICES. In addition to the records required by Section 002, above, an investment adviser which renders any investment supervisory or management service to any client shall, to the extent the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current the following records with respect to each portfolio being supervised or managed:

004.01 Separate records for each ~~such~~ client showing the securities purchased and sold, and the date, amount and price of each such purchase and sale; and

004.02 For each security in which ~~any such client has an interest~~ any client has a current position, records from which the investment adviser can promptly furnish the name of ~~each such~~ the client, and the current amount or interest of ~~such~~ the client.

~~004.03 For purposes of this Section, "investment supervisory services" means the giving of continuous advice as to investing funds based on each client's individual needs.~~

004.03 For purposes of this subsection, "investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client; and "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.

005 CLIENT IDENTITY. Any books or records required by this Rule may be maintained by the investment adviser in such manner that the identity of any client to whom ~~such~~ the investment adviser renders investment ~~advisory~~ supervisory services is indicated by numerical or alphabetical code or some similar designation. ~~, provided the investment adviser can identify, by name, the client represented by each code or designation upon a request by the Director.~~

006 RETENTION.

006.01 All books and records required by this Rule, except for books and records required by the provisions of ~~Sections~~ subsections 002.11 and ~~002.15~~ 002.16, above, 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 the principal office of the investment adviser.

006.02 Partnership articles and any amendments, articles of incorporation, ~~articles of organization as a limited liability corporation, and any amendments thereto,~~ and 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.

006.03 Books and records required by ~~Sections~~ subsections 002.11 and ~~002.15~~ 002.16, above, shall be maintained and preserved in an easily accessible location for a period of not less than five years, the first two years in the principal 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, including by electronic media.

006.04 ~~The records identified in 006.01 and 006.03 above shall be maintained and preserved in the appropriate office of the investment adviser for the first two years. Thereafter, the records may be maintained at any other location which provides the investment adviser with access to the records necessary to comply with requests for production of such records by the Director.~~ Books and records required to be made under the provisions of subsections 002.17 to 002.22, above, inclusive, 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 the principal office of the investment adviser, or for the time period during which the investment adviser was registered or required to be registered in the state, if less.

006.05 Notwithstanding other record preservation requirements of this Rule, the following records or copies shall be required to be maintained at the business location of the investment adviser from which the customer or client is being provided or has been provided with investment advisory services: (A) the records required to be preserved under Sections 002.03, 002.07 through 002.10, 002.14, 002.15, and 002.17 through 002.19. and Sections 003 and 004 inclusive, above, and (B) the records or copies required under the provision of Sections 002.11 and 002.16, above, which records or related records identify the name of the investment adviser representative providing investment advice from that business location, or which identify the business location's physical address, mailing address, electronic mailing address, or telephone number. The records shall be maintained for the period described in this subsection.

007 PERSERVATION OF BOOKS AND RECORDS. Before ceasing to conduct business as an investment adviser, an investment adviser shall arrange for and be responsible for preserving the books and records required to be maintained and preserved under ~~Section 002~~ this Rule for the remainder of the period specified therein and shall notify the Director in writing of the exact address where such books and records will be maintained during such period.

008 PRODUCTION OF BOOKS AND RECORDS. The records required to be maintained and preserved pursuant to this Rule ~~may~~ shall be immediately produced or reproduced by an investment adviser. ~~by photograph on film or, as provided below, on magnetic disk, tape or other computer storage medium, and be maintained and preserved for the required time in that form. by an investment adviser.~~

~~008.01 If records are produced or reproduced by photographic film or computer storage medium, the investment adviser shall:~~

~~008.01A Arrange the records and index the films or computer storage medium so as to provide immediate access to any particular record;~~

~~008.01B Provide a facsimile enlargement of film, a computer printout, or copy of the computer storage medium which the Director may request;~~

~~008.01C Store the original and one other copy of the film or computer storage medium separately for the time required;~~

~~008.01D With respect to records stored on computer storage medium, maintain procedures to maintain, preserve, and access the records so as to reasonably safeguard the records from loss, alteration, or destruction; and~~

~~008.01E With respect to records stored on photographic film, at all times have available for the Director's examination of its records pursuant to Section 8-1103(7) of the Act, facilities for immediate, easily readable projection of the film and for production of easily readable facsimile enlargements.~~

~~008.02 An investment adviser may maintain and preserve records on computer tape or disk or other computer storage medium if such records are created by the investment adviser on electronic media or are received by the investment adviser~~

~~solely on electronic media or by electronic data transmission in the ordinary course of the investment adviser's business.~~

008.01 Such records may be maintained and preserved for the required time by an investment adviser on:

008.01A Paper or hard copy form, as those records are kept in their original form; or

008.0~~2~~1B Micrographic media, including microfilm, microfiche, or any similar medium; or

008.0~~3~~1C Electronic storage media, including any digital storage medium or system that meets the terms of this section.

008.042 The investment adviser must:

008.042A Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;

008.042B Provide promptly any of the following that the Director, including his or her examiners or other representatives, may request:

008.042B1 A legible, true, and complete copy of the record in the medium and format in which it is stored;

008.042B2 A legible, true, and complete printout of the record; and

008.042B3 Means to access, view, and print the records; and

008.04~~B~~42C Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section.

008.0~~5~~3 In the case of records created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:

008.0~~5~~3A To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;

008.0~~5~~3B To limit access to the records to properly authorized personnel and the Director, including his or her examiners and other representatives; and

008.0~~5~~3C To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

008.074 Any book or other record made, kept, maintained and preserved in compliance with Rules 17a-3 [17 C.F.R. 240.17a-3] and 17a-4 [17 C.F.R. 240.17a-4] 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 Rule, shall be deemed to be made, kept, maintained and preserved in compliance with this Rule.

009 EXCEPTIONS. The provisions of this Rule shall not apply to any investment adviser whose principal place of business is not located in this state provided:

009.01 Such investment adviser is registered in the state in which its principal place of business is located; and

009.02 Such investment adviser is in compliance with the recordkeeping requirements established by the state in which its principal place of business is located.

009.03 For purposes of this Section, principal place of business shall mean 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.

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 4
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 275.206(4)-3 - Cash payments for client solicitations.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION (CONTINUED). PART 275 - RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940.

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

(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.

(e) *Special rule for solicitation of government entity clients.* Solicitation activities involving a government entity, as defined in § 275.206(4)-5, shall be subject to the additional limitations set forth in that section.

[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; 75 FR 41069, July 14, 2010]

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 4
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 240.17a-3 - Records to be made by certain exchange members, brokers and dealers.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION (CONTINUED). PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934. Subpart A - Rules and Regulations Under the Securities Exchange Act of 1934. - Preservation of Records and Reports of Certain Stabilizing Activities.

§ 240.17a-3 Records to be made by certain exchange members, brokers and dealers.

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, (48 Stat. 895, 49 Stat. 1377, 52 Stat. 1075; 15 U.S.C. 78*o*) shall make and keep current the following books and records relating to its business:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.

(2) Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.

(3) Ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of such member, broker or dealer and partners thereof, all purchases, sales, receipts and deliveries of securities and commodities for such account and all other debits and credits to such account.

(4) Ledgers (or other records) reflecting the following:

(i) Securities in transfer;

(ii) Dividends and interest received;

(iii) Securities borrowed and securities loaned;

(iv) Moneys borrowed and moneys loaned (together with a record of the collateral therefor and any substitutions in such collateral);

(v) Securities failed to receive and failed to deliver;

(vi) All long and all short securities record differences arising from the examination, count, verification and comparison pursuant to §§ 240.17a-5, 240.17a-12, and 240.17a-13 (by date of examination, count, verification and comparison showing for each security the number of long or short count differences);

(vii) Repurchase and reverse repurchase agreements;

(5) A securities record or ledger reflecting separately for each security as of the clearance dates all "long" or "short" positions (including securities in safekeeping and securities that are the subjects of repurchase or reverse repurchase agreements) carried by such member, broker or dealer for its account of for the account of its customers or partners or others and showing the location of all securities long and the offsetting position to all securities short, including long security count differences and short security count differences classified by the date of the physical count and verification in which they were discovered, and in all cases the name or designation of the account in which each position is carried.

(6)(i) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. The memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation. The memorandum need not show the identity of any person, other than the associated person responsible for the account, who may have entered or accepted the order if the order is entered into an electronic system that generates the memorandum and if that system is not capable of receiving an entry of the identity of any person other than the responsible associated person; in that circumstance, the member, broker or dealer shall produce upon request by a representative of a securities regulatory authority a separate record which identifies each other person. An order entered pursuant to the exercise of discretionary authority by the member, broker or dealer, or associated person thereof, shall be so designated. The term *instruction* shall include instructions between partners and employees of a member, broker or dealer. The term *time of entry* shall mean the time when the member, broker or dealer transmits the order or instruction for execution.

(ii) This memorandum need not be made as to a purchase, sale or redemption of a security on a subscription way basis directly from or to the issuer, if the member, broker or dealer maintains a copy of the customer's subscription agreement regarding a purchase, or a copy of any other document required by the issuer regarding a sale or redemption.

(7) A memorandum of each purchase and sale for the account of the member, broker, or dealer showing the price and, to the extent feasible, the time of execution; and, in addition, where the purchase or sale is with a customer other than a broker or dealer, a memorandum of each order received, showing the time of receipt; the terms and conditions of the order and of any modification thereof; the account for which it was entered; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer or, if a customer entered the order on an electronic system, a notation of that entry. The memorandum need not show the identity of any person other than the associated person responsible for the account who may have entered the order if the order is entered into an electronic system that generates the memorandum and if that system is not capable of receiving an entry of the identity of any person other than the responsible associated person: in that circumstance, the member, broker or dealer shall produce upon request by a representative of a securities regulatory authority a separate record which identifies each other person. An order with a customer other than a member, broker or dealer entered pursuant to the exercise of discretionary authority by the member, broker or dealer, or associated person thereof, shall be so designated.

(8) Copies of confirmations of all purchases and sales of securities, including all repurchase and reverse repurchase agreements, and copies of notices of all other debits and credits for securities, cash and other items for the account of customers and partners of such member, broker or dealer.

(9) A record in respect of each cash and margin account with such member, broker or dealer indicating

(i) The name and address of the beneficial owner of such account, and

(ii) Except with respect to exempt employee benefit plan securities as defined in § 240.14a-1(d), but only to the extent such securities are held by employee benefit plans established by the issuer of the securities, whether or not the beneficial owner of securities registered in the name of such members, brokers or dealers, or a registered clearing agency or its nominee objects to disclosure of his or her identity, address and securities positions to issuers, and

(iii) In the case of a margin account, the signature of such owner; *Provided,* That, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account.

(10) A record of all puts, calls, spreads, straddles and other options in which such member, broker or dealer has any direct or indirect interest or which such members, broker or dealer has granted or guaranteed, containing, at least, an identification of the security and the number of units involved. An OTC derivatives dealer shall also keep a record of all eligible OTC derivative instruments as defined in § 240.3b-13 in which the OTC derivatives dealer has any direct or indirect interest or which it has written or guaranteed, containing, at a minimum, an identification of the security or other instrument, the number of units involved, and the identity of the counterparty.

(11) A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to § 240.15c3-1; *Provided, however,* (i) That such computation need not be made by any member, broker or dealer unconditionally exempt from § 240.15c3-1 by paragraph (b)(1) or (b)(3), thereof; and (ii) that any member of an exchange whose members are exempt from § 240.15c3-1 by paragraph (b)(2) thereof shall make a record of the computation of aggregate indebtedness and net capital as of the trial balance date in accordance with the capital rules of at least one of the exchanges therein listed of which it is a member. Such trial balances and computations shall be prepared currently at least once a month.

(12)(i) A questionnaire or application for employment executed by each "associated person" (as defined in paragraph (h)(4) of this section) of the member, broker or dealer, which questionnaire or application shall be approved in writing by an authorized representative of the member, broker or dealer and shall contain at least the following information with respect to the associated person:

(A) The associated person's name, address, social security number, and the starting date of the associated person's employment or other association with the member, broker or dealer;

(B) The associated person's date of birth;

(C) A complete, consecutive statement of all the associated person's business connections for at least the preceding ten years, including whether the employment was part-time or full-time;

(D) A record of any denial of membership or registration, and of any disciplinary action taken, or sanction imposed, upon the associated person by any federal or state agency, or by any national securities exchange or national securities association, including any finding that the associated person was a cause of any disciplinary action or had violated any law;

(E) A record of any denial, suspension, expulsion or revocation of membership or registration of any member, broker or dealer with which the associated person was associated in any capacity when such action was taken;

(F) A record of any permanent or temporary injunction entered against the associated person or any member, broker or dealer with which the associated person was associated in any capacity at the time such injunction was entered;

(G) A record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association), fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion, and the disposition of the foregoing.

(H) A record of any other name or names by which the associated person has been known or which the associated person has used;

Provided, however, That if such associated person has been registered as a registered representative of such member, broker or dealer with, or the associated person's employment has been approved by, the Financial Industry Regulatory Authority, Inc., the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Arca, Inc., the Philadelphia Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the National Stock Exchange, Inc. or the International Securities Exchange, LLC, then retention of a full, correct, and complete copy of any and all applications for such registration or approval shall be deemed to satisfy the requirements of this paragraph.

(ii) A record listing every associated person of the member, broker or dealer which shows, for each associated person, every office of the member, broker or dealer where the associated person regularly conducts the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security for the member, broker or dealer, and the Central Registration Depository number, if any, and every internal identification number or code assigned to that person by the member, broker or dealer.

(13) Records required to be maintained pursuant to paragraph (d) of § 240.17f-2.

(14) Copies of all Forms X-17F-1A filed pursuant to § 240.17f-1, all agreements between reporting institutions regarding registration or other aspects of § 240.17f-1, and all confirmations or other information received from the Commission or its designee as a result of inquiry.

(15) Records required to be maintained pursuant to paragraph (e) of § 240.17f-2.

(16)(i) The following records regarding any internal broker-dealer system of which such a broker or dealer is the sponsor:

(A) A record of the broker's or dealer's customers that have access to an internal broker-dealer system sponsored by such broker or dealer (identifying any affiliations between such customers and the broker or dealer);

(B) Daily summaries of trading in the internal broker-dealer system, including:

(*1*) Securities for which transactions have been executed through use of such system; and

(*2*) Transaction volume (separately stated for trading occurring during hours when consolidated trade reporting facilities are and are not in operation):

(*i*) With respect to equity securities, stated in number of trades, number of shares, and total U.S. dollar value;

(*ii*) With respect to debt securities, stated in total settlement value in U.S. dollars; and

(*iii*) With respect to other securities, stated in number of trades, number of units of securities, and in dollar value, or other appropriate commonly used measure of value of such securities; and

(C) Time-sequenced records of each transaction effected through the internal broker-dealer system, including date and time executed, price, size, security traded, counterparty identification information, and method of execution (if internal broker-dealer system allows alternative means or locations for execution, such as routing to another market, matching with limit orders, or executing against the quotations of the broker or dealer sponsoring the system).

(ii) For purposes of paragraph (a) of this section, the term:

(A) *Internal broker-dealer system* shall mean any facility, other than a national securities exchange, an exchange exempt from registration based on limited volume, or an alternative trading system as defined in Regulation ATS, §§ 242.300 through 242.303 of this chapter, that provides a mechanism, automated in full or in part, for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, or between two customers of the sponsor,

through use of the internal broker-dealer system or through the broker or dealer sponsor of such system;

(B) *Sponsor* shall mean any broker or dealer that organizes, operates, administers, or otherwise directly controls an internal broker-dealer trading system or, if the operator of the internal broker-dealer system is not a registered broker or dealer, any broker or dealer that, pursuant to contract, affiliation, or other agreement with the system operator, is involved on a regular basis with executing transactions in connection with use of the internal broker-dealer system, other than solely for its own account or as a customer with access to the internal broker-dealer system; and

(C) *System order* means any order or other communication or indication submitted by any customer with access to the internal broker-dealer system for entry into a trading system announcing an interest in purchasing or selling a security. The term "system order" does not include inquiries or indications of interest that are not entered into the internal broker-dealer system.

(17) For each account with a natural person as a customer or owner:

(i)(A) An account record including the customer's or owner's name, tax identification number, address, telephone number, date of birth, employment status (including occupation and whether the customer is an associated person of a member, broker or dealer), annual income, net worth (excluding value of primary residence), and the account's investment objectives. In the case of a joint account, the account record must include personal information for each joint owner who is a natural person; however, financial information for the individual joint owners may be combined. The account record shall indicate whether it has been signed by the associated person responsible for the account, if any, and approved or accepted by a principal of the member, broker or dealer. For accounts in existence on the effective date of this section, the member, broker or dealer must obtain this information within three years of the effective date of the section.

(B) A record indicating that:

(*1*) The member, broker or dealer has furnished to each customer or owner within three years of the effective date of this section, and to each customer or owner who opened an account after the effective date of this section within thirty days of the opening of the account, and thereafter at intervals no greater than thirty-six months, a copy of the account record or an alternate document with all information required by paragraph (a)(17)(i)(A) of this section. The member, broker or dealer may elect to send this notification with the next statement mailed to the customer or owner after the opening of the account. The member, broker or dealer may choose to exclude any tax identification number and date of birth from the account record or alternative document furnished to the customer or owner. The member, broker or dealer shall include with the account record or alternative document provided to each customer or owner an explanation of any terms regarding investment objectives. The account record or alternate document furnished to the customer or owner shall include or be accompanied by prominent statements that the customer or owner should mark any corrections and return the account record or alternate document to the member, broker or dealer, and that the customer or owner should notify the member, broker or dealer of any future changes to information contained in the account record.

(*2*) For each account record updated to reflect a change in the name or address of the customer or owner, the member, broker or dealer furnished a notification of that change to the customer's old address, or to each joint owner, and the associated person, if any, responsible for that account, on or before the 30th day after the date the member, broker or dealer received notice of the change.

(*3*) For each change in the account's investment objectives the member, broker or dealer has furnished to each customer or owner, and the associated person, if any, responsible for that account a copy of the updated customer account record or alternative document with all information required to be furnished by paragraph (a)(17)(i)(B)(*1*) of this section, on or before the 30th day after the date the member, broker or dealer received notice of any change, or, if the account was updated for some reason other than the firm receiving notice of a change, after the date the account record was updated. The member, broker or dealer may elect to send this notification with the next statement scheduled to be mailed to the customer or owner.

(C) For purposes of this paragraph (a)(17), the neglect, refusal, or inability of a customer or owner to provide or update any account record information required under paragraph (a)(17)(i)(A) of this section shall excuse the member, broker or dealer from obtaining that required information.

(D) The account record requirements in paragraph (a)(17)(i)(A) of this section shall only apply to accounts for which the member, broker or dealer is, or has within the past 36 months been, required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member. Additionally, the furnishing requirement in paragraph (a)(17)(i)(B)(*1*) of this section shall not be applicable to an account for which, within the last 36 months, the member, broker or dealer has not been required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member. This paragraph (a)(17)(i)(D) does not relieve a member, broker or dealer from any obligation arising from the rules of a self-regulatory organization of which it is a member regarding the collection of information from a customer or owner.

(ii) If an account is a discretionary account, a record containing the dated signature of each customer or owner granting the authority and the dated signature of each natural person to whom discretionary authority was granted.

(iii) A record for each account indicating that each customer or owner was furnished with a copy of each written agreement entered into on or after the effective date of this paragraph pertaining to that account and that, if requested by the customer or owner, the customer or owner was furnished with a fully executed copy of each agreement.

(18) A record:

(i) As to each associated person of each written customer complaint received by the member, broker or dealer concerning that associated person. The record shall include the complainant's name, address, and account number; the date the complaint was received; the name of any other associated person identified in the complaint; a description of the nature of the complaint; and the disposition of the complaint. Instead of the record, a member, broker or dealer may maintain a copy of each original complaint in a separate file by the associated person named in the complaint along with a record of the disposition of the complaint.

(ii) Indicating that each customer of the member, broker or dealer has been provided with a notice containing the address and telephone number of the department of the member, broker or dealer to which any complaints as to the account may be directed.

(19) A record:

(i) As to each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person. The record shall include the amount of compensation if monetary and a description of the compensation if non-monetary. In lieu of making this record, a member, broker or dealer may elect to produce the required information promptly upon request of a representative of a securities regulatory authority.

(ii) Of all agreements pertaining to the relationship between each associated person and the member, broker or dealer including a summary of each associated person's compensation arrangement or plan with the member, broker or dealer, including commission and concession schedules and, to the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation is determined.

(20) A record, which need not be separate from the advertisements, sales literature, or communications, documenting that the member, broker or dealer has complied with, or adopted policies and procedures reasonably designed to establish compliance with, applicable federal requirements and rules of a self-regulatory organization of which the member, broker or dealer is a member which require that advertisements, sales literature, or any other communications with the public by a member, broker or dealer or its associated persons be approved by a principal.

(21) A record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the firm maintains at that office and the information contained in those records.

(22) A record listing each principal of a member, broker or dealer responsible for establishing policies and procedures that are reasonably designed to ensure compliance with any applicable federal requirements or rules of a self-regulatory organization of which the member, broker or dealer is a member that require acceptance or approval of a record by a principal.

(23) A record documenting the credit, market, and liquidity risk management controls established and maintained by the broker or dealer to assist it in analyzing and managing the risks associated with its business activities, *Provided,* that the records required by this paragraph (a)(23) need only be made if the broker or dealer has more than:

(i) $1,000,000 in aggregate credit items as computed under § 240.15c3-3a; or

(ii) $20,000,000 in capital, which includes debt subordinated in accordance with § 240.15c3-1d.

(b)(1) This section shall not be deemed to require a member of a national securities exchange, a broker, or dealer who transacts a business in securities through the medium of any such member, or a broker or dealer registered pursuant to section 15 of the Act, to make or keep such records of transactions cleared for such member, broker, or dealer as are customarily made and kept by a clearing broker or dealer pursuant to the requirements of §§ 240.17a-3 and 240.17a-4: *Provided,* That the clearing broker or dealer has and maintains net capital of not less than $25,000 and is otherwise in compliance with § 240.15c3-1 or the capital rules of the exchange of which such clearing broker or dealer is a member if the members of such exchange are exempt from § 240.15c3-1 by paragraph (b)(2) thereof.

(2) This section shall not be deemed to require a member of a national securities exchange, a broker, or dealer who transacts a business in securities through the medium of any such member, or a broker or dealer registered pursuant to section 15 of the Act, to make or keep such records of transactions cleared for such member, broker or dealer by a bank as are customarily made and kept by a clearing broker or dealer pursuant to the requirements of §§ 240.17a-3 and 240.17a-4: *Provided,* That such member, broker, or dealer obtains from such bank an agreement in writing to the effect that the records made and kept by such bank are the property of the member, broker, or dealer: *And provided further,* That such bank files with the Commission a written undertaking in form acceptable to the Commission and signed by a duly authorized person, that such books and records are available for examination by representatives of the Commission as specified in section 17(a) of the Act, and that it will furnish to the Commission, upon demand, at its principal office in Washington, DC, or at any regional office of the Commission designated in such demand, true, correct, complete, and current copies of any or all of such records. Such undertaking shall include the following provisions:

THE UNDERSIGNED HEREBY UNDERTAKES TO MAINTAIN AND PRESERVE ON BEHALF OF [*BD*] THE BOOKS AND RECORDS REQUIRED TO BE MAINTAINED AND PRESERVED BY [*BD*] PURSUANT TO RULES 17A-3 AND 17A-4 UNDER THE SECURITIES EXCHANGE ACT OF 1934 AND TO PERMIT EXAMINATION OF SUCH BOOKS AND RECORDS AT ANY TIME OR FROM TIME TO TIME DURING BUSINESS HOURS BY EXAMINERS OR OTHER REPRESENTATIVES OF THE SECURITIES AND EXCHANGE COMMISSION, AND TO FURNISH TO SAID COMMISSION AT ITS PRINCIPAL OFFICE IN WASHINGTON, DC, OR AT ANY REGIONAL OFFICE OF SAID COMMISSION SPECIFIED IN A DEMAND MADE BY OR ON BEHALF OF SAID COMMISSION FOR COPIES OF BOOKS AND RECORDS, TRUE, CORRECT, COMPLETE, AND CURRENT COPIES OF ANY OR ALL, OR ANY PART, OF SUCH BOOKS AND RECORDS. THIS UNDERTAKING SHALL BE BINDING UPON THE UNDERSIGNED, AND THE SUCCESSORS AND ASSIGNS OF THE UNDERSIGNED.

Nothing herein contained shall be deemed to relieve such member, broker, or dealer from the responsibility that such books and records be accurately maintained and preserved as specified in §§ 240.17a-3 and 240.17a-4.

(c) This section shall not be deemed to require a member of a national securities exchange, or a broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934 (48 Stat. 895, 49 Stat. 1377; 15 U.S.C. 78*o*) as amended, to make or keep such records as are required by paragraph (a) reflecting the sale of United States Tax Savings Notes, United States Defense Savings Stamps, or United States Defense Savings Bonds, Series E, F and G.

(d) The records specified in paragraph (a) of this section shall not be required with respect to any cash transaction of $100 or less involving only subscription rights or warrants which by their terms expire within 90 days after the issuance thereof.

(e) For purposes of transactions in municipal securities by municipal securities brokers and municipal securities dealers, compliance with Rule G-8 of the Municipal Securities Rulemaking Board will be deemed to be in compliance with this section.

(f) *Security futures products.* The provisions of this section shall not apply to security futures product transactions and positions in a futures account (as that term is defined in § 240.15c3-3 (a)(15)); *provided,* that the Commodity Futures Trading Commission's recordkeeping rules apply to those transactions and positions.

(g) Every member, broker or dealer shall make and keep current, as to each office, the books and records described in paragraphs (a)(1), (a)(6), (a)(7), (a)(12), (a)(17), (a)(18)(i), (a)(19), (a)(20), (a)(21), and (a)(22) of this section.

(h) When used in this section:

(1) The term *office* means any location where one or more associated persons regularly conduct the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security.

(2) The term *principal* means any individual registered with a registered national securities association as a principal or branch manager of a member, broker or dealer or any other person who has been delegated supervisory responsibility over associated persons by the member, broker or dealer.

(3) The term *securities regulatory authority* means the Commission, any self-regulatory organization, or any securities commission (or any agency or office performing like functions) of the States.

(4) The term *associated person* means an "associated person of a member" or "associated person of a broker or dealer" as defined in sections 3(a)(21) and 3(a)(18) of the Act (15 U.S.C. 78c(a)(21) and (a)(18)) respectively, but shall not include persons whose functions are solely clerical or ministerial.

Cross References For interpretative release applicable to § 240.17a-3, see No. 3040 tabulation, part 241 of this chapter.
[13 FR 8212, Dec. 22, 1948]

Editorial Note: For **Federal Register** citations affecting § 240.17a-3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 4
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 240.17a-4 - Records to be preserved by certain exchange members, brokers and dealers.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION (CONTINUED). PART 240 - GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934. Subpart A - Rules and Regulations Under the Securities Exchange Act of 1934. - Preservation of Records and Reports of Certain Stabilizing Activities.

§ 240.17a-4 Records to be preserved by certain exchange members, brokers and dealers.

(a) Every member, broker and dealer subject to § 240.17a-3 shall preserve for a period of not less than six years, the first two years in an easily accessible place, all records required to be made pursuant to paragraphs § 240.17a-3(a)(1), (a)(2), (a)(3), (a)(5), (a)(21), (a)(22), and analogous records created pursuant to paragraph § 240.17a-3(f).

(b) Every member, broker and dealer subject to § 240.17a-3 shall preserve for a period of not less than three years, the first two years in an easily accessible place:

(1) All records required to be made pursuant to § 240.17a-3(a)(4), (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), (a)(16), (a)(18), (a)(19), (a)(20), and analogous records created pursuant to § 240.17a-3(g).

(2) All check books, bank statements, cancelled checks and cash reconciliations.

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such.

(4) Originals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public. As used in this paragraph (b)(4), the term communications includes sales scripts.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such member, broker or dealer, as such.

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to its business as such, including agreements with respect to any account.

(8) Records which contain the following information in support of amounts included in the report prepared as of the audit date on Form X-17A-5 (§ 249.617 of this chapter) Part II or Part IIA or Part IIB and in annual audited financial statements required by § 240.17a-5(d) and § 240.17a-12(b):

(i) Money balance position, long or short, including description, quantity, price and valuation of each security including contractual commitments in customers' accounts, in cash and fully

secured accounts, partly secured accounts, unsecured accounts, and in securities accounts payable to customers;

(ii) Money balance and position, long or short, including description, quantity, price and valuation of each security including contractual commitments in non-customers' accounts, in cash and fully secured accounts, partly secured and unsecured accounts, and in securities accounts payable to non-customers;

(iii) Position, long or short, including description, quantity, price and valuation of each security including contractual commitments included in the Computation of Net Capital as commitments, securities owned, securities owned not readily marketable, and other investments owned not readily marketable;

(iv) Amount of secured demand note, description of collateral securing such secured demand note including quantity, price and valuation of each security and cash balance securing such secured demand note;

(v) Description of futures commodity contracts, contract value on trade date, market value, gain or loss, and liquidating equity or deficit in customers' and non-customers' accounts;

(vi) Description of futures commodity contracts, contract value on trade date, market value, gain or loss and liquidating equity or deficit in trading and investment accounts;

(vii) Description, money balance, quantity, price and valuation of each spot commodity position or commitments in customers' and non-customers' accounts;

(viii) Description, money balance, quantity, price and valuation of each spot commodity position or commitments in trading and investment accounts;

(ix) Number of shares, description of security, exercise price, cost and market value of put and call options including short out of the money options having no market or exercise value, showing listed and unlisted put and call options separately;

(x) Quantity, price, and valuation of each security underlying the haircut for undue concentration made in the Computation for Net Capital;

(xi) Description, quantity, price and valuation of each security and commodity position or contractual commitment, long or short, in each joint account in which the broker or dealer has an interest, including each participant's interest and margin deposit;

(xii) Description, settlement date, contract amount, quantity, market price, and valuation for each aged failed to deliver requiring a charge in the Computation of Net Capital pursuant to § 240.15c3-1;

(xiii) Detail relating to information for possession or control requirements under § 240.15c3-3 and reported on the schedule in Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter);

(xiv) Detail of all items, not otherwise substantiated, which are charged or credited in the Computation of Net Capital pursuant to § 240.15c3-1, such as cash margin deficiencies, deductions related to securities values and undue concentration, aged securities differences and insurance claims receivable; and

(xv) Other schedules which are specifically prescribed by the Commission as necessary to support information reported as required by § 240.17a-5 and § 240.17a-12.

(9) The records required to be made pursuant to § 240.15c3-3(d)(5) and (o).

(10) The records required to be made pursuant to § 240.15c3-4 and the results of the periodic reviews conducted pursuant to § 240.15c3-4(d).

(11) All notices relating to an internal broker-dealer system provided to the customers of the broker or dealer that sponsors such internal broker-dealer system, as defined in paragraph (a)(16)(ii)(A) of § 240.17a-3. Notices, whether written or communicated through the internal broker-dealer trading system or other automated means, shall be preserved under this paragraph (b)(11) if they are provided to all customers with access to an internal broker-dealer system, or to

one or more classes of customers. Examples of notices to be preserved under this paragraph (b)(11) include, but are not limited to, notices addressing hours of system operations, system malfunctions, changes to system procedures, maintenance of hardware and software, and instructions pertaining to access to the internal broker-dealer system.

(12) The records required to be made pursuant to § 240.15c3-1e(c)(4)(vi).

(13) The written policies and procedures the broker-dealer establishes, documents, maintains, and enforces to assess creditworthiness for the purpose of § 240.15c3-1(c)(2)(vi)(E), (c)(2)(vi)(F)(*1*), (c)(2)(vi)(F)(*2*), and (c)(2)(vi)(H).

(c) Every member, broker and dealer subject to § 240.17a-3 shall preserve for a period of not less than six years after the closing of any customer's account any account cards or records which relate to the terms and conditions with respect to the opening and maintenance of the account.

(d) Every member, broker and dealer subject to § 240.17a-3 shall preserve during the life of the enterprise and of any successor enterprise all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books and stock certificate books (or, in the case of any other form of legal entity, all records such as articles of organization or formation, and minute books used for a purpose similar to those records required for corporations or partnerships), all Forms BD (§ 249.501 of this chapter), all Forms BDW (§ 249.501a of this chapter), all amendments to these forms, all licenses or other documentation showing the registration of the member, broker or dealer with any securities regulatory authority.

(e) Every member, broker and dealer subject to § 240.17a-3 shall maintain and preserve in an easily accessible place:

(1) All records required under paragraph (a)(12) of § 240.17a-3 until at least three years after the associated person's employment and any other connection with the member, broker or dealer has terminated.

(2) All records required under paragraph (a)(13) of § 240.17a-3 until at least three years after the termination of employment or association of those persons required by § 240.17f-2 to be fingerprinted; and

(3) All records required pursuant to paragraph (a)(15) of § 240.17a-3 for the life of the enterprise.

(4) All records required pursuant to paragraph (a)(14) of § 240.17a-3 for three years.

(5) All account record information required pursuant to § 240.17a-3(a)(17) until at least six years after the earlier of the date the account was closed or the date on which the information was replaced or updated.

(6) Each report which a securities regulatory authority has requested or required the member, broker or dealer to make and furnish to it pursuant to an order or settlement, and each securities regulatory authority examination report until three years after the date of the report.

(7) Each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions to the manual, describing the policies and practices of the member, broker or dealer with respect to compliance with applicable laws and rules, and supervision of the activities of each natural person associated with the member, broker or dealer until three years after the termination of the use of the manual.

(8) All reports produced to review for unusual activity in customer accounts until eighteen months after the date the report was generated. In lieu of maintaining the reports, a member, broker or dealer may produce promptly the reports upon request by a representative of a securities regulatory authority. If a report was generated in a computer system that has been changed in the most recent eighteen month period in a manner such that the report cannot be reproduced using historical data in the same format as it was originally generated, the report may be produced by using the historical data in the current system, but must be accompanied by a record explaining each system change which affected the reports. If a report is generated in a computer system that has been changed in the most recent eighteen month period in a manner such that the report cannot be reproduced in any format using historical data, the member,

broker or dealer shall promptly produce upon request a record of the parameters that were used to generate the report at the time specified by a representative of a securities regulatory authority, including a record of the frequency with which the reports were generated.

(9) All records required pursuant to § 240.17a-3(a)(23) until three years after the termination of the use of the risk management controls documented therein.

(f) The records required to be maintained and preserved pursuant to §§ 240.17a-3 and 240.17a-4 may be immediately produced or reproduced on "micrographic media" (as defined in this section) or by means of "electronic storage media" (as defined in this section) that meet the conditions set forth in this paragraph and be maintained and preserved for the required time in that form.

(1) For purposes of this section:

(i) The term *micrographic media* means microfilm or microfiche, or any similar medium; and

(ii) The term *electronic storage media* means any digital storage medium or system and, in the case of both paragraphs (f)(1)(i) and (f)(1)(ii) of this section, that meets the applicable conditions set forth in this paragraph (f).

(2) If electronic storage media is used by a member, broker, or dealer, it shall comply with the following requirements:

(i) The member, broker, or dealer must notify its examining authority designated pursuant to section 17(d) of the Act (15 U.S.C. 78q(d)) prior to employing electronic storage media. If employing any electronic storage media other than optical disk technology (including CD-ROM), the member, broker, or dealer must notify its designated examining authority at least 90 days prior to employing such storage media. In either case, the member, broker, or dealer must provide its own representation or one from the storage medium vendor or other third party with appropriate expertise that the selected storage media meets the conditions set forth in this paragraph (f)(2).

(ii) The electronic storage media must:

(A) Preserve the records exclusively in a non-rewriteable, non-erasable format;

(B) Verify automatically the quality and accuracy of the storage media recording process;

(C) Serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media; and

(D) Have the capacity to readily download indexes and records preserved on the electronic storage media to any medium acceptable under this paragraph (f) as required by the Commission or the self-regulatory organizations of which the member, broker, or dealer is a member.

(3) If a member, broker, or dealer uses micrographic media or electronic storage media, it shall:

(i) At all times have available, for examination by the staffs of the Commission and self-regulatory organizations of which it is a member, facilities for immediate, easily readable projection or production of micrographic media or electronic storage media images and for producing easily readable images.

(ii) Be ready at all times to provide, and immediately provide, any facsimile enlargement which the staffs of the Commission, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker or dealer may request.

(iii) Store separately from the original, a duplicate copy of the record stored on any medium acceptable under § 240.17a-4 for the time required.

(iv) Organize and index accurately all information maintained on both original and any duplicate storage media.

(A) At all times, a member, broker, or dealer must be able to have such indexes available for examination by the staffs of the Commission and the self- regulatory organizations of which the broker or dealer is a member.

(B) Each index must be duplicated and the duplicate copies must be stored separately from the original copy of each index.

(C) Original and duplicate indexes must be preserved for the time required for the indexed records.

(v) The member, broker, or dealer must have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to §§ 240.17a-3 and 240.17a-4 to electronic storage media and inputting of any changes made to every original and duplicate record maintained and preserved thereby.

(A) At all times, a member, broker, or dealer must be able to have the results of such audit system available for examination by the staffs of the Commission and the self-regulatory organizations of which the broker or dealer is a member.

(B) The audit results must be preserved for the time required for the audited records.

(vi) The member, broker, or dealer must maintain, keep current, and provide promptly upon request by the staffs of the Commission or the self-regulatory organizations of which the member, broker, or broker-dealer is a member all information necessary to access records and indexes stored on the electronic storage media; or place in escrow and keep current a copy of the physical and logical file format of the electronic storage media, the field format of all different information types written on the electronic storage media and the source code, together with the appropriate documentation and information necessary to access records and indexes.

(vii) For every member, broker, or dealer exclusively using electronic storage media for some or all of its record preservation under this section, at least one third party ("the undersigned"), who has access to and the ability to download information from the member's, broker's, or dealer's electronic storage media to any acceptable medium under this section, shall file with the designated examining authority for the member, broker, or dealer the following undertakings with respect to such records:

THE UNDERSIGNED HEREBY UNDERTAKES TO FURNISH PROMPTLY TO THE U.S. SECURITIES AND EXCHANGE COMMISSION ("COMMISSION"), ITS DESIGNEES OR REPRESENTATIVES, ANY SELF-REGULATORY ORGANIZATION OF WHICH IT IS A MEMBER, OR ANY STATE SECURITIES REGULATOR HAVING JURISDICTION OVER THE MEMBER, BROKER OR DEALER, UPON REASONABLE REQUEST, SUCH INFORMATION AS IS DEEMED NECESSARY BY THE STAFFS OF THE COMMISSION, ANY SELF-REGULATORY ORGANIZATION OF WHICH IT IS A MEMBER, OR ANY STATE SECURITIES REGULATOR HAVING JURISDICTION OVER THE MEMBER, BROKER OR DEALER TO DOWNLOAD INFORMATION KEPT ON THE BROKER'S OR DEALER'S ELECTRONIC STORAGE MEDIA TO ANY MEDIUM ACCEPTABLE UNDER RULE 17A-4.

FURTHERMORE, THE UNDERSIGNED HEREBY UNDERTAKES TO TAKE REASONABLE STEPS TO PROVIDE ACCESS TO INFORMATION CONTAINED ON THE BROKER'S OR DEALER'S ELECTRONIC STORAGE MEDIA, INCLUDING, AS APPROPRIATE, ARRANGEMENTS FOR THE DOWNLOADING OF ANY RECORD REQUIRED TO BE MAINTAINED AND PRESERVED BY THE BROKER OR DEALER PURSUANT TO RULES 17A-3 AND 17A-4 UNDER THE SECURITIES EXCHANGE ACT OF 1934 IN A FORMAT ACCEPTABLE TO THE STAFFS OF THE COMMISSION, ANY SELF-REGULATORY ORGANIZATION OF WHICH IT IS A MEMBER, OR ANY STATE SECURITIES REGULATOR HAVING JURISDICTION OVER THE MEMBER, BROKER OR DEALER. SUCH ARRANGEMENTS WILL PROVIDE SPECIFICALLY THAT IN THE EVENT OF A FAILURE ON THE PART OF A BROKER OR DEALER TO DOWNLOAD THE RECORD INTO A READABLE FORMAT AND AFTER REASONABLE NOTICE TO THE BROKER OR DEALER, UPON BEING PROVIDED WITH THE APPROPRIATE ELECTRONIC STORAGE MEDIUM, THE UNDERSIGNED WILL UNDERTAKE TO DO SO, AS THE STAFFS OF THE COMMISSION, ANY SELF-REGULATORY ORGANIZATION OF WHICH IT IS A MEMBER, OR ANY STATE SECURITIES REGULATOR HAVING JURISDICTION OVER THE MEMBER, BROKER OR DEALER MAY REQUEST.

(g) If a person who has been subject to § 240.17a-3 ceases to transact a business in securities directly with others than members of a national securities exchange, or ceases to transact a business in securities through the medium of a member of a national securities exchange, or ceases to be registered pursuant to section 15 of the Securities Exchange Act of 1934 as amended (48 Stat. 895, 49 Stat. 1377; 15 U.S.C. 78*o*), such person shall, for the remainder of the periods of time specified in this section, continue to preserve the records which he theretofore preserved pursuant to this section.

(h) For purposes of transactions in municipal securities by municipal securities brokers and municipal securities dealers, compliance with Rule G-9 of the Municipal Securities Rulemaking Board will be deemed to be in compliance with this section.

(i) If the records required to be maintained and preserved pursuant to the provisions of §§ 240.17a-3 and 240.17a-4 are prepared or maintained by an outside service bureau, depository, bank which does not operate pursuant to § 240.17a-3(b)(2), or other recordkeeping service on behalf of the member, broker or dealer required to maintain and preserve such records, such outside entity shall file with the Commission a written undertaking in form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the member, broker or dealer required to maintain and preserve such records and will be surrendered promptly on request of the member, broker or dealer and including the following provision:

WITH RESPECT TO ANY BOOKS AND RECORDS MAINTAINED OR PRESERVED ON BEHALF OF [BD], THE UNDERSIGNED HEREBY UNDERTAKES TO PERMIT EXAMINATION OF SUCH BOOKS AND RECORDS AT ANY TIME OR FROM TIME TO TIME DURING BUSINESS HOURS BY REPRESENTATIVES OR DESIGNEES OF THE SECURITIES AND EXCHANGE COMMISSION, AND TO PROMPTLY FURNISH TO SAID COMMISSION OR ITS DESIGNEE TRUE, CORRECT, COMPLETE AND CURRENT HARD COPY OF ANY OR ALL OR ANY PART OF SUCH BOOKS AND RECORDS.

Agreement with an outside entity shall not relieve such member, broker or dealer from the responsibility to prepare and maintain records as specified in this section or in § 240.17a-3.

(j) Every member, broker and dealer subject to this section shall furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the member, broker or dealer that are required to be preserved under this section, or any other records of the member, broker or dealer subject to examination under section 17(b) of the Act (15 U.S.C. 78*q*(b)) that are requested by the representative of the Commission.

(k) *Exchanges of futures for physical.* (1) Except as provided in paragraph (k)(2) of this section, upon request of any designee or representative of the Commission or of any self-regulatory organization of which it is a member, every member, broker or dealer subject to this section shall request and obtain from its customers documentation regarding an exchange of security futures products for physical securities, including documentation of underlying cash transactions and exchanges. Upon receipt of such documentation, the member, broker or dealer shall promptly provide that documentation to the requesting designee or representative.

(2) This paragraph (k) does not apply to an underlying cash transaction(s) or exchange(s) that was effected through a member, broker or dealer registered with the Commission and is of a type required to be recorded pursuant to § 240.17a-3.

(l) Records for the most recent two year period required to be made pursuant to § 240.17a-3(g) and paragraphs (b)(4) and (e)(7) of this section which relate to an office shall be maintained at the office to which they relate. If an office is a private residence where only one associated person (or multiple associated persons who reside at that location and are members of the same immediate family) regularly conducts business, and it is not held out to the public as an office nor are funds or securities of any customer of the member, broker or dealer handled there, the member, broker or dealer need not maintain records at that office, but the records must be maintained at another location within the same State as the member, broker or dealer may select. Rather than maintain the records at each office, the member, broker or dealer may choose to produce the records promptly at the request of a representative of a securities regulatory authority at the office to which they relate or at another location agreed to by the representative.

(m) When used in this section:

(1) The term *office* shall have the meaning set forth in § 240.17a-3(h)(1).

(2) The term *principal* shall have the meaning set forth in § 240.17a-3(h)(2).

(3) The term *securities regulatory authority* shall have the meaning set forth in § 240.17a-3(h)(3).

(4) The term *associated person* shall have the meaning set forth in § 240.17a-3(h)(4).

Cross Reference For interpretative releases applicable to § 240.17a-4, see No. 3040 and No. 8024 in tabulation, part 241 of this chapter.
[13 FR 8212, Dec. 22, 1948]

Editorial Note: For **Federal Register** citations affecting § 240.17a-4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 11 - PERFORMANCE BASED COMPENSATION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1102(3) and Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to performance based compensation for investment advisers and investment adviser representatives is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected parties, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Chapter is attached hereto.

002 REQUIREMENT. Notwithstanding the provisions of Section 8-1102(3)(a), an investment adviser ~~or an investment adviser representative~~ may enter into, perform, renew or extend an investment advisory contract that provides for compensation to the investment adviser ~~or investment adviser representative~~ 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, if: ~~the client entering into the contract subject to this section is a qualified client, as defined in Section 005.01 below.~~

002.01 The investment adviser is not registered and is not required to be registered pursuant to Section 8-1103(2) of the Act; or

002.02 The following conditions are met:

002.02A The client entering into the contract is a "qualified client", as defined by Rule 205-3 under the Investment Advisers Act of 1940 (17 C.F.R. §275.205-3); and

002.02B To the extent not otherwise disclosed on Uniform Application for Investment Adviser Registration, Form ADV Part 2, the investment adviser must disclose in writing to the client all material information concerning the proposed advisory arrangement, including the following:

002.02B1 That the fee arrangement may create an incentive for the investment adviser to make investments that are riskier or more speculative than would be the case in the absence of a performance fee;

002.02B2 Where relevant, that the investment adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client's account;

002.02B3 The periods which will be used to measure investment performance throughout the contract and their significance in the computation of the fee;

002.02B4 The nature of any index which will be used as a comparative measure of investment performance, the significance of the index, and the reason the investment adviser believes that the index is appropriate; and

002.02B5 Where the investment adviser's compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available within the meaning of Rule 2a-4(a)(1) under the Investment Company Act of 1940, 17 C.F.R. 270.2a-4(a)(1), how the securities will be valued and the extent to which the valuation will be independently determined.

003 IDENTIFICATION OF THE CLIENT. In the case of a private investment company, as defined in Section ~~005.03~~005.02 below, 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 Investment Advisers Act of 1940 (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 Section 002 of this Rule.

004 TRANSITION RULE. ~~An investment adviser or investment adviser representative that entered into a contract before the effective date of this Rule and satisfied the conditions of 48 NAC 18, Performance Based Compensation, issued February 25, 1992, in effect on the date that the contract was entered into will be considered to satisfy the conditions of this Rule. This Rule 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 the effective date of these amendments.~~

004.01 If an investment adviser entered into a contract and satisfied the conditions of this Rule that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of this Rule; provided, however, that if a natural person or company who was not a party to the contract becomes a party, including an equity owner of a private investment company advised by the adviser, the conditions of this Rule in effect when the person or company becomes a party to the contract will apply with regard to that person or company.

004.02 If an investment adviser was not required to register pursuant to Section 8-1103(2) of the Act and was not registered, Section 8-1102(3)(a) of the Act shall not apply to an advisory contract entered into when the investment adviser was not required to register and was not registered; provided, however, that the investment adviser was in compliance with all rules and regulations regarding performance based compensation in any jurisdiction in which the investment adviser was registered or required to be registered at the time of entering into the advisory contract.

004.03 Solely for purposes of this section, a transfer of an equity ownership interest in a private investment company by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, will not cause the transferee to "become a party" to the contract, and will not cause Section 8-1102(3)(a) of the Act to apply to such transferee.

005 DEFINITIONS. For the purposes of this Rule:

~~005.01 The term "qualified client" means:~~

~~005.01A 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;~~

~~005.01B 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:~~

~~005.01B1 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~~

~~005.01B2 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~~

~~005.01C A natural person who immediately prior to entering into the contract is:~~

~~005.01C1 An executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or~~

~~005.01C2 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.~~

~~005.02~~005.01 The term "company" has the same meaning as in section 202(a)(5) of the Investment Advisers Act of 1940 (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.

~~005.03~~005.02 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)).

~~005.04 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.~~

006 Nothing in the Rule, or the amendment of any previous rule regarding performance based compensation, shall be construed to alter the obligation of an investment adviser, as a fiduciary, to deal fairly with its clients and to make full and fair disclosure of its compensation arrangements, including disclosure of all material information regarding a proposed performance fee arrangement as well as any material conflicts posed by this arrangement.

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 4
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 275.205-3 - Exemption from the compensation prohibition of section 205(a)(1) for investment advisers.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION (CONTINUED). PART 275 - RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940.

§ 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 rules*—(1) *Registered investment advisers.* If a registered investment adviser entered into a contract and satisfied the conditions of this section that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of this section; *Provided,* however, that if a natural person or company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser), the conditions of this section in effect at that time will apply with regard to that person or company.

(2) *Registered investment advisers that were previously not registered.* If an investment adviser was not required to register with the Commission pursuant to section 203 of the Act (15 U.S.C. 80b-3) and was not registered, section 205(a)(1) of the Act will not apply to an advisory contract entered into when the adviser was not required to register and was not registered, or to an account of an equity owner of a private investment company advised by the adviser if the account was established when the adviser was not required to register and was not registered; *Provided,* however, that section 205(a)(1) of the Act will apply with regard to a natural person or company who was not a party to the contract and becomes a party (including an equity owner of a private investment company advised by the adviser) when the adviser is required to register.

(3) *Certain transfers of interests.* Solely for purposes of paragraphs (c)(1) and (c)(2) of this section, a transfer of an equity ownership interest in a private investment company by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, will not cause the transferee to "become a party" to the contract and will not cause section 205(a)(1) of the Act to apply to such transferee.

(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 $1,000,000 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 $2,000,000. For purposes of calculating a natural person's net worth:

(*1*) The person's primary residence must not be included as an asset;

(*2*) Indebtedness secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time the investment advisory contract is entered into may not be included as a liability (except that if the amount of such indebtedness outstanding at the time of calculation exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess must be included as a liability); and

(*3*) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the residence must be included as a liability; 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.

(e) *Inflation adjustments.* Pursuant to section 205(e) of the Act, the dollar amounts specified in paragraphs (d)(1)(i) and (d)(1)(ii)(A) of this section shall be adjusted by order of the Commission, on or about May 1, 2016 and issued approximately every five years thereafter. The adjusted dollar amounts established in such orders shall be computed by:

(1) Dividing the year-end value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), as published by the United States Department of Commerce, for the calendar year preceding the calendar year in which the order is being issued, by the year-end value of such index (or successor) for the calendar year 1997;

(2) For the dollar amount in paragraph (d)(1)(i) of this section, multiplying $750,000 times the quotient obtained in paragraph (e)(1) of this section and rounding the product to the nearest multiple of $100,000; and

(3) For the dollar amount in paragraph (d)(1)(ii)(A) of this section, multiplying $1,500,000 times the quotient obtained in paragraph (e)(1) of this section and rounding the product to the nearest multiple of $100,000.

[63 FR 39027, July 21, 1998, as amended at 69 FR 72088, Dec. 10, 2004; 77 FR 10368, Feb. 22, 2012]

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 4
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 270.2a-4 - Definition of âcurrent net asset valueâ for use in computing periodically the current price of redeemable security.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION (CONTINUED). PART 270 - RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940.

§ 270.2a-4 Definition of "current net asset value" for use in computing periodically the current price of redeemable security.

(a) The current net asset value of any redeemable security issued by a registered investment company used in computing periodically the current price for the purpose of distribution, redemption, and repurchase means an amount which reflects calculations, whether or not recorded in the books of account, made substantially in accordance with the following, with estimates used where necessary or appropriate.

(1) Portfolio securities with respect to which market quotations are readily available shall be valued at current market value, and other securities and assets shall be valued at fair value as determined in good faith by the board of directors of the registered company.

(2) Changes in holdings of portfolio securities shall be reflected no later than in the first calculation on the first business day following the trade date.

(3) Changes in the number of outstanding shares of the registered company resulting from distributions, redemptions, and repurchases shall be reflected no later than in the first calculation on the first business day following such change.

(4) Expenses, including any investment advisory fees, shall be included to date of calculation. Appropriate provision shall be made for Federal income taxes if required. Investment companies which retain realized capital gains designated as a distribution to shareholders shall comply with paragraph (h) of § 210.6-03 of Regulation S-X.

(5) Dividends receivable shall be included to date of calculation either at ex-dividend dates or record dates, as appropriate.

(6) Interest income and other income shall be included to date of calculation.

(b) The items which would otherwise be required to be reflected by paragraphs (a) (4) and (6) of this section need not be so reflected if cumulatively, when netted, they do not amount to as much as one cent per outstanding share.

(c) Notwithstanding the requirements of paragraph (a) of this section, any interim determination of current net asset value between calculations made as of the close of the New York Stock Exchange on the preceding business day and the current business day may be estimated so as to reflect any change in current net asset value since the closing calculation on the preceding business day.

(Secs. 7, 19(a), 48 Stat. 78, 85, 908, 15 U.S.C. 77g, 77s(a); secs. 12, 13, 15(d), 23(a), 48 Stat. 892, 894, 895, 901; secs. 3, 8, 49 Stat. 1377, 1379, secs. 3, 4, 78 Stat. 569, 570, secs. 1, 2, 82 Stat. 454, 15 U.S.C. 78l, 78m, 78o(d), 78w(a); secs. 8, 22, 30, 31(c), 38(a), 54 Stat. 803, 823, 836, 838, 841, 15 U.S.C. 80a-8, 80a-22, 80a-29, 80a-30(c)) [29 FR 19101, Dec. 30, 1964, as amended at 35 FR 314, Jan. 8, 1970; 47 FR 56844, Dec. 21, 1982]

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER II - INVESTMENT ADVISERS
Sec. 80b-2 - Definitions
From the U.S. Government Publishing Office, www.gpo.gov

§80b–2. Definitions

(a) In general

When used in this subchapter, unless the context otherwise requires, the following definitions shall apply:

(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract shall be deemed to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(2) "Bank" means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 1462(5) of title 12, (B) a member bank of the Federal Reserve System, (C) any other banking institution, savings association, as defined in section 1462(4) of title 12, or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(3) The term "broker" has the same meaning as given in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c].

(4) "Commission" means the Securities and Exchange Commission.

(5) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under title 11, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such.

(6) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(7) The term "dealer" has the same meaning as given in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c], but does not include an insurance company or investment company.

(8) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(9) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to

securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(10) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 [12 U.S.C. 1841 et seq.] which is not an investment company, except that the term "investment adviser" includes any bank or bank holding company to the extent that such bank or bank holding company serves or acts as an investment adviser to a registered investment company, but if, in the case of a bank, such services or actions are performed through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the investment adviser; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(12)], as exempted securities for the purposes of that Act [15 U.S.C. 78a et seq.]; (F) any nationally recognized statistical rating organization, as that term is defined in section 3(a)(62) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(62)], unless such organization engages in issuing recommendations as to purchasing, selling, or holding securities or in managing assets, consisting in whole or in part of securities, on behalf of others;; [1] (G) any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this subchapter; or (H) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

(12) "Investment company", affiliated person, and "insurance company" have the same meanings as in the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.]. "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

(13) "Investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.

(14) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(15) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934 [15 U.S.C. 78f].

(16) "Person" means a natural person or a company.

(17) The term "person associated with an investment adviser" means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that for the purposes of section 80b–3 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may by rules

and regulations classify, for the purposes of any portion of portions of this subchapter, persons, including employees controlled by an investment adviser.

(18) "Security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing.

(19) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(20) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(21) "Securities Act of 1933" [15 U.S.C. 77a et seq.], "Securities Exchange Act of 1934" [15 U.S.C. 78a et seq.], and "Trust Indenture Act of 1939" [15 U.S.C. 77aaa et seq.], mean those Acts, respectively, as heretofore or hereafter amended.

(22) "Business development company" means any company which is a business development company as defined in section 80a–2(a)(48) of this title and which complies with section 80a–54 of this title, except that—

(A) the 70 per centum of the value of the total assets condition referred to in sections 80a–2 (a)(48) and 80a–54 of this title shall be 60 per centum for purposes of determining compliance therewith;

(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 80a–54 through 80a–64 of this title; and

(C) the securities which may be purchased pursuant to section 80a–54(a) of this title may be purchased from any person.

For purposes of this paragraph, all terms in sections 80a–2(a)(48) and 80a–54 of this title shall have the same meaning set forth in subchapter I of this chapter as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 80a–54 through 80a–64 of this title shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities, and shall be determined no less frequently than annually.

(23) "Foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(24) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign

equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(25) "Supervised person" means any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the investment adviser.

(26) The term "separately identifiable department or division" of a bank means a unit—

(A) that is under the direct supervision of an officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's investment adviser activities for one or more investment companies, including the supervision of all bank employees engaged in the performance of such activities; and

(B) for which all of the records relating to its investment adviser activities are separately maintained in or extractable from such unit's own facilities or the facilities of the bank, and such records are so maintained or otherwise accessible as to permit independent examination and enforcement by the Commission of this subchapter or the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.] and rules and regulations promulgated under this subchapter or the Investment Company Act of 1940.

(27) The terms "security future" and "narrow-based security index" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(55)].

(28) The term "credit rating agency" has the same meaning as in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c].

(29) [2] The term "private fund" means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3 (c)(1) or 3(c)(7) of that Act.

(30) The term "foreign private adviser" means any investment adviser who—

(A) has no place of business in the United States;

(B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser;

(C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this subchapter; and

(D) neither—

(i) holds itself out generally to the public in the United States as an investment adviser; nor

(ii) acts as—

(I) an investment adviser to any investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.]; or

(II) a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53), and has not withdrawn its election.

(29) [3] The terms "commodity pool", "commodity pool operator", "commodity trading advisor", "major swap participant", "swap", "swap dealer", and "swap execution facility" have the same meanings as in section 1a of title 7.

(b) Applicability to Federal or State government, agency, or instrumentality, or to officers, agents, or employees thereof

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or

more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(c) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(Aug. 22, 1940, ch. 686, title II, §202, 54 Stat. 847; Pub. L. 86–70, §12(c), June 25, 1959, 73 Stat. 143; Pub. L. 86–624, §7(d), July 12, 1960, 74 Stat. 412; Pub. L. 86–750, §1, Sept. 13, 1960, 74 Stat. 885; Pub. L. 89–485, §13(j), July 1, 1966, 80 Stat. 243; Pub. L. 91–547, §23, Dec. 14, 1970, 84 Stat. 1430; Pub. L. 95–598, title III, §311, Nov. 6, 1978, 92 Stat. 2676; Pub. L. 96–477, title II, §201, Oct. 21, 1980, 94 Stat. 2289; Pub. L. 97–303, §6, Oct. 13, 1982, 96 Stat. 1410; Pub. L. 100–181, title VII, §701, Dec. 4, 1987, 101 Stat. 1263; Pub. L. 101–550, title II, §206(b), Nov. 15, 1990, 104 Stat. 2720; Pub. L. 104–290, title III, §303(c), Oct. 11, 1996, 110 Stat. 3438; Pub. L. 106–102, title II, §§217–219, 224, Nov. 12, 1999, 113 Stat. 1399, 1400, 1402; Pub. L. 106–554, §1(a)(5) [title II, §209(a)(2), (4)], Dec. 21, 2000, 114 Stat. 2763, 2763A–435, 2763A–436; Pub. L. 109–291, §4(b)(3)(A), (B), Sept. 29, 2006, 120 Stat. 1337; Pub. L. 109–351, title IV, §401(b)(1), Oct. 13, 2006, 120 Stat. 1973; Pub. L. 111–203, title IV, §§402(a), 409(a), title VII, §770, title IX, §986(d), July 21, 2010, 124 Stat. 1570, 1575, 1801, 1936.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle B (§§761–774) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

REFERENCES IN TEXT

The Bank Holding Company Act of 1956, referred to in subsec. (a)(11)(A), is act May 9, 1956, ch. 240, 70 Stat. 133, which is classified principally to chapter 17 (§1841 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 1841 of Title 12 and Tables.

The Investment Company Act of 1940, referred to in subsec. (a)(12), (26)(B), (30)(D)(ii)(I), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, which is classified generally to subchapter I (§80a–1 et seq.) of this chapter. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

The Securities Act of 1933, referred to in subsec. (a)(21), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, which is classified generally to subchapter I (§77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (a)(21), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

The Trust Indenture Act of 1939, referred to in subsec. (a)(21), is title III of act May 27, 1933, ch. 38, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149, which is classified generally to subchapter III (§77aaa et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77aaa of this title and Tables.

This subchapter, referred to in subsec. (a)(26)(B), was in the original "this Act" and was translated as reading "this title", meaning title II of act Aug. 22, 1940, ch. 686, known as the Investment Advisers Act of 1940, to reflect the probable intent of Congress.

AMENDMENTS

2010—Subsec. (a)(11)(G), (H). Pub. L. 111–203, §409(a), added subpar. (G) and redesignated former subpar. (G) as (H).

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER I - INVESTMENT COMPANIES
Sec. 80a-3 - Definition of investment company
From the U.S. Government Publishing Office, www.gpo.gov

§80a–3. Definition of investment company

(a) Definitions

(1) When used in this subchapter, "investment company" means any issuer which—

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c) of this section.

(b) Exemption from provisions

Notwithstanding paragraph (1)(C) of subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this subchapter applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Further exemptions

Notwithstanding subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. Such issuer shall be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a–12(d)(1) of this title governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer. For purposes of this paragraph:

(A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, and is or, but for the exception provided for in this paragraph or paragraph (7), would be an investment company, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper).

(B) Beneficial ownership by any person who acquires securities or interests in securities of an issuer described in the first sentence of this paragraph shall be deemed to be beneficial ownership by the person from whom such transfer was made, pursuant to such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter, where the transfer was caused by legal separation, divorce, death, or other involuntary event.

(2)(A) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as broker, and acting as market intermediary, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(B) For purposes of this paragraph—

(i) the term "market intermediary" means any person that regularly holds itself out as being willing contemporaneously to engage in, and that is regularly engaged in, the business of entering into transactions on both sides of the market for a financial contract or one or more such financial contracts; and

(ii) the term "financial contract" means any arrangement that—

(I) takes the form of an individually negotiated contract, agreement, or option to buy, sell, lend, swap, or repurchase, or other similar individually negotiated transaction commonly entered into by participants in the financial markets;

(II) is in respect of securities, commodities, currencies, interest or other rates, other measures of value, or any other financial or economic interest similar in purpose or function to any of the foregoing; and

(III) is entered into in response to a request from a counter party for a quotation, or is otherwise entered into and structured to accommodate the objectives of the counter party to such arrangement.

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; or any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian, if—

(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4), and (5) of this subsection, or in one or more of such businesses (from which not less than 25 per centum of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7)(A) Any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Securities that are owned by persons who received the securities from a qualified purchaser as a gift or bequest, or in a case in which the transfer was caused by legal separation, divorce, death, or other involuntary event, shall be deemed to be owned by a qualified purchaser, subject to such rules, regulations, and orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) Notwithstanding subparagraph (A), an issuer is within the exception provided by this paragraph if—

(i) in addition to qualified purchasers, outstanding securities of that issuer are beneficially owned by not more than 100 persons who are not qualified purchasers, if—

(I) such persons acquired any portion of the securities of such issuer on or before September 1, 1996; and

(II) at the time at which such persons initially acquired the securities of such issuer, the issuer was excepted by paragraph (1); and

(ii) prior to availing itself of the exception provided by this paragraph—

(I) such issuer has disclosed to each beneficial owner, as determined under paragraph (1), that future investors will be limited to qualified purchasers, and that ownership in such issuer is no longer limited to not more than 100 persons; and

(II) concurrently with or after such disclosure, such issuer has provided each beneficial owner, as determined under paragraph (1), with a reasonable opportunity to redeem any part or all of their interests in the issuer, notwithstanding any agreement to the contrary between the issuer and such persons, for that person's proportionate share of the issuer's net assets.

(C) Each person that elects to redeem under subparagraph (B)(ii)(II) shall receive an amount in cash equal to that person's proportionate share of the issuer's net assets, unless the issuer elects to provide such person with the option of receiving, and such person agrees to receive, all or a portion of such person's share in assets of the issuer. If the issuer elects to provide such persons

with such an opportunity, disclosure concerning such opportunity shall be made in the disclosure required by subparagraph (B)(ii)(I).

(D) An issuer that is excepted under this paragraph shall nonetheless be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a–12(d)(1) of this title relating to the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer.

(E) For purposes of determining compliance with this paragraph and paragraph (1), an issuer that is otherwise excepted under this paragraph and an issuer that is otherwise excepted under paragraph (1) shall not be treated by the Commission as being a single issuer for purposes of determining whether the outstanding securities of the issuer excepted under paragraph (1) are beneficially owned by not more than 100 persons or whether the outstanding securities of the issuer excepted under this paragraph are owned by persons that are not qualified purchasers. Nothing in this subparagraph shall be construed to establish that a person is a bona fide qualified purchaser for purposes of this paragraph or a bona fide beneficial owner for purposes of paragraph (1).

(8) [Repealed] Pub. L. 111–203, title IX, §986(c)(2), July 21, 2010, 124 Stat. 1936.

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10)(A) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes—

(i) no part of the net earnings of which inures to the benefit of any private shareholder or individual; or

(ii) which is or maintains a fund described in subparagraph (B).

(B) For the purposes of subparagraph (A)(ii), a fund is described in this subparagraph if such fund is a pooled income fund, collective trust fund, collective investment fund, or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of one or more of the following:

(i) assets of the general endowment fund or other funds of one or more charitable organizations;

(ii) assets of a pooled income fund;

(iii) assets contributed to a charitable organization in exchange for the issuance of charitable gift annuities;

(iv) assets of a charitable remainder trust or of any other trust, the remainder interests of which are irrevocably dedicated to any charitable organization;

(v) assets of a charitable lead trust;

(vi) assets of a trust, the remainder interests of which are revocably dedicated to or for the benefit of 1 or more charitable organizations, if the ability to revoke the dedication is limited to circumstances involving—

(I) an adverse change in the financial circumstances of a settlor or an income beneficiary of the trust;

(II) a change in the identity of the charitable organization or organizations having the remainder interest, provided that the new beneficiary is also a charitable organization; or

(III) both the changes described in subclauses (I) and (II);

(vii) assets of a trust not described in clauses (i) through (v), the remainder interests of which are revocably dedicated to a charitable organization, subject to subparagraph (C); or

(viii) such assets as the Commission may prescribe by rule, regulation, or order in accordance with section 80a–6(c) of this title.

(C) A fund that contains assets described in clause (vii) of subparagraph (B) shall be excluded from the definition of an investment company for a period of 3 years after December 8, 1995, but only if—

(i) such assets were contributed before the date which is 60 days after December 8, 1995; and

(ii) such assets are commingled in the fund with assets described in one or more of clauses (i) through (vi) and (viii) of subparagraph (B).

(D) For purposes of this paragraph—

(i) a trust or fund is "maintained" by a charitable organization if the organization serves as a trustee or administrator of the trust or fund or has the power to remove the trustees or administrators of the trust or fund and to designate new trustees or administrators;

(ii) the term "pooled income fund" has the same meaning as in section 642(c)(5) of title 26;

(iii) the term "charitable organization" means an organization described in paragraphs (1) through (5) of section 170(c) or section 501(c)(3) of title 26;

(iv) the term "charitable lead trust" means a trust described in section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of title 26;

(v) the term "charitable remainder trust" means a charitable remainder annuity trust or a charitable remainder unitrust, as those terms are defined in section 664(d) of title 26; and

(vi) the term "charitable gift annuity" means an annuity issued by a charitable organization that is described in section 501(m)(5) of title 26.

(11) Any employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of title 26; or any governmental plan described in section 77c(a)(2)(C) of this title; or any collective trust fund maintained by a bank consisting solely of assets of one or more of such trusts, government plans, or church plans, companies or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of section 401 of title 26 or the requirements for deduction of the employer's contribution under section 404(a)(2) of title 26, (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 77e of this title by section 77c(a)(2)(C) of this title, and (C) advances made by an insurance company in connection with the operation of such separate account.

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and short-term paper.

(14) Any church plan described in section 414(e) of title 26, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is—

(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of title 26; and

(B) substantially all of the activities of which consist of—

(i) managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under title 26; or

(ii) administering or providing benefits pursuant to church plans.

(Aug. 22, 1940, ch. 686, title I, §3, 54 Stat. 797; Oct. 21, 1942, ch. 619, title I, §162(e), 56 Stat. 867; Pub. L. 89–485, §13(i), July 1, 1966, 80 Stat. 243; Pub. L. 91–547, §3(a), (b), Dec. 14, 1970, 84 Stat. 1414; Pub. L. 94–210, title III, §308(c), Feb. 5, 1976, 90 Stat. 57; Pub. L. 96–477, title I, §102, title VII, §703, Oct. 21, 1980, 94 Stat. 2276, 2295; Pub. L. 100–181, title VI, §§604–606, Dec. 4, 1987,

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 12 - FRAUDULENT, DISHONEST AND UNETHICAL BUSINESS PRACTICES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Director has determined that this Rule relating to unethical and fraudulent business practices by broker-dealers, agents, investment advisers, federal covered advisers, and investment adviser representatives is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 The delineation in this Rule of certain acts and practices is not intended to be all inclusive. Acts or practices not enumerated herein may also be deemed fraudulent or dishonest.

001.06 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the statutes or rules referenced in this Rule is available as an appendix to this rule at http://www.ndbf.ne.gov/legal/title48.shtml.

002 FRAUDULENT PRACTICES OF BROKER-DEALERS AND AGENTS. A broker-dealer or agent who engages in one or more of the following practices shall be deemed to have engaged in an "act, practice, or course of business which operates or would operate as a fraud" as used in Section 8-1102(1)(c) of the Act:

002.01 Entering into a transaction with a customer in any security at an unreasonable price, or at a price not reasonably related to the current market price of the security, or receiving an unreasonable commission or profit.

002.02 Contradicting or negating the importance of any information contained in a prospectus or other offering materials with intent to deceive or mislead, or using any advertising or sales presentation in a deceptive or misleading manner.

002.03 In connection with the offer, sale, or purchase of a security, falsely leading a customer to believe that the broker-dealer or agent is in possession of material, non-public information which would impact on the value of the security.

002.04 In connection with the solicitation of a sale or purchase of a security, engaging in a pattern or practice of making contradictory recommendations to different investors of similar investment objectives for some to sell and others to purchase the same security, at or about the same time, when not justified by the particular circumstance of each investor.

002.05 Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things, (1) transferring securities to a customer, another broker-dealer or a fictitious account with the understanding that those securities will be returned to the broker-dealer or its nominees, or (2) "parking" or withholding securities.

002.06 Failing to disclose the firm's present bid and ask price of a particular security at the time of solicitation, and the firm's bid and ask price at the time of execution of the written confirmation.

002.07 In connection with the solicitation of a purchase or sale of over the counter ("OTC") unlisted non-NASDAQ equity securities, ~~F~~failing to advise the customer, both at the time of solicitation and on the written confirmation, of any and all compensation related to the specific securities transaction which is to be paid to the agent, including commissions, sales charges, or concessions.

002.08 In connection with a principal transaction, failing to disclose, both at the time of solicitation and on the written confirmation, a short inventory position in the firm's account of more than five percent ~~(5%)~~ of the issued and outstanding shares of that class of securities of the issuer, provided that this subsection shall apply only if the firm is a market maker at the time of the solicitation.

002.09 Conducting sales contests in a particular security.

002.10 After a solicited purchase by a customer, failing or refusing, in connection with a principal transaction, to promptly execute sell orders.

002.11 Soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market.

002.12 Engaging in a pattern of compensating an agent in different amounts for effecting contemporaneous sales and purchases in the same security.

002.13 ~~Effecting any transaction in or inducing the purchase or sale of any security by means of any manipulative, deceptive, or other device or contrivance including but not limited to the use of boiler room tactics or use of fictitious or nominee accounts.~~ Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include, but not be limited to;

002.13A Effecting any transaction in a security which involves no change in the beneficial ownership thereof.

002.13B Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the

same size, at substantially the same time and substantially the same price, for the sale of any such security, has been, or will be, entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security. Nothing in this subsection shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers.

002.13C Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

002.14 ~~Failing to comply with any prospectus delivery requirement promulgated under any law.~~ Failing to furnish to a customer purchasing securities in an offering, no later than the due date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and any additional document, which together include all information set forth in the final prospectus.

002.15 ~~Allowing a customer to invest inappropriately~~ Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

002.16 Representing that a market will be established, or that securities will be subject to an increase in value.

002.17 ~~Willfully delaying delivery of securities purchased or remittance for securities sold.~~ Engaging in unreasonable and/or unjustifiable delays in the delivery of securities purchased by any of its customers and/or in the payment upon request of free credit balances reflecting completed transactions of any of its customers.

002.18 In connection with the solicitation of a purchase of a designated security:

002.18A Failing to disclose to the customer the bid and ask price, at which the broker-dealer effects transactions with individual, retail customers, of the designated security as well as its spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents; or

002.18B Failing to include with the confirmation a written explanation of the bid and ask price.

002.18C The following transactions shall be exempt from the requirements of this ~~Section~~subsection:

002.18C1 Transactions in which the price of the designated security is five dollars ($5.00) or more, exclusive of costs or charges; provided, however, that if the designated security is a unit composed of one or more securities, the unit price divided

by the number of components of the unit other than warrants, options, rights, or similar securities must be five dollars ($5.00) or more, and any component of the unit that is a warrant, option, right, or similar security, or a convertible security must have an exercise price or conversion price of five dollars ($5.00) or more;

002.18C2 Transactions that are not recommended by the broker-dealer or agent;

002.18C3 Transactions by a broker-dealer:

002.18C3a Whose commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the immediately preceding three months, and during eleven or more of the preceding twelve months, did not exceed five percent ~~(5%)~~ of its total commissions, commission-equivalents, and mark-ups from transactions in securities during those months; and

002.18C3b Who has not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the immediately preceding twelve months.

002.18C4 Any transaction or transactions that, upon prior written request or upon his or her own motion, the Director conditionally or unconditionally exempts as not encompassed within the purposes of this Section.

002.18D For purposes of this Section, the term "designated security" means any equity security other than a security:

002.18D1 Registered, or approved for registration upon notice of issuance, on a national securities exchange, and the issuer of which makes transaction reports available pursuant to ~~17 CFR 11Aa3-1~~17 CFR 242.601;

002.18D2 Authorized, or approved for authorization upon notice of issuance, for quotation in the ~~National Association of Securities Dealers Automated Quotation System ("Nasdaq");~~ Nasdaq Stock Market;

002.18D3 Issued by an investment company registered under the Investment Company Act of 1940;

002.18D4 That is a put option or call option issued by The Options Clearing Corporation; or

002.18D5 Issued by a company ~~whose~~ which has net tangible assets in excess of four million dollars ($4,000,000.00) as demonstrated by financial statements dated less than fifteen ~~15~~ months previously that the broker-dealer has reviewed and has a reasonable basis to believe are true and complete in relation to the date of the transaction with the person, and are:

002.18D5a The most recent financial statements of the issuer, other than a foreign private issuer, that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2~~-~~02; or

002.18D5b The most recent financial statements of the foreign private issuer that have been filed with the ~~Securities and Exchange Commission ("SEC");~~ SEC; furnished to the SEC pursuant to 17 CFR 240.12g3-2(b); or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

002.19 Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.

002.20 Executing a transaction on behalf of a customer without authorization to do so.

002.21 Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the executing of orders.

002.22 Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account.

002.23 Failing to segregate customers' free securities or securities held in safekeeping.

002.24 Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business.

002.25 Offering to buy from, or to sell to, any person any security at a stated price unless such broker-dealer is prepared to purchase or sell, as the case may be, at

such price and under such conditions as are stated at the time of such offer to buy or sell.

002.26 Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless the broker-dealer knows or has reasonable grounds to believe that a market for the security exists other than that made, created or controlled by the broker-dealer, or by a person the broker-dealer is acting or with whom the broker-dealer is associated in such distribution, or any person controlled by, controlling or under common control with, the broker-dealer.

002.27 Guaranteeing a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer.

002.28 Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale or such security; or which purports to quote the bid price or asked price for any security, unless such broker-dealer believes that such quotation represents a bona fide bid for, or offer of, such security.

002.29 Failing to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with, the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, the existence of such control to such customer, and if such disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

002.30 Failing or refusing to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written request or complaint.

003 UNETHICAL PRACTICES FOR BROKER-DEALERS, ISSUER-DEALERS, AND AGENTS. A broker-dealer, issuer-dealer or agent who engages in one or more of the following practices shall be deemed to have engaged in a "dishonest or unethical practice" as used in Section 8-1103(9)(a)(vii) of the Act:

003.01 Any acts or practices enumerated in Section 002, above.

003.02 In connection with the solicitation of a sale or purchase of an Over the Counter ("OTC"), unlisted, non-Nasdaq security, failing to promptly provide the most current prospectus or the most recent periodic report filed under Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. 78m, when requested to do so by a customer.

003.03 Marking any order tickets or confirmations as unsolicited when in fact the transaction was solicited.

003.04 Failing to provide documentation of unsolicited sales to the Department upon request, pursuant to 48 NAC 14.

003.05 Failing to provide each customer with a statement of account which, with respect to all OTC non-Nasdaq equity securities in the account, contains a value for each such security based on the closing market bid on a date certain.

003.05A This statement must cover any month in which activity has occurred in a customer's account, but in no event shall be provided less than every three months.

003.05B This ~~Section~~ subsection shall apply only if the firm has been a market maker in such security at any time during the month in which the monthly or quarterly statement is issued.

003.06 Failing to comply with any applicable provision of ~~the conduct Rules of the National Association of Securities Dealers, Inc., or any applicable~~ fair practice or ethical rules and/or standards promulgated by the SEC, FINRA or by a self-regulatory organization approved by the SEC.~~, and~~

003.07 Failing to cooperate with, or providing false or incomplete information to, the Director in connection with an investigation or inquiry.

004 DISHONEST AND UNETHICAL PRACTICES FOR BROKER-DEALERS AND AGENTS IN CONNECTION WITH THE SALE OF INVESTMENT COMPANY SECURITIES. A broker-dealer or agent who engages in one or more of the following practices shall be deemed to have engaged in "dishonest or unethical practices in the securities business" as used in Section 8-1103(9)(a)(vii) of the Act:

004.01 Sales Load Communications.

004.01A In connection with the offer or sale of investment company shares, failing to adequately disclose to a customer all sales charges, including asset based and contingent deferred sales charges, which may be imposed with respect to the purchase, retention or redemption of such shares.

004.01B In connection with the solicitation of investment company shares, stating or implying to a customer that the shares are sold without a commission, are "no load" or have "no sales charge" if there is associated with the purchase of the shares a front-end load, a contingent deferred sales load, a SEC Rule 12b-1 fee, 17 CFR 270.12b-1, or a service fee which exceeds one-quarter of one percent ~~(.25%)~~ of average net fund assets per year, or in the case of closed-end investment company shares, underwriting fees, commissions or other offering expenses.

004.01C In connection with the solicitation of investment company shares, failing to disclose to a customer any relevant:

004.01C1 Sales charge discount on the purchase of shares in dollar amounts at or above a breakpoint; ~~or~~

004.01C2 Letter of intent feature, if available, which will reduce the sales charges to the customer.

004.01D In connection with the solicitation of investment company shares, recommending to a customer the purchase of a specific class of investment company shares in connection with a multi-class sales charge or fee arrangement without reasonable grounds to believe that the sales charge or fee arrangement associated with such class of shares is suitable and appropriate based on the customer's investment objectives, financial situation and other securities holdings, and the associated transaction or other fees.

004.02 Recommendations.

004.02A In connection with the solicitation of investment company shares, recommending to a customer the purchase of investment company shares which results in the customer simultaneously holding shares in different investment company portfolios having similar investment objectives and policies without reasonable grounds to believe that such recommendation is suitable and appropriate based on the customer's investment objectives, financial situation and other securities holdings, and any associated transaction charges or other fees.

004.02B In connection with the solicitation of investment company shares, recommending to a customer the liquidation or redemption of investment company shares for the purpose of purchasing shares in a different investment company portfolio having similar investment objectives and policies without reasonable grounds to believe that such recommendation is suitable and appropriate based on the customer's investment objectives, financial situation and other securities holdings and any associated transaction charges or other fees.

004.03 Disclosure Statements.

004.03A In connection with the solicitation of investment company shares, stating or implying to a customer the fund's current yield or income without disclosing the fund's most recent average annual total return, calculated in a manner prescribed in SEC Form N-1A, 17 CFR 239.15A, for one, five, and ten year periods and fully explaining the difference between current yield and total return; provided, however, that if the fund's registration statement under the Securities Act of 1933 has been in effect for less than one, five or ten years, the time during which the registration statement was in effect shall be substituted for the periods otherwise prescribed.

004.03B In connection with the solicitation of investment company shares, stating or implying to a customer that the investment performance of an investment company portfolio is comparable to that of a savings account, certificate of deposit or other ~~bank~~ financial institution deposit account without disclosing to the customer that the shares are not insured

or otherwise guaranteed by the Federal Deposit Insurance Corporation ("FDIC") or any other government agency and the relevant differences regarding risk, guarantees, fluctuation of principal and/or return, and any other factors which are necessary to ensure that such comparisons are fair, complete and not misleading.

004.03C In connection with the solicitation of investment company shares, stating or implying to a customer, the existence of insurance, credit quality, guarantees or similar features regarding securities held, or proposed to be held, in the investment company's portfolio without disclosing to the customer other kinds of relevant investment risks, including but not limited to, interest rate, market, political, liquidity, or currency exchange risks, which may adversely affect investment performance and result in loss and/or fluctuation of principal notwithstanding the creditworthiness of such portfolio securities.

004.03D In connection with the offer or sale of investment company shares, stating or implying to a customer that:

004.03D1 The purchase of such shares shortly before an ex-dividend date is advantageous to such customer unless there are specific, clearly described tax or other advantages to the customer, or

004.03D2 A distribution of long-term capital gains by an investment company is part of the income yield from an investment in such shares.

004.03E In connection with the offer or sale of investment company shares, making:

004.03E1 Projections of future performance;

004.03E2 Statements not warranted under existing circumstances; or

004.03E3 Statements based upon non-public information.

004.04 Prospectus. In connection with the solicitation of investment company shares, the delivery of a prospectus shall not be dispositive that the broker-dealer or agent has fulfilled the duties set forth in ~~the subsections of~~ this Rule.

004.05 Definitions. For purposes of this Rule, the following definitions shall apply:

004.05A Recommend means any affirmative act or statement that endorses, solicits, requests, or commends a securities transaction to a customer or any affirmative act or statement that solicits, requests, ~~commands~~commends, importunes or intentionally aids such person to engage in such conduct.

004.05B Solicitation means any oral, written or other communications used to offer or sell investment company shares excluding any proxy statement, report to shareholders, or other disclosure document relating to a security covered under Section 18(b)(2) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(2) that is required to be and is filed with the SEC or any national securities organization registered under Section 15A of the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3.

005 UNETHICAL PRACTICES FOR AGENTS. An agent of a broker-dealer or issuer-dealer who engages in one or more of the following practices shall be deemed to have engaged in a "dishonest or unethical practice" as used in Section 8-1103(9)(a)(vii) of the Act:

005.01 Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian of money, securities or an executed stock power of a customer, unless such customer is a member of the agent's immediate family.

005.01A For purposes of this subsection, "immediate family" means a spouse, child, sibling, parent, grandparent, or grandchild, including stepparents, stepchildren, stepsiblings, and adoptive relationships.

005.02 Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction.

005.03 Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.

005.04 Sharing directly or indirectly in profits or losses in the account of any customer unless the agent obtains the written authorization of the customer and the broker-dealer which the agent represents and the agent's share of profits or losses is in direct proportion to the financial contributions made to such account by either the member or person associated with a broker-dealer.

005.05 Dividing or otherwise splitting an agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control.

005.06 Using advertising describing or relating to the agent's securities business unless the advertising clearly identifies the name of the agent's employing broker-dealer or issuer-dealer.

005.07 Misrepresenting the services of a registered broker-dealer or issuer-dealer on whose behalf the agent is soliciting business or accounts.

005.08 Conducting a seminar, or advertising for a seminar, unless all advertisements, including, but not limited to, flyers, invitations, postcards, letters, e-mails, sales material, newspaper, television radio, and social media posts related to the seminar, and handouts given to attendees at the seminar, identify the name of

the agent offering the seminar and any broker-dealer with which the agent is affiliated

005.08A For purposes of this subsection, "seminar" shall include any educational or financial workshop targeted to members of the public at which at least one of the following occur:

005.08A1 Securities products are discussed;

005.08A2 The presenter is likely to receive follow-up questions from attendees about securities products; or

005.08A3 The presenter is collecting contact information to make future solicitations concerning securities products.

~~005~~ 006 FRAUDULENT AND DISHONEST OR UNETHICAL PRACTICES FOR INVESTMENT ADVISERS, FEDERAL COVERED ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES. An investment adviser, federal covered adviser, or investment adviser representative, or any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale (collectively "adviser") who engages in one or more of the following practices shall be deemed to have engaged in an "act, practice, or course of business which operates or would operate as a fraud" for purposes of Section 8-1102(2)(b) or a "dishonest or unethical practice" as used in Section 8-1102(2)(d) and Section 8-1103(9)(a)(vii) of the Act:

~~005.01~~ 006.01 Recommending the purchase, sale or exchange of any security to a client without reasonable grounds to believe the recommendation is suitable for the client based on:

~~005.01A~~ 006.01A Information furnished by the client;

~~005.01B~~ 006.01B Reasonable inquiry concerning the client's investment objectives, financial situation and needs by the adviser or its registered representative; and

~~005.01C~~ 006.01C Any other information known or acquired by the adviser after reasonable examination of any records provided to the adviser by the client.

~~005.02~~ 006.02 Placing an order to purchase or sell a security for the account of a client without authority to do so.

~~005.03~~ 006.03 Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first obtaining a written authorization from the client.

~~005.04~~ 006.04 Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written ~~authorization~~ discretionary authority from the client, unless the discretionary power relates solely to

the price at which, or the time when, an order involving a definite amount of specified securities shall be executed, or both.

~~005.05~~ 006.05 Inducing trading in a client's account that is excessive in size and frequency in view of the client's financial resources and investment objectives, and character of the account.

~~005.06~~ 006.06 Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the adviser, ~~or~~ a financial institution engaged in the business of loaning funds or securities, or a member of the investment adviser representative's immediate family.

006.06A For purposes of this subsection, "immediate family" means a spouse, child, sibling, parent, grandparent, or grandchild, including stepparents, stepchildren, stepsiblings, and adoptive relationships.

~~005.07~~ 006.07 Loaning money to a client unless the adviser is a financial institution engaged in the business of loaning funds, ~~or~~ the client is an affiliate of the adviser, or the client is a member of the investment adviser representative's immediate family.

~~005.08~~ 006.08 Misrepresenting to any client or prospective client, the qualifications of the adviser, ~~its representatives~~ any representative or any ~~employees~~ employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or omitting to state a material fact necessary to make the statements made regarding qualifications, services or fees not misleading, in light of the circumstances under which they are made.

~~005.09~~ 006.09 Providing a report or recommendation to any advisory client prepared by someone other than the adviser to any client, without disclosing that fact, except where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service.

~~005.10~~ 006.10 Charging a client an excessive advisory fee.

~~005.11~~ 006.11 Failing to disclose any material conflict of interest relating to the adviser, ~~its representatives~~ any representative or any ~~employees,~~ employee, which could reasonably be expected to impair the rendering of unbiased and objective advice, to a client in writing before entering into or renewing an advisory agreement with that client. Such conflicts include, but are not limited to:

~~005.11A~~ 006.11A Receiving compensation relating to advisory services provided to clients which is in addition to compensation received from such clients for such services; and

~~005.11B~~ 006.11B Charging a client a fee for rendering advice without disclosing that a commission for executing transactions pursuant to such advice will be received by the adviser, its representatives or its employees, or that the advisory fee will be reduced by the amount of the commission.

~~005.12~~ 006.12 Guaranteeing a client that a specific result, ~~(~~either gain or loss,~~)~~ will be achieved as a result of the advice.

~~005.13 006.13 Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940, 17 CFR § 275.206(4)-1.~~

~~005.14~~ 006.~~14~~13 Disclosing the identity, affairs, or investments of any client to any third party without the client's consent, unless required by law to do so.

~~005.15~~ 006.~~15~~14 ~~Violating~~ Failing to comply with the requirements for investment advisers with custody found set forth in 48 NAC 7.012 or for federal covered advisers with custody found in Rule 206(4)-2 under the Investment Advisers Act of 1940, 17 CFR § 275.206(4)-2.

~~005.16~~ 006.~~16~~15 Entering into, extending or renewing any investment advisory contract, other than a contract for impersonal advisory services as defined in 48 NAC 7.010.06A, unless:

~~005.16A~~ 006.~~16~~15A The contract is in writing; and

~~005.16B~~ 006.~~16~~15B The contract discloses, in substance:

~~005.16B1~~ 006.~~16~~15B1 The services to be provided,

~~005.16B2~~ 006.~~16~~15B2 The term of the contract,

~~005.16B3~~ 006.~~16~~15B3 The advisory fee or the formula for computing the fee,

~~005.16B4~~ 006.~~16~~15B4 The amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or non-performance,

~~005.16B5~~ 006.~~16~~15B5 The discretionary power granted to the adviser or its representatives, if any, and

~~005.16B6~~ 006.~~16~~15B6 The contract shall not be assigned by the adviser without the client's consent.

~~005.17~~ 006.~~17~~16 Employing any device, scheme, or artifice to defraud or engage in any act, practice or course of business which operates or would operate as a fraud or deceit.

~~005.18~~ 006.~~18~~17 Failing to disclose to any client or prospective client all material facts with respect to:

~~005.18A~~ 006.~~18~~17A 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~~ twelve hundred dollars ($1,200.00) from such client, six months or more in advance; or

~~005.18B~~ 006.~~18~~17B A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients. There shall be a rebuttable presumption that the following legal or disciplinary events involving the adviser or a management person of the adviser ("person") that were not resolved in the person's favor or subsequently reversed, suspended, or vacated are material within the meaning of this paragraph for a period of ~~10~~ ten years from the time of the event:

~~005.18B1~~ 006.~~18~~17B1 A criminal action in a court of competent jurisdiction in which the person was convicted or pleaded guilty or nolo contendere ("no contest") to a felony or misdemeanor, or is the named subject of a pending criminal proceeding, involving an investment-related business; fraud, false statements, or omissions; wrongful taking of property; or bribery, forgery, counterfeiting, or extortion.

~~005.18B2~~ 006.~~18~~17B2 A criminal or civil action in a court of competent jurisdiction in which the person:

~~005.18B2a~~ 006.~~18~~17B2a Was found to have been involved in a violation of an investment-related statute or regulation; or

~~005.18B2b~~ 006.~~18~~17B2b 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.

~~005.18B3~~ 006.~~18~~17B3 Administrative proceedings before the Director, SEC, any other federal regulatory agency, or any other state agency (collectively "agency") in which the person:

~~005.18B3a~~ 006.~~18~~17B3a Was found to have caused an investment-related business to lose its authorization to do business; or

~~005.18B3b~~ 006.~~18~~17B3b 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.

~~005.18B4~~ 006.~~18~~17B4 Self-Regulatory Organization ("SRO") proceedings in which the person:

~~005.18B4a~~ 006.~~18~~17B4a Was found to have caused an investment-related business to lose its authorization to do business; or

~~005.18B4b~~ 006.~~18~~17B4b 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 association with other members, or expelling the person from membership; or fining the person more than two thousand five hundred dollars ($2,500.00), or otherwise significantly limiting the person's investment-related activities.

~~005.18B5~~ 006.~~18~~17B5 For purposes of calculating the ~~10~~ ten year period during which events are presumed to be material under ~~Section 005.018B,~~ this subsection, 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.

~~005.18C~~ 006.~~18~~17C The information required to be disclosed by ~~Section 005.18~~ this subsection shall be disclosed to clients within thirty ~~30~~ days, and to prospective clients not less than forty-eight ~~48~~ hours prior to entering into any written 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.

~~005.18D~~ 006.~~18~~17D For purposes of ~~Section 005.18 of the Act~~ this subsection:

~~005.18D1~~ 006.~~18~~17D1 "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.

~~005.18D2~~ 006.~~18~~17D2 "Found" means determined or ascertained by adjudication or consent in a final SRO proceeding, agency administrative proceeding, or court action.

~~005.18D3~~ 006.~~18~~17D3 "Investment-related" means pertaining to securities, commodities, banking, insurance, or real estate, including, but not limited to, acting 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.

~~005.18D4~~ 006.~~18~~17D4 "Involved" means acting or aiding, abetting, causing, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

~~005.18D5~~ 006.~~18~~17D5 "Self-Regulatory Organization" ~~("SRO")~~ means any national securities or commodities exchange, registered association, or registered clearing agency, rule, or regulation.

~~005.18E~~ 006.~~18~~17E ~~Compliance with Section 005.1~~ ~~8~~ Disclosure pursuant to this subsection shall not relieve any investment adviser from the obligations of any other disclosure requirement under the Act, the rules and regulations thereunder, or under any other federal or state law.

~~005.19~~ 006.~~19~~18 Entering into, extending or renewing any investment advisory contract, if such contract contains any provision which limits or purports to limit:

~~005.19A~~ 006.~~19~~18A Liability of the adviser for conduct or omission arising from the advisory relationship which does not conform to the Act, applicable federal statutes, and common law fiduciary standards of care; or

~~005.19B~~ 006.~~19~~18B Applicability of the laws of Nebraska with respect to the construction or interpretation of the contract provisions.

~~005.20~~ 006.~~20~~19 Failing to cooperate with, or providing false or incomplete information to, the Director in connection with an investigation.

~~005.21~~ 006.~~21~~20 Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information in violation of Section 204A of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-4a.

~~005.22~~ 006.~~22~~21 Entering into, extending or renewing any advisory contract which would violate Section 205 of the Investment Advisers Act of 1940, 15 U.S.C § 80b-5 notwithstanding the fact that such adviser would be exempt from federal registration pursuant to Section 203(b) of the Investment Advisers Act of 1940, 15 U.S.C § 80b-3.

~~005.23~~ 006.~~23~~22 Including a provision which purports to waive compliance with any provision of the Act, of the rules and regulations thereunder, or of the Investment Advisers Act of 1940 in any advisory contract, stipulation or other document binding on any person, or any other practice that would violate Section 215 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-15.

~~005.24~~ 006.~~24~~23 Engaging in any act, practice, or course of business which is fraudulent, deceptive or manipulative in contravention of Section 206(4) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6, notwithstanding the fact that

such investment adviser is not registered or required to be registered under Section 203(b) of the Investment Advisers Act of 1940, 15 U.S.C § 80b-3.

~~005.25~~ 006.~~2524~~ Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the Act or any rule or regulation thereunder.

006.~~2625~~ Dividing, splitting or otherwise paying fees or other compensation paid pursuant to the investment adviser contract with any individual or entity which is not registered as an investment adviser or investment adviser representative under the Act.

006.~~2726~~ Publishing, circulating or distributing any advertisement, directly or indirectly:

006.~~2726~~A Which refers, directly or indirectly, to any testimonial of any kind by any customer concerning the investment adviser or investment adviser representative concerning any advice, analysis, report or other service rendered to the customer by the investment adviser or investment adviser representative.

006.~~2726~~B Which refers, directly or indirectly, to past specific recommendations of the investment adviser or investment adviser representative which were or would have been profitable to any person; provided, however, that this does not prohibit an advertisement which sets forth or offers to furnish a list of all recommendations made by the investment adviser or investment adviser representative for the twelve month period immediately preceding the date of the publication of the advertisement, and which:

006.~~2726~~B1 Includes the name of each such security recommended, the date and nature of each such recommendation, for example, whether to buy, sell or hold, the market price at the time, the price at which the recommendation was to be acted upon, and the current market price of each such security.

006.~~2726~~B2 Contains a disclosure statement prominently displayed on the first page thereof in print or type as large as the largest print or type used in the body or text cautioning investors that future results may vary from the past performance. Examples of acceptable statements include: "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." and/or "PAST PERFORMANCE IS NOT AN INDICATION OF FUTURE RESULT."

006.~~2726~~C 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 decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations thereof and the difficulties with respect to its use.

006.~~27~~26DWhich contains any statement to the effect that any report, analysis or other service will be furnished free or without charge, unless the report, analysis or other service actually is or will be furnished absolutely without condition or obligation.

006.~~27~~26EWhich contains any untrue statement of a material fact, or which is otherwise false or misleading in any material respect, including the failure to disclose compensation, including free or discounted securities, received directly or indirectly in connection with making a recommendation concerning a specific security.

006.~~27~~26F Which recommends the purchase or sale of any security unless the investment adviser or investment adviser representative simultaneously offers to furnish to any person upon request a tabular presentation of:

006.~~27~~26F1 The total number of shares or other units of the security held by the investment adviser or investment adviser representative for its own account or for the account of officers, directors, trustees, partners or affiliates of the investment adviser or for discretionary accounts of the investment adviser or investment adviser representative maintained for clients.

006.~~27~~26F2 The price or price range at which the securities listed in subsection 017.06A were purchased.

006.~~27~~26F3 The date or range of dates during which the securities listed in response to subsection 017.06A were purchased.

006.~~27~~26G Definitions.

006.~~27~~26G1 For the purpose of this section, the term "advertisement" includes any notice, circular, letter or other written communication addressed to more than one person or any notice or other announcement in any publication, by radio or television, or by electronic means, which offers:

006.~~27~~26G1a 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.

006.~~27~~26G1b 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.

006.~~27~~26G1c Any other investment advisory service with regard to securities.

006.~~27~~26G2 The term "client" means any person to whom the investment adviser or investment adviser representative has given investment advice for which the investment adviser or investment adviser representative has received compensation.

006.~~27~~26HThis section does not apply to federal covered advisers unless the conduct is otherwise actionable under the Act.

006.27 Conducting a seminar, or advertising for a seminar, unless all advertisements, including but not limited to flyers, invitations, postcards, letters, e-mails, sales material, newspaper, television radio, and social media posts related to the seminar, and handouts given to attendees at the seminar, identify the name of the investment adviser representative offering the seminar and any investment adviser with which the agent is affiliated.

006.27A For purposes of this subsection, "seminar" shall include any educational or financial workshop targeted to members of the public at which at least one of the following occur:

006.27A1 Securities products are discussed;

006.27A2 The presenter is likely to receive follow-up questions from attendees about securities products; or

006.27A3 The presenter is collecting contact information to make future solicitations concerning securities products.

~~005.26~~ 006.28 Federal statutory and regulatory provisions referenced herein shall apply to investment advisers and federal covered advisers, regardless of whether the federal provision limits its application to advisers subject to federal registration.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 13 - INFORMATION REQUIREMENTS FOR THE SECTION 8-1110(5) EXCHANGE EXEMPTION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Sections 8-1120(3) and 8-1110(5) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to Section 8-1110(5) of the Act is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

~~001.05~~001.06 The provisions of this Rule shall not apply to any security that is a federal covered security pursuant to the provisions of Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(1).

002 NOTICE FILING REQUIREMENT. The notice required by Section 8-1110(5)(b) of the Act will be satisfied if the following conditions of this Rule are met.

002.01 Such notice shall be filed with the Nebraska Department of Banking and Finance, ~~Suite 311, The Atrium, 1200 N Street,~~ P.O. Box 95006, Lincoln, Nebraska 68509-~~5009~~5006.

002.02 Such notice shall be filed by, or on behalf of, the issuer prior to the first use of a disclosure document covering a security which has been approved for listing on a recognized exchange if no quotations have been available and no public trading has taken place for any securities of such issuer.

003 CONTENTS OF NOTICE. The notice of exemption shall contain the following information:

003.01 The name and address of the issuer;

003.02 One of the following:

003.02A The name and address of the Nebraska-registered broker-dealer(s) that will be selling the securities,

003.02B If the issuer is selling its own securities, the name, business address and business telephone number of the person responsible for such activities, or

003.02C A statement by the issuer or issuer's counsel that all securities transactions with Nebraska residents will be executed by a Nebraska-registered broker-dealer or a person properly exempt from broker-dealer registration in Nebraska;

003.03 A description of the business of the issuer;

003.04 The type of security to be sold and the total dollar amount of the offering;

003.05 The name of the exchange or market system on which the securities will be listed; and

003.06 A check or money order in the amount of two hundred dollars ($200.00), payable to "Nebraska Department of Banking and Finance."

004 DISCLOSURE. Nothing in this exemption is intended to relieve, or should be construed as in any way relieving, sellers or persons acting on behalf of sellers from providing to prospective investors disclosure adequate to satisfy the provisions of Section 8-1102(1) of the Act.

005 BURDEN OF PROOF. In any proceeding involving this Rule, the burden of proving the exemption ~~or an exception from a definition or condition~~from registration is upon the person claiming ~~it~~the exemption.

006 CURE ORDERS. If the notice required by Section 8-1110(5) of this Act and this Rule is not filed prior to the first sale made in reliance on this exemption, the issuer shall file, with the notice described in Section 003 above:

006.01 The information required by 48 NAC 19; and

006.02 The date the subject security was listed.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES
Sec. 77r - Exemption from State regulation of securities offerings
From the U.S. Government Publishing Office, www.gpo.gov

§77r. Exemption from State regulation of securities offerings

(a) Scope of exemption

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

(2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of—

(A) with respect to a covered security described in subsection (b) of this section, any offering document that is prepared by or on behalf of the issuer; or

(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission or any national securities organization registered under section 78o–3 of this title, except that this subparagraph does not apply to the laws, rules, regulations, or orders, or other administrative actions of the State of incorporation of the issuer; or

(3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security described in paragraph (1).

(b) Covered securities

For purposes of this section, the following are covered securities:

(1) Exclusive Federal registration of nationally traded securities

A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

(2) Exclusive Federal registration of investment companies

A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.].

(3) Sales to qualified purchasers

A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing such rule, the Commission may define the term "qualified purchaser" differently with respect to different categories of securities, consistent with the public interest and the protection of investors.

(4) Exemption in connection with certain exempt offerings

A security is a covered security with respect to a transaction that is exempt from registration under this subchapter pursuant to—

(A) paragraph (1) or (3) of section 77d [1] of this title, and the issuer of such security files reports with the Commission pursuant to section 78m or 78o(d) of this title;

(B) section 77d(4) [1] of this title;

(C) section 77d(6) [1] of this title;

(D) [2] a rule or regulation adopted pursuant to section 77c(b)(2) of this title and such security is—

(i) offered or sold on a national securities exchange; or

(ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale;

(D) [2] section 77c(a) of this title, other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located; or

(E) Commission rules or regulations issued under section 77d(2) [1] of this title, except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 77d(2) [1] of this title that are in effect on September 1, 1996.

(c) Preservation of authority

(1) Fraud authority

Consistent with this section, the securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions [3]

(A) with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, or funding portal; and

(B) in connection to [4] a transaction described under section 77d(6) [1] of this title, with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, funding portal, or issuer.

(2) Preservation of filing requirements

(A) Notice filings permitted

Nothing in this section prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any document filed with the Commission pursuant to this subchapter, together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.

(B) Preservation of fees

(i) In general

Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof, adopted after October 11, 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before October 11, 1996.

(ii) Schedule

The fees required by this subparagraph shall be paid, and all necessary supporting data on sales or offers for sales required under subparagraph (A), shall be reported on the same schedule as would have been applicable had the issuer not relied on the exemption provided in subsection (a) of this section.

(C) Availability of preemption contingent on payment of fees

(i) In general

During the period beginning on October 11, 1996, and ending 3 years after October 11, 1996, the securities commission (or any agency or office performing like functions) of any State may require the registration of securities issued by any issuer who refuses to pay the fees required by subparagraph (B).

(ii) Delays

For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

(D) Fees not permitted on listed securities

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(1) of this section, or will be such a covered security upon completion of the transaction, or is a security of the same issuer that is equal in seniority or that is a senior security to a security that is a covered security pursuant to subsection (b)(1) of this section.

(F) [5] Fees not permitted on crowdfunded securities

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(4)(B), or will be such a covered security upon completion of the transaction, except for the securities commission (or any agency or office performing like functions) of the State of the principal place of business of the issuer, or any State in which purchasers of 50 percent or greater of the aggregate amount of the issue are residents, provided that for purposes of this subparagraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) Enforcement of requirements

Nothing in this section shall prohibit the securities commission (or any agency or office performing like functions) of any State from suspending the offer or sale of securities within such State as a result of the failure to submit any filing or fee required under law and permitted under this section.

(d) Definitions

For purposes of this section, the following definitions shall apply:

(1) Offering document

The term "offering document"—

(A) has the meaning given the term "prospectus" in section 77b(a)(10) of this title, but without regard to the provisions of subparagraphs (a) and (b) of that section; and

(B) includes a communication that is not deemed to offer a security pursuant to a rule of the Commission.

(2) Prepared by or on behalf of the issuer

Not later than 6 months after October 11, 1996, the Commission shall, by rule, define the term "prepared by or on behalf of the issuer" for purposes of this section.

(3) State

The term "State" has the same meaning as in section 78c of this title.

(4) Senior security

The term "senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends.

(May 27, 1933, ch. 38, title I, §18, 48 Stat. 85; Pub. L. 104–290, title I, §102(a), Oct. 11, 1996, 110 Stat. 3417; Pub. L. 105–353, title III, §§301(a)(4), 302, Nov. 3, 1998, 112 Stat. 3235, 3237; Pub. L. 111–203, title IX, §985(a)(2), July 21, 2010, 124 Stat. 1933; Pub. L. 112–106, title III, §305(a), (b)(2), (c), (d)(2), title IV, §401(b), Apr. 5, 2012, 126 Stat. 322, 323, 325.)

REFERENCES IN TEXT

The Investment Company Act of 1940, referred to in subsec. (b)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

Section 77d(1), (2), (3), (4), and (6) of this title, referred to in subsecs. (b)(4)(A) to (C), (E) and (c)(1)(B), were redesignated section 77d(a)(1), (2), (3), (4), and (6), respectively, of this title by Pub. L. 112–106, title II, §201(b)(1), (c)(1), Apr. 5, 2012, 126 Stat. 314.

AMENDMENTS

2012—Subsec. (b)(4)(C). Pub. L. 112–106, §305(a)(2), added subpar. (C). Former subpar. (C) redesignated (D).

Subsec. (b)(4)(D). Pub. L. 112–106, §401(b), added subpar. (D) relating to section 77c(b)(2) of this title.

Pub. L. 112–106, §305(a)(1), redesignated subpar. (C), relating to section 77c(a) of this title, as (D). Former subpar (D) redesignated (E).

Subsec. (b)(4)(E). Pub. L. 112–106, §305(a)(1), redesignated subpar. (D) as (E).

Subsec. (c)(1). Pub. L. 112–106, §305(b)(2), substituted ", in connection with securities or securities transactions" for "with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions." and added subpars. (A) and (B).

Subsec. (c)(1)(A)(ii). Pub. L. 112–106, §305(d)(2), which directed amendment of subsec. (c)(1) by substituting ", dealer, or funding portal" for "or dealer", was executed by making the substitution in subpar. (A)(ii) as added by Pub. L. 112–106, §305(b)(2).

Subsec. (c)(2)(F). Pub. L. 112–106, §305(c), added subpar. (F).

2010—Subsec. (b)(1)(C). Pub. L. 111–203, §985(a)(2)(A), substituted "(C) a security" for "(C) is a security".

Subsec. (c)(2)(B)(i). Pub. L. 111–203, §985(a)(2)(B), substituted "State or" for "State, or".

1998—Subsec. (b)(1)(A). Pub. L. 105–353, §301(a)(4)(A), inserted ", or authorized for listing," after "Exchange, or listed".

Subsec. (b)(4)(C). Pub. L. 105–353, §302, substituted "paragraph (4), (10), or (11)" for "paragraph (4) or (11)".

Subsec. (c)(2)(B)(i), (C)(i). Pub. L. 105–353, §301(a)(4)(B), (C), made technical amendments to references in original act which appear in text as references to October 11, 1996.

Subsec. (d)(1)(A). Pub. L. 105–353, §301(a)(4)(D), substituted "section 77b(a)(10)" for "section 77b(10)" and "subparagraphs (a) and (b)" for "subparagraphs (A) and (B)".

Subsec. (d)(2). Pub. L. 105–353, §301(a)(4)(E), made technical amendment to reference in original act which appears in text as reference to October 11, 1996.

Subsec. (d)(4). Pub. L. 105–353, §301(a)(4)(F), substituted "The term" for "For purposes of this paragraph, the term".

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 15 - INFORMATION REQUIREMENTS FOR THE SECTION 8-1111(9) *DE MINIMUS* EXEMPTION ~~NOTICE~~

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Sections 8-1120(3) and 8-1111(9) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to Section 8-1111(9) is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

002 NOTICE FILING REQUIREMENT. The notice required by Section 8-1111(9)(a) of the Act will be satisfied if the conditions of this Rule are met.

002.01 Such notice shall be filed with the Nebraska Department of Banking and Finance, P.O. Box 95006, Lincoln, Nebraska 68509-5006.

002.02 Such notice shall be filed within thirty ~~(30)~~ days of the first sale made in reliance on this exemption.

003 CONTENTS OF NOTICE. The notice filed by a seller pursuant to Section 8-1111(9)(a) shall include the following information:

003.01 The name and address of the issuer and the name and address of the seller, if other than the issuer;

003.02 The name and address of the broker-dealer representing the seller in promoting the offering or, if there is no broker-dealer representing the seller, the name and address of any officer, director, manager, member or other person representing the seller in promoting the offering;

003.03 The business in which the issuer is to be engaged;

003.04 The type of security being issued (common stock, limited partnership interests, debentures, etc.);

003.05 The total dollar amount of such securities sold as of the date of the filing, whether in Nebraska or elsewhere;

003.06 The dollar amount to be offered during the ~~12-~~twelve-month period following the filing, whether in Nebraska or elsewhere;

003.07 The date of the first sale made in reliance on this exemption; and

003.08 A representation that all of the conditions of Section 8-1111(9) of the Act have been or will be met.

004 ADDITIONAL FILINGS. An issuer which meets the requirements set forth below shall file audited financial statements and a sales report with the Director.

004.01 An issuer is required to make such filing after the issuer has made:

004.01A Sales pursuant to Section 8-1111(9)(a) for five ~~(5)~~ consecutive twelve ~~(12)~~-month periods; or

004.01B Total sales of one million dollars ($1,000,000.00) from one or more offerings pursuant to Section 8-1111(9)(a).

004.01B1 In determining the total amount of sales for purposes of determining the necessity of complying with this provision, the issuer shall include sales to persons excluded from the fifteen ~~(15)~~ person limitation under Section 8-1111(9)(a).

004.01B2 In determining the total amount of sales for purposes of determining the necessity of complying with this provision, the issuer shall include all sales of securities, regardless of the location of the purchaser or the location where the transaction occurred.

004.02 The required information shall be filed no later than ninety ~~(90)~~ days after:

004.02A ~~(a) the~~ The date on which the issuer files the fifth consecutive annual notice claiming exemption pursuant to Section 8-1111(9)(a); or

004.02B ~~(b) the~~ The date on which the issuer's total sales of the securities ~~exceeds~~ reaches one million dollars ($1,000,000.00).

004.03 The financial statements shall include a balance sheet, an income statement, and a cash flow statement and must be:

004.03A Examined in accordance with generally accepted auditing standards and prepared in conformity with generally accepted accounting principles;

004.03B Audited by an independent certified public accountant;

004.03C Accompanied by an opinion of the accountant as to the report of financial position, and by a note stating the principles used to prepare it, the basis of included securities, and any other explanations required for clarity; and

004.03D Prepared as of the end of the issuer's most recent fiscal year.

004.04 The sales report shall include:

004.04A The name and address of all purchasers and holders of the issuer's securities, the amount of securities held by such persons, and the dates on which purchases were made; and

004.04B A statement indicating whether each purchaser or holder of a security is an accredited investor and whether the status as an accredited investor is based on net worth or net income.

004.05 An issuer shall file audited financial statements and sales reports with the Director each time that the issuer sells an additional one million dollars ($1,000,000.00) in securities or after the elapse of each additional sixty-month period during which sales are made pursuant to Section 8-1111(9).

004.06 The filing set forth in this subsection shall be deemed to be a condition of the exemption for any issuer who meets the requirements contained in Section 004.01, above. Failure to make a required filing will result in the loss of the exemption. Sales made in reliance during the time when an issuer is not in compliance with these filing requirements will be considered to violate Section 8-1104 of the Act.

004.07 The Department may grant a request for an extension of the ninety-day period for the filing of financial statements, upon the timely filing of such a request by an issuer, based on the need for additional time to prepare the audit.

005 DISCLOSURE. Nothing in this exemption is intended to relieve, or should be construed as in any way relieving, sellers or persons acting on behalf of sellers from providing to prospective investors disclosure adequate to satisfy the provisions of Section 8-1102(1) of the Act.

006 INVESTMENT INTENT. The seller must have reasonable belief that the securities purchased are taken for investment. Investment intent may be manifested by, but is not limited to, a restriction which shall be stated on the face of the security that it shall be held by the purchaser until the earlier of the date the issuer of the securities becomes subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m or 15 U.S.C. § 78o(d) or one year from the date of purchase.

007 EFFECTIVENESS. A notice of exemption filed pursuant to Section 8-1111(9)(a) of the Act shall remain effective until the earlier of the following events:

007.01 Sales to fifteen persons, other than persons designated in Sections 8-1111(8), (11) and (17) of the Act, have been effected; or

007.02 One year from the date of the first sale.

008 AVAILABILITY OF EXEMPTION.

008.01 Offers and sales which are exempt under this rule may not be combined with offers and sales exempt under any other Rule or Section of the Act, except as specifically allowed in Section 8-1111(9) of the Act; however, nothing in this limitation shall act as an election. Should, for any reason, the offer and sale fail to comply with all of the conditions for this exemption, the seller may claim the availability of any other applicable exemption.

008.02 This exemption is not available to any seller with respect to any transaction which, although in technical compliance with this Rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this Rule.

009 CURE ORDERS. If the notice required by Section 8-1111(9)(a) of the Act and this Rule is not filed within thirty ~~(30)~~ days of the first sale made in reliance on this exemption, the seller shall file the information required by 48 NAC 19.

010 BURDEN OF PROOF. In any proceeding involving this Rule, the burden of proving the exemption ~~or an exception from a definition or condition~~ from registration is upon the person claiming ~~it~~the exemption.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2B - SECURITIES EXCHANGES
Sec. 78m - Periodical and other reports
From the U.S. Government Publishing Office, www.gpo.gov

§78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this chapter or the Securities Act of 1933 [15 U.S.C. 77a et seq.] and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Form of report; books, records, and internal accounting; directives

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent

with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

(c) Alternative reports

If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.] or any equity security issued by a Native Corporation pursuant to section 1629c(d)(6) of title 43, or otherwise becomes or is deemed to become a beneficial owner of any of the foregoing upon the purchase or sale of a security-based swap that the Commission may define by rule, and is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition or within such shorter time as the Commission may establish by rule, file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the Commission, in accordance with such rules and regulations as

the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933 [15 U.S.C. 77a et seq.];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Purchase of securities by issuer

(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78l of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to paragraph (1) of this subsection, the person making the filing shall pay to the Commission a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the value of securities proposed

to be purchased. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to any securities issued in connection with the proposed transaction under section 6 (b) of the Securities Act of 1933 [15 U.S.C. 77f(b)], or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this paragraph.

(4) ANNUAL ADJUSTMENT.—For each fiscal year, the Commission shall by order adjust the rate required by paragraph (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 [15 U.S.C. 77f(b)] for such fiscal year.

(5) FEE COLLECTIONS.—Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

(6) EFFECTIVE DATE; PUBLICATION.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).

(7) PRO RATA APPLICATION.—The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(f) Reports by institutional investment managers

(1) Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) of this section or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule, having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least $100,000,000 or such lesser amount (but in no case less than $10,000,000) as the Commission, by rule, may determine, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security. Such reports may also include for accounts (in aggregate or by type) with respect to which the institutional investment manager exercises investment discretion such of the following information as the Commission, by rule, prescribes—

(A) the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value or cost or amortized cost of each other security (other than an exempted security) held on the last day of the reporting period by such accounts;

(B) the aggregate fair market value or cost or amortized cost of exempted securities (in aggregate or by class) held on the last day of the reporting period by such accounts;

(C) the number of shares of each equity security of a class described in subsection (d)(1) of this section held on the last day of the reporting period by such accounts with respect to which the institutional investment manager possesses sole or shared authority to exercise the voting rights evidenced by such securities;

(D) the aggregate purchases and aggregate sales during the reporting period of each security (other than an exempted security) effected by or for such accounts; and

(E) with respect to any transaction or series of transactions having a market value of at least $500,000 or such other amount as the Commission, by rule, may determine, effected during the

reporting period by or for such accounts in any equity security of a class described in subsection (d)(1) of this section—

(i) the name of the issuer and the title, class, and CUSIP number of the security;
(ii) the number of shares or principal amount of the security involved in the transaction;
(iii) whether the transaction was a purchase or sale;
(iv) the per share price or prices at which the transaction was effected;
(v) the date or dates of the transaction;
(vi) the date or dates of the settlement of the transaction;
(vii) the broker or dealer through whom the transaction was effected;
(viii) the market or markets in which the transaction was effected; and
(ix) such other related information as the Commission, by rule, may prescribe.

(2) The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.

(3) The Commission, by rule, or order, may exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder.

(4) The Commission shall make available to the public for a reasonable fee a list of all equity securities of a class described in subsection (d)(1) of this section, updated no less frequently than reports are required to be filed pursuant to paragraph (1) of this subsection. The Commission shall tabulate the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State authorities and the public. Promptly after the filing of any such report, the Commission shall make the information contained therein conveniently available to the public for a reasonable fee in such form as the Commission, by rule, may prescribe, except that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with section 552 of title 5. Notwithstanding the preceding sentence, any such information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public.

(5) In exercising its authority under this subsection, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets or, in granting an exemption, that its action is consistent with the protection of investors and the purposes of this subsection. In exercising such authority the Commission shall take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the appropriate regulatory agencies, Federal and State authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection, national securities exchanges, and registered securities associations, (A) to achieve uniform, centralized reporting of information concerning the securities holdings of and transactions by or for accounts with respect to which institutional investment managers exercise investment discretion, and (B) consistently with the objective set forth in the preceding subparagraph, to avoid unnecessarily duplicative reporting by, and minimize the compliance burden on, institutional investment managers. Federal authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection shall cooperate with the Commission in the performance of its responsibilities under the preceding sentence. An institutional investment manager which is a bank, the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.], shall file with

the appropriate regulatory agency a copy of every report filed with the Commission pursuant to this subsection.

(6)(A) For purposes of this subsection the term "institutional investment manager" includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.

(B) The Commission shall adopt such rules as it deems necessary or appropriate to prevent duplicative reporting pursuant to this subsection by two or more institutional investment managers exercising investment discretion with respect to the same amount.[1]

(g) Statement of equity security ownership

(1) Any person who is directly or indirectly the beneficial owner of more than 5 per centum of any security of a class described in subsection (d)(1) of this section or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule shall file with the Commission a statement setting forth, in such form and at such time as the Commission may, by rule, prescribe—

(A) such person's identity, residence, and citizenship; and

(B) the number and description of the shares in which such person has an interest and the nature of such interest.

(2) If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors (A) to achieve centralized reporting of information regarding ownership, (B) to avoid unnecessarily duplicative reporting by and minimize the compliance burden on persons required to report, and (C) to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State agencies and the public.

(6) The Commission may, by rule or order, exempt, in whole or in part, any person or class of persons from any or all of the reporting requirements of this subsection as it deems necessary or appropriate in the public interest or for the protection of investors.

(h) Large trader reporting

(1) Identification requirements for large traders

For the purpose of monitoring the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value and for the purpose of otherwise assisting the Commission in the enforcement of this chapter, each large trader shall—

(A) provide such information to the Commission as the Commission may by rule or regulation prescribe as necessary or appropriate, identifying such large trader and all accounts in or through which such large trader effects such transactions; and

(B) identify, in accordance with such rules or regulations as the Commission may prescribe as necessary or appropriate, to any registered broker or dealer by or through whom such large trader directly or indirectly effects securities transactions, such large trader and all accounts

directly or indirectly maintained with such broker or dealer by such large trader in or through which such transactions are effected.

(2) Recordkeeping and reporting requirements for brokers and dealers

Every registered broker or dealer shall make and keep for prescribed periods such records as the Commission by rule or regulation prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, with respect to securities transactions that equal or exceed the reporting activity level effected directly or indirectly by or through such registered broker or dealer of or for any person that such broker or dealer knows is a large trader, or any person that such broker or dealer has reason to know is a large trader on the basis of transactions in securities effected by or through such broker or dealer. Such records shall be available for reporting to the Commission, or any self-regulatory organization that the Commission shall designate to receive such reports, on the morning of the day following the day the transactions were effected, and shall be reported to the Commission or a self-regulatory organization designated by the Commission immediately upon request by the Commission or such a self-regulatory organization. Such records and reports shall be in a format and transmitted in a manner prescribed by the Commission (including, but not limited to, machine readable form).

(3) Aggregation rules

The Commission may prescribe rules or regulations governing the manner in which transactions and accounts shall be aggregated for the purpose of this subsection, including aggregation on the basis of common ownership or control.

(4) Examination of broker and dealer records

All records required to be made and kept by registered brokers and dealers pursuant to this subsection with respect to transactions effected by large traders are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

(5) Factors to be considered in Commission actions

In exercising its authority under this subsection, the Commission shall take into account—

(A) existing reporting systems;

(B) the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission or self-regulatory organizations; and

(C) the relationship between the United States and international securities markets.

(6) Exemptions

The Commission, by rule, regulation, or order, consistent with the purposes of this chapter, may exempt any person or class of persons or any transaction or class of transactions, either conditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection, and the rules and regulations thereunder.

(7) Authority of Commission to limit disclosure of information

Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be kept or reported under this subsection. Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(8) Definitions

For purposes of this subsection—

(A) the term "large trader" means every person who, for his own account or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level;

(B) the term "publicly traded security" means any equity security (including an option on individual equity securities, and an option on a group or index of such securities) listed, or admitted to unlisted trading privileges, on a national securities exchange, or quoted in an automated interdealer quotation system;

(C) the term "identifying activity level" means transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule or regulation, specifying the time interval during which such transactions shall be aggregated;

(D) the term "reporting activity level" means transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated; and

(E) the term "person" has the meaning given in section 78c(a)(9) of this title and also includes two or more persons acting as a partnership, limited partnership, syndicate, or other group, but does not include a foreign central bank.

(i) Accuracy of financial reports

Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this chapter and filed with the Commission shall reflect all material correcting adjustments that have been identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

(j) Off-balance sheet transactions

Not later than 180 days after July 30, 2002, the Commission shall issue final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.

(k) Prohibition on personal loans to executives

(1) In general

It shall be unlawful for any issuer (as defined in section 7201 of this title), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on July 30, 2002, shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after July 30, 2002.

(2) Limitation

Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 1464 of title 12), consumer credit (as defined in section 1602 of this title), or any extension of credit under an open end credit plan (as defined in section 1602 of this title), or a charge card (as defined in section 1637(c)(4)(e) of this title), or any extension of credit by a broker or dealer registered under section 78o of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 78g of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—

(A) made or provided in the ordinary course of the consumer credit business of such issuer;

(B) of a type that is generally made available by such issuer to the public; and

(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

(3) Rule of construction for certain loans

Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 375b of title 12.

(l) Real time issuer disclosures

Each issuer reporting under subsec. (a) of this section or section 78o(d) of this title shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.

(m) Public availability of security-based swap transaction data

(1) In general

(A) Definition of real-time public reporting

In this paragraph, the term "real-time public reporting" means to report data relating to a security-based swap transaction, including price and volume, as soon as technologically practicable after the time at which the security-based swap transaction has been executed.

(B) Purpose

The purpose of this subsection is to authorize the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.

(C) General rule

The Commission is authorized to provide by rule for the public availability of security-based swap transaction, volume, and pricing data as follows:

(i) With respect to those security-based swaps that are subject to the mandatory clearing requirement described in section 78c–3(a)(1) of this title (including those security-based swaps that are excepted from the requirement pursuant to section 78c–3(g) of this title), the Commission shall require real-time public reporting for such transactions.

(ii) With respect to those security-based swaps that are not subject to the mandatory clearing requirement described in section 78c–3(a)(1) of this title, but are cleared at a registered clearing agency, the Commission shall require real-time public reporting for such transactions.

(iii) With respect to security-based swaps that are not cleared at a registered clearing agency and which are reported to a security-based swap data repository or the Commission under section 78c–3(a)(6) of this title,[2] the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person.

(iv) With respect to security-based swaps that are determined to be required to be cleared under section 78c–3(b) of this title but are not cleared, the Commission shall require real-time public reporting for such transactions.

(D) Registered entities and public reporting

The Commission may require registered entities to publicly disseminate the security-based swap transaction and pricing data required to be reported under this paragraph.

(E) Rulemaking required

With respect to the rule providing for the public availability of transaction and pricing data for security-based swaps described in clauses (i) and (ii) of subparagraph (C), the rule promulgated by the Commission shall contain provisions—

(i) to ensure such information does not identify the participants;

(ii) to specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts;

(iii) to specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public; and

(iv) that take into account whether the public disclosure will materially reduce market liquidity.

(F) Timeliness of reporting

Parties to a security-based swap (including agents of the parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.

(G) Reporting of swaps to registered security-based swap data repositories

Each security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository.

(H) Registration of clearing agencies

A clearing agency may register as a security-based swap data repository.

(2) Semiannual and annual public reporting of aggregate security-based swap data

(A) In general

In accordance with subparagraph (B), the Commission shall issue a written report on a semiannual and annual basis to make available to the public information relating to—

(i) the trading and clearing in the major security-based swap categories; and

(ii) the market participants and developments in new products.

(B) Use; consultation

In preparing a report under subparagraph (A), the Commission shall—

(i) use information from security-based swap data repositories and clearing agencies; and

(ii) consult with the Office of the Comptroller of the Currency, the Bank for International Settlements, and such other regulatory bodies as may be necessary.

(C) Authority of Commission

The Commission may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.

(n) Security-based swap data repositories

(1) Registration requirement

It shall be unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository.

(2) Inspection and examination

Each registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.

(3) Compliance with core principles

(A) In general

To be registered, and maintain registration, as a security-based swap data repository, the security-based swap data repository shall comply with—

(i) the requirements and core principles described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation.

(B) Reasonable discretion of security-based swap data repository

Unless otherwise determined by the Commission, by rule or regulation, a security-based swap data repository described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the security-based swap data repository complies with the core principles described in this subsection.

(4) Standard setting

(A) Data identification

(i) In general

In accordance with clause (ii), the Commission shall prescribe standards that specify the data elements for each security-based swap that shall be collected and maintained by each registered security-based swap data repository.

(ii) Requirement

In carrying out clause (i), the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.

(B) Data collection and maintenance

The Commission shall prescribe data collection and data maintenance standards for security-based swap data repositories.

(C) Comparability

The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps.

(5) Duties

A security-based swap data repository shall—

(A) accept data prescribed by the Commission for each security-based swap under subsection (b);

(B) confirm with both counterparties to the security-based swap the accuracy of the data that was submitted;

(C) maintain the data described in subparagraph (A) in such form, in such manner, and for such period as may be required by the Commission;

(D)(i) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity); and

(ii) provide the information described in subparagraph (A) in such form and at such frequency as the Commission may require to comply with the public reporting requirements set forth in subsection (m);

(E) at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(F) maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any other registered entity; and

(G) on a confidential basis pursuant to section 78x of this title, upon request, and after notifying the Commission of the request, make available all data obtained by the security-based swap data repository, including individual counterparty trade and position data, to—

(i) each appropriate prudential regulator;

(ii) the Financial Stability Oversight Council;

(iii) the Commodity Futures Trading Commission;

(iv) the Department of Justice; and

(v) any other person that the Commission determines to be appropriate, including—

(I) foreign financial supervisors (including foreign futures authorities);

(II) foreign central banks; and

(III) foreign ministries.

(H) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G)—

(i) the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 78x of this title relating to the information on security-based swap transactions that is provided; and

(ii) each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 78x of this title.

(6) Designation of chief compliance officer

(A) In general

Each security-based swap data repository shall designate an individual to serve as a chief compliance officer.

(B) Duties

The chief compliance officer shall—

(i) report directly to the board or to the senior officer of the security-based swap data repository;

(ii) review the compliance of the security-based swap data repository with respect to the requirements and core principles described in this subsection;

(iii) in consultation with the board of the security-based swap data repository, a body performing a function similar to the board of the security-based swap data repository, or the senior officer of the security-based swap data repository, resolve any conflicts of interest that may arise;

(iv) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(v) ensure compliance with this chapter (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

(vi) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(I) compliance office review;

(II) look-back;

(III) internal or external audit finding;

(IV) self-reported error; or
(V) validated complaint; and

(vii) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(C) Annual reports

(i) In general

In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(I) the compliance of the security-based swap data repository of the chief compliance officer with respect to this chapter (including regulations); and

(II) each policy and procedure of the security-based swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the security-based swap data repository).

(ii) Requirements

A compliance report under clause (i) shall—

(I) accompany each appropriate financial report of the security-based swap data repository that is required to be furnished to the Commission pursuant to this section; and

(II) include a certification that, under penalty of law, the compliance report is accurate and complete.

(7) Core principles applicable to security-based swap data repositories

(A) Antitrust considerations

Unless necessary or appropriate to achieve the purposes of this chapter, the swap data repository shall not—

(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or

(ii) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.

(B) Governance arrangements

Each security-based swap data repository shall establish governance arrangements that are transparent—

(i) to fulfill public interest requirements; and

(ii) to support the objectives of the Federal Government, owners, and participants.

(C) Conflicts of interest

Each security-based swap data repository shall—

(i) establish and enforce rules to minimize conflicts of interest in the decision-making process of the security-based swap data repository; and

(ii) establish a process for resolving any conflicts of interest described in clause (i).

(D) Additional duties developed by Commission

(i) In general

The Commission may develop 1 or more additional duties applicable to security-based swap data repositories.

(ii) Consideration of evolving standards

In developing additional duties under subparagraph (A),[3] the Commission may take into consideration any evolving standard of the United States or the international community.

(iii) Additional duties for Commission designees

The Commission shall establish additional duties for any registrant described in subsection (m)(2)(C) in order to minimize conflicts of interest, protect data, ensure compliance, and guarantee the safety and security of the security-based swap data repository.

(8) Required registration for security-based swap data repositories

Any person that is required to be registered as a security-based swap data repository under this subsection shall register with the Commission, regardless of whether that person is also licensed under the Commodity Exchange Act [7 U.S.C. 1 et seq.] as a swap data repository.

(9) Rules

The Commission shall adopt rules governing persons that are registered under this subsection.

(o) Beneficial ownership

For purposes of this section and section 78p of this title, a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security.

(p) Disclosures relating to conflict minerals originating in the Democratic Republic of the Congo

(1) Regulations

(A) In general

Not later than 270 days after July 21, 2010, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—

(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ("DRC conflict free" is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

(B) Certification

The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

(C) Unreliable determination

If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

(D) DRC conflict free

For purposes of this paragraph, a product may be labeled as "DRC conflict free" if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

(E) Information available to the public

Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

(2) Person described

A person is described in this paragraph if—

(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) Revisions and waivers

The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that—

(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and

(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

(4) Termination of disclosure requirements

The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than the date that is one day after the end of the 5-year period beginning on July 21, 2010, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

(5) Definitions

For purposes of this subsection, the terms "adjoining country", "appropriate congressional committees", "armed group", and "conflict mineral" have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(q) Disclosure of payments by resource extraction issuers

(1) Definitions

In this subsection—

(A) the term "commercial development of oil, natural gas, or minerals" includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;

(B) the term "foreign government" means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;

(C) the term "payment"—

(i) means a payment that is—

(I) made to further the commercial development of oil, natural gas, or minerals; and
(II) not de minimis; and

(ii) includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals;

(D) the term "resource extraction issuer" means an issuer that—
(i) is required to file an annual report with the Commission; and
(ii) engages in the commercial development of oil, natural gas, or minerals;

(E) the term "interactive data format" means an electronic data format in which pieces of information are identified using an interactive data standard; and

(F) the term "interactive data standard" means [4] standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.

(2) Disclosure

(A) Information required

Not later than 270 days after July 21, 2010, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—

(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and
(ii) the type and total amount of such payments made to each government.

(B) Consultation in rulemaking

In issuing rules under subparagraph (A), the Commission may consult with any agency or entity that the Commission determines is relevant.

(C) Interactive data format

The rules issued under subparagraph (A) shall require that the information included in the annual report of a resource extraction issuer be submitted in an interactive data format.

(D) Interactive data standard

(i) In general

The rules issued under subparagraph (A) shall establish an interactive data standard for the information included in the annual report of a resource extraction issuer.

(ii) Electronic tags

The interactive data standard shall include electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the Federal Government—

(I) the total amounts of the payments, by category;
(II) the currency used to make the payments;
(III) the financial period in which the payments were made;
(IV) the business segment of the resource extraction issuer that made the payments;
(V) the government that received the payments, and the country in which the government is located;
(VI) the project of the resource extraction issuer to which the payments relate; and

(VII) such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors.

(E) International transparency efforts

To the extent practicable, the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.

(F) Effective date

With respect to each resource extraction issuer, the final rules issued under subparagraph (A) shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year of the resource extraction issuer that ends not earlier than 1 year after the date on which the Commission issues final rules under subparagraph (A).

(3) Public availability of information

(A) In general

To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).

(B) Other information

Nothing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the rules issued under paragraph (2)(A).

(4) Authorization of appropriations

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out this subsection.

(r) Disclosure of certain activities relating to Iran

(1) In general

Each issuer required to file an annual or quarterly report under subsection (a) shall disclose in that report the information required by paragraph (2) if, during the period covered by the report, the issuer or any affiliate of the issuer—

(A) knowingly engaged in an activity described in subsection (a) or (b) of section 5 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note);

(B) knowingly engaged in an activity described in subsection (c)(2) of section 8513 of title 22 or a transaction described in subsection (d)(1) of that section;

(C) knowingly engaged in an activity described in section 8514a(b)(2) of title 22; or

(D) knowingly conducted any transaction or dealing with—

(i) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13224 (66 Fed. Reg. 49079; relating to blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism);

(ii) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13382 (70 Fed. Reg. 38567; relating to blocking of property of weapons of mass destruction proliferators and their supporters); or

(iii) any person or entity identified under section 560.304 of title 31, Code of Federal Regulations (relating to the definition of the Government of Iran) without the specific authorization of a Federal department or agency.

(2) Information required

If an issuer or an affiliate of the issuer has engaged in any activity described in paragraph (1), the issuer shall disclose a detailed description of each such activity, including—

(A) the nature and extent of the activity;

(B) the gross revenues and net profits, if any, attributable to the activity; and

(C) whether the issuer or the affiliate of the issuer (as the case may be) intends to continue the activity.

(3) Notice of disclosures

If an issuer reports under paragraph (1) that the issuer or an affiliate of the issuer has knowingly engaged in any activity described in that paragraph, the issuer shall separately file with the Commission, concurrently with the annual or quarterly report under subsection (a), a notice that the disclosure of that activity has been included in that annual or quarterly report that identifies the issuer and contains the information required by paragraph (2).

(4) Public disclosure of information

Upon receiving a notice under paragraph (3) that an annual or quarterly report includes a disclosure of an activity described in paragraph (1), the Commission shall promptly—

(A) transmit the report to—

(i) the President;

(ii) the Committee on Foreign Affairs and the Committee on Financial Services of the House of Representatives; and

(iii) the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(B) make the information provided in the disclosure and the notice available to the public by posting the information on the Internet website of the Commission.

(5) Investigations

Upon receiving a report under paragraph (4) that includes a disclosure of an activity described in paragraph (1) (other than an activity described in subparagraph (D)(iii) of that paragraph), the President shall—

(A) initiate an investigation into the possible imposition of sanctions under the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note), section 8513 or 8514a of title 22, an Executive order specified in clause (i) or (ii) of paragraph (1)(D), or any other provision of law relating to the imposition of sanctions with respect to Iran, as applicable; and

(B) not later than 180 days after initiating such an investigation, make a determination with respect to whether sanctions should be imposed with respect to the issuer or the affiliate of the issuer (as the case may be).

(6) Sunset

The provisions of this subsection shall terminate on the date that is 30 days after the date on which the President makes the certification described in section 8551(a) of title 22.

(June 6, 1934, ch. 404, title I, §13, 48 Stat. 894; Pub. L. 88–467, §4, Aug. 20, 1964, 78 Stat. 569; Pub. L. 90–439, §2, July 29, 1968, 82 Stat. 454; Pub. L. 91–567, §§1, 2, Dec. 22, 1970, 84 Stat. 1497; Pub. L. 94–29, §10, June 4, 1975, 89 Stat. 119; Pub. L. 94–210, title III, §308(b), Feb. 5, 1976, 90 Stat. 57; Pub. L. 95–213, title I, §102, title II, §§202, 203, Dec. 19, 1977, 91 Stat. 1494, 1498, 1499; Pub. L. 98–38, §2(a), June 6, 1983, 97 Stat. 205; Pub. L. 100–181, title III, §§315, 316, Dec. 4, 1987, 101 Stat. 1256; Pub. L. 100–241, §12(d), Feb. 3, 1988, 101 Stat. 1810; Pub. L. 100–418, title V, §5002, Aug. 23, 1988, 102 Stat. 1415; Pub. L. 101–432, §3, Oct. 16, 1990, 104 Stat. 964; Pub. L. 107–123, §5, Jan. 16, 2002, 115 Stat. 2395; Pub. L. 107–204, title I, §109(i), formerly §109(h), title IV, §§401(a), 402(a), 409, July 30, 2002, 116 Stat. 771, 785, 787, 791, renumbered §109(i), Pub. L. 111–203, title IX, §982(h)(3), July 21, 2010, 124 Stat. 1930; Pub. L. 111–203, title VII, §§763(i), 766(b), (c), (e), title IX, §§929R(a), 929X(a), 985(b)(4), 991(b)(2), title XV, §§1502(b), 1504, July 21, 2010, 124 Stat. 1779, 1799, 1866, 1870, 1933, 1952, 2213, 2220; Pub. L. 112–106, title I, §102 (b)(2), Apr. 5, 2012, 126 Stat. 309; Pub. L. 112–158, title II, §219(a), Aug. 10, 2012, 126 Stat. 1235.)

15 U.S.C.
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Title 15 - COMMERCE AND TRADE
CHAPTER 2B - SECURITIES EXCHANGES
Sec. 78o - Registration and regulation of brokers and dealers
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§78*o*. Registration and regulation of brokers and dealers

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b) Manner of registration of brokers and dealers

(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this subsection.

(2)(A) An application for registration of a broker or dealer to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application, in such form as the Commission, by rule, may prescribe, shall contain such information and documents concerning the applicant, the successor, and any persons associated with

the applicant or the successor, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The grant or denial of registration to such an applicant shall be in accordance with the procedures set forth in paragraph (1) of this subsection. If the Commission grants such registration, the registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt the application for registration as its own.

(B) Any person who is a broker or dealer solely by reason of acting as a municipal securities dealer or municipal securities broker, who so acts through a separately identifiable department or division, and who so acted in such a manner on June 4, 1975, may, in accordance with such terms and conditions as the Commission, by rule, prescribes as necessary and appropriate in the public interest and for the protection of investors, register such separately identifiable department or division in accordance with this subsection. If any such department or division is so registered, the department or division and not such person himself shall be the broker or dealer for purposes of this chapter.

(C) Within six months of the date of the granting of registration to a broker or dealer, the Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange of which such broker or dealer is a member, shall conduct an inspection of the broker or dealer to determine whether it is operating in conformity with the provisions of this chapter and the rules and regulations thereunder: *Provided, however*, That the Commission may delay such inspection of any class of brokers or dealers for a period not to exceed six months.

(3) Any provision of this chapter (other than section 78e of this title and subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered broker or dealer or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds—

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer municipal advisor,[1] government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the

above, or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.) or any substantially equivalent foreign statute or regulation;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18 or a violation of a substantially equivalent foreign statute.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer municipal advisor,[1] government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker, dealer, security-based swap dealer, or a major security-based swap participant;

(G) has been found by a foreign financial regulatory authority to have—

(i) made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(ii) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade;

(iii) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision; or

(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(5) Pending final determination whether any registration under this subsection shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer.

(6)(A) With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person—

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection;

(ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(B) It shall be unlawful—

(i) for any person as to whom an order under subparagraph (A) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order, or to participate in an offering of penny stock in contravention of such order;

(ii) for any broker or dealer to permit such a person, without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order; or

(iii) for any broker or dealer to permit such a person, without the consent of the Commission, to participate in an offering of penny stock in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order and of such participation.

(C) For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from such term.

(7) No registered broker or dealer or government securities broker or government securities dealer registered (or required to register) under section 78o–5(a)(1)(A) of this title shall effect any transaction in, or induce the purchase or sale of, any security unless such broker or dealer meets such standards of operational capability and such broker or dealer and all natural persons associated with such broker or dealer meet such standards of training, experience, competence, and such other qualifications as the Commission finds necessary or appropriate in the public interest or for the protection of investors. The Commission shall establish such standards by rules and regulations, which may—

(A) specify that all or any portion of such standards shall be applicable to any class of brokers and dealers and persons associated with brokers and dealers;

(B) require persons in any such class to pass tests prescribed in accordance with such rules and regulations, which tests shall, with respect to any class of partners, officers, or supervisory employees (which latter term may be defined by the Commission's rules and regulations and as so defined shall include branch managers of brokers or dealers) engaged in the management of the broker or dealer, include questions relating to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matters; and

(C) provide that persons in any such class other than brokers and dealers and partners, officers, and supervisory employees of brokers or dealers, may be qualified solely on the basis of compliance with such standards of training and such other qualifications as the Commission finds appropriate.

The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this paragraph, including, but not limited to, fees for any test administered by it or under its direction. The Commission may cooperate with registered securities associations and national securities exchanges in devising and administering tests and may require registered brokers and dealers and persons associated with such brokers and dealers to pass tests administered by or on behalf of any such association or exchange and to pay such association or exchange reasonable fees or charges to defray the costs incurred by such association or exchange in administering such tests.

(8) It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or [2] commercial paper, bankers'

acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78o–3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

(9) The Commission by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (8) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(10) For the purposes of determining whether a person is subject to a statutory disqualification under section 78f(c)(2), 78o–3(g)(2), or 78q–1(b)(4)(A) of this title, the term "Commission" in paragraph (4)(B) of this subsection shall mean "exchange", "association", or "clearing agency", respectively.

(11) BROKER/DEALER REGISTRATION WITH RESPECT TO TRANSACTIONS IN SECURITY FUTURES PRODUCTS.—

(A) NOTICE REGISTRATION.—

(i) CONTENTS OF NOTICE.—Notwithstanding paragraphs (1) and (2), a broker or dealer required to register only because it effects transactions in security futures products on an exchange registered pursuant to section 78f(g) of this title may register for purposes of this section by filing with the Commission a written notice in such form and containing such information concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. A broker or dealer may not register under this paragraph unless that broker or dealer is a member of a national securities association registered under section 78o–3(k) of this title.

(ii) IMMEDIATE EFFECTIVENESS.—Such registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission, except that such registration shall not be effective if the registration would be subject to suspension or revocation under paragraph (4).

(iii) SUSPENSION.—Such registration shall be suspended immediately if a national securities association registered pursuant to section 78o–3(k) of this title suspends the membership of that broker or dealer.

(iv) TERMINATION.—Such registration shall be terminated immediately if any of the above stated conditions for registration set forth in this paragraph are no longer satisfied.

(B) EXEMPTIONS FOR REGISTERED BROKERS AND DEALERS.—A broker or dealer registered pursuant to the requirements of subparagraph (A) shall be exempt from the following provisions of this chapter and the rules thereunder with respect to transactions in security futures products:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3) and (c)(5) of this section.

(iv) Section 78o–4 of this title.

(v) Section 78o–5 of this title.

(vi) Subsections (d), (e), (f), (g), (h), and (i) [3] of section 78q of this title.

(12) EXEMPTION FOR SECURITY FUTURES PRODUCT EXCHANGE MEMBERS.—

(A) REGISTRATION EXEMPTION.—A natural person shall be exempt from the registration requirements of this section if such person—

(i) is a member of a designated contract market registered with the Commission as an exchange pursuant to section 78f(g) of this title;

(ii) effects transactions only in securities on the exchange of which such person is a member; and

(iii) does not directly accept or solicit orders from public customers or provide advice to public customers in connection with the trading of security futures products.

(B) OTHER EXEMPTIONS.—A natural person exempt from registration pursuant to subparagraph (A) shall also be exempt from the following provisions of this chapter and the rules thereunder:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3), (c)(5), and (e) of this section.

(iv) Section 78o–4 of this title.

(v) Section 78o–5 of this title.

(vi) Subsections (d), (e), (f), (g), (h), and (i) [3] of section 78q of this title.

(c) Use of manipulative or deceptive devices; contravention of rules and regulations

(1)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security or any security-based swap agreement involving a municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or to attempt to induce the purchase or sale of, any government security or any security-based swap agreement involving a government security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(2)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such broker, dealer, or municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security in connection with which such government securities broker or government securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(D) The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(E) The Commission shall, prior to adopting any rule or regulation under subparagraph (C), consult with and consider the views of the Secretary of the Treasury and each appropriate regulatory agency. If the Secretary of the Treasury or any appropriate regulatory agency comments in writing on a proposed rule or regulation of the Commission under such subparagraph (C) that has been published for comment, the Commission shall respond in writing to such written comment before adopting the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission,

that such rule or regulation, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule or regulation, find that such rule or regulation is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(3)(A) No broker or dealer (other than a government securities broker or government securities dealer, except a registered broker or dealer) shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall (A) require the maintenance of reserves with respect to customers' deposits or credit balances, and (B) no later than September 1, 1975, establish minimum financial responsibility requirements for all brokers and dealers.

(B) Consistent with this chapter, the Commission, in consultation with the Commodity Futures Trading Commission, shall issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to any broker or dealer registered with the Commission pursuant to subsection (b) of this section (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act [7 U.S.C. 6f(a)] (except paragraph (2) thereof), with respect to the application of: (i) the provisions of section 78h of this title, subsection (c)(3) of this section, and section 78q of this title and the rules and regulations thereunder related to the treatment of customer funds, securities, or property, maintenance of books and records, financial reporting, or other financial responsibility rules, involving security futures products; and (ii) similar provisions of the Commodity Exchange Act [7 U.S.C. 1 et seq.] and rules and regulations thereunder involving security futures products.

(C) Notwithstanding any provision of sections 2(a)(1)(C)(i) or 4d(a)(2) of the Commodity Exchange Act [7 U.S.C. 2(a)(1)(C)(i), 6d(a)(2)] and the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 78mm of this title or pursuant to a rule or regulation, cash and securities may be held by a broker or dealer registered pursuant to subsection (b)(1) and also registered as a futures commission merchant pursuant to section 4f(a)(1) of the Commodity Exchange Act [7 U.S.C. 6f(a)(1)], in a portfolio margining account carried as a futures account subject to section 4d of the Commodity Exchange Act [7 U.S.C. 6d] and the rules and regulations thereunder, pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission, and subject to subchapter IV of chapter 7 of title 11 and the rules and regulations thereunder. The Commission shall consult with the Commodity Futures Trading Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practicable for similar products.

(4) If the Commission finds, after notice and opportunity for a hearing, that any person subject to the provisions of section 78l, 78m, 78n of this title or subsection (d) of this section or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person, and any person who was a cause of the failure to comply due to an act or omission the person knew or should have known would contribute to the failure to comply, to comply, or to take steps to effect compliance, with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

(5) No dealer (other than a specialist registered on a national securities exchange) acting in the capacity of market maker or otherwise shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or a municipal security) in contravention of such specified and appropriate standards with respect to dealing as the Commission, by rule, shall prescribe as necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to remove impediments to and perfect the mechanism of a national market system. Under the rules of the Commission a dealer in a security may be prohibited from acting as a broker in that security.

(6) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security, municipal security, commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors or to perfect or remove impediments to a national system for the prompt and accurate clearance and settlement of securities transactions, with respect to the time and method of, and the form and format of documents used in connection with, making settlements of and payments for transactions in securities, making transfers and deliveries of securities, and closing accounts. Nothing in this paragraph shall be construed (A) to affect the authority of the Board of Governors of the Federal Reserve System, pursuant to section 78g of this title, to prescribe rules and regulations for the purpose of preventing the excessive use of credit for the purchase or carrying of securities, or (B) to authorize the Commission to prescribe rules or regulations for such purpose.

(7) In connection with any bid for or purchase of a government security related to an offering of government securities by or on behalf of an issuer, no government securities broker, government securities dealer, or bidder for or purchaser of securities in such offering shall knowingly or willfully make any false or misleading written statement or omit any fact necessary to make any written statement made not misleading.

(8) PROHIBITION OF REFERRAL FEES.—No broker or dealer, or person associated with a broker or dealer, may solicit or accept, directly or indirectly, remuneration for assisting an attorney in obtaining the representation of any person in any private action arising under this chapter or under the Securities Act of 1933 [15 U.S.C. 77a et seq.].

(d) Supplementary and periodic information

(1) In general

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended [15 U.S.C. 77a et seq.], shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78l of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than 300 persons, or, in the case of bank [4] or a bank holding company, as such term is defined in section 1841 of title 12, 1,200 persons persons.[1] For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar

rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

(2) Asset-backed securities

(A) Suspension of duty to file

The Commission may, by rule or regulation, provide for the suspension or termination of the duty to file under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(B) Classification of issuers

The Commission may, for purposes of this subsection, classify issuers and prescribe requirements appropriate for each class of issuers of asset-backed securities.

(e) Notices to customers regarding securities lending

Every registered broker or dealer shall provide notice to its customers that they may elect not to allow their fully paid securities to be used in connection with short sales. If a broker or dealer uses a customer's securities in connection with short sales, the broker or dealer shall provide notice to its customer that the broker or dealer may receive compensation in connection with lending the customer's securities. The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, may prescribe the form, content, time, and manner of delivery of any notice required under this paragraph.

(f) Compliance with this chapter by members not required to be registered

The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors or to assure equal regulation, may require any member of a national securities exchange not required to register under this section and any person associated with any such member to comply with any provision of this chapter (other than subsection (a) of this section) or the rules or regulations thereunder which by its terms regulates or prohibits any act, practice, or course of business by a "broker or dealer" or "registered broker or dealer" or a "person associated with a broker or dealer," respectively.

(g) Prevention of misuse of material, nonpublic information

Every registered broker or dealer shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse in violation of this chapter, or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, shall adopt rules or regulations to require specific policies or procedures reasonably designed to prevent misuse in violation of this chapter (or the rules or regulations thereunder) of material, nonpublic information.

(h) Requirements for transactions in penny stocks

(1) In general

No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any penny stock by any customer except in accordance with the requirements of this subsection and the rules and regulations prescribed under this subsection.

(2) Risk disclosure with respect to penny stocks

Prior to effecting any transaction in any penny stock, a broker or dealer shall give the customer a risk disclosure document that—

(A) contains a description of the nature and level of risk in the market for penny stocks in both public offerings and secondary trading;

(B) contains a description of the broker's or dealer's duties to the customer and of the rights and remedies available to the customer with respect to violations of such duties or other requirements of Federal securities laws;

(C) contains a brief, clear, narrative description of a dealer market, including "bid" and "ask" prices for penny stocks and the significance of the spread between the bid and ask prices;

(D) contains the toll free telephone number for inquiries on disciplinary actions established pursuant to section 78o–3(i) of this title;

(E) defines significant terms used in the disclosure document or in the conduct of trading in penny stocks; and

(F) contains such other information, and is in such form (including language, type size, and format), as the Commission shall require by rule or regulation.

(3) Commission rules relating to disclosure

The Commission shall adopt rules setting forth additional standards for the disclosure by brokers and dealers to customers of information concerning transactions in penny stocks. Such rules—

(A) shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors—

(i) the bid and ask prices for penny stock, or such other information as the Commission may, by rule, require to provide customers with more useful and reliable information relating to the price of such stock;

(ii) the number of shares to which such bid and ask prices apply, or other comparable information relating to the depth and liquidity of the market for such stock; and

(iii) the amount and a description of any compensation that the broker or dealer and the associated person thereof will receive or has received in connection with such transaction;

(B) shall require brokers and dealers to provide, to each customer whose account with the broker or dealer contains penny stocks, a monthly statement indicating the market value of the penny stocks in that account or indicating that the market value of such stock cannot be determined because of the unavailability of firm quotes; and

(C) may, as the Commission finds necessary or appropriate in the public interest or for the protection of investors, require brokers and dealers to disclose to customers additional information concerning transactions in penny stocks.

(4) Exemptions

The Commission, as it determines consistent with the public interest and the protection of investors, may by rule, regulation, or order exempt in whole or in part, conditionally or unconditionally, any person or class of persons, or any transaction or class of transactions, from the requirements of this subsection. Such exemptions shall include an exemption for brokers and dealers based on the minimal percentage of the broker's or dealer's commissions, commission-equivalents, and markups received from transactions in penny stocks.

(5) Regulations

It shall be unlawful for any person to violate such rules and regulations as the Commission shall prescribe in the public interest or for the protection of investors or to maintain fair and orderly markets—

(A) as necessary or appropriate to carry out this subsection; or

(B) as reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

(i) Limitations on State law

(1) Capital, margin, books and records, bonding, and reports

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this chapter. The Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this chapter.

(2) Funding portals

(A) Limitation on State laws

Except as provided in subparagraph (B), no State or political subdivision thereof may enforce any law, rule, regulation, or other administrative action against a registered funding portal with respect to its business as such.

(B) Examination and enforcement authority

Subparagraph (A) does not apply with respect to the examination and enforcement of any law, rule, regulation, or administrative action of a State or political subdivision thereof in which the principal place of business of a registered funding portal is located, provided that such law, rule, regulation, or administrative action is not in addition to or different from the requirements for registered funding portals established by the Commission.

(C) Definition

For purposes of this paragraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) De minimis transactions by associated persons

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof may prohibit an associated person of a broker or dealer from effecting a transaction described in paragraph (3) for a customer in such State if—

(A) such associated person is not ineligible to register with such State for any reason other than such a transaction;

(B) such associated person is registered with a registered securities association and at least one State; and

(C) the broker or dealer with which such person is associated is registered with such State.

(4) Described transactions

(A) In general

A transaction is described in this paragraph if—

(i) such transaction is effected—

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) by an associated person of the broker or dealer—

(aa) to which the customer was assigned for 14 days prior to the day of the transaction; and

(bb) who is registered with a State in which the customer was a resident or was present for at least 30 consecutive days during the 1-year period prior to the day of the transaction; or

(ii) the transaction is effected—

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) during the period beginning on the date on which such associated person files an application for registration with the State in which the transaction is effected and ending on the earlier of—

(aa) 60 days after the date on which the application is filed; or

(bb) the date on which such State notifies the associated person that it has denied the application for registration or has stayed the pendency of the application for cause.

(B) Rules of construction

For purposes of subparagraph (A)(i)(II)—

(i) each of up to 3 associated persons of a broker or dealer who are designated to effect transactions during the absence or unavailability of the principal associated person for a customer may be treated as an associated person to which such customer is assigned; and

(ii) if the customer is present in another State for 30 or more consecutive days or has permanently changed his or her residence to another State, a transaction is not described in this paragraph, unless the associated person of the broker or dealer files an application for registration with such State not later than 10 business days after the later of the date of the transaction, or the date of the discovery of the presence of the customer in the other State for 30 or more consecutive days or the change in the customer's residence.

(j) [5] Rulemaking to extend requirements to new hybrid products

(1) Consultation

Prior to commencing a rulemaking under this subsection, the Commission shall consult with and seek the concurrence of the Board concerning the imposition of broker or dealer registration requirements with respect to any new hybrid product. In developing and promulgating rules under this subsection, the Commission shall consider the views of the Board, including views with respect to the nature of the new hybrid product; the history, purpose, extent, and appropriateness of the regulation of the new product under the Federal banking laws; and the impact of the proposed rule on the banking industry.

(2) Limitation

The Commission shall not—

(A) require a bank to register as a broker or dealer under this section because the bank engages in any transaction in, or buys or sells, a new hybrid product; or

(B) bring an action against a bank for a failure to comply with a requirement described in subparagraph (A),

unless the Commission has imposed such requirement by rule or regulation issued in accordance with this section.

(3) Criteria for rulemaking

The Commission shall not impose a requirement under paragraph (2) of this subsection with respect to any new hybrid product unless the Commission determines that—

(A) the new hybrid product is a security; and

(B) imposing such requirement is necessary and appropriate in the public interest and for the protection of investors.

(4) Considerations

In making a determination under paragraph (3), the Commission shall consider—

(A) the nature of the new hybrid product; and

(B) the history, purpose, extent, and appropriateness of the regulation of the new hybrid product under the Federal securities laws and under the Federal banking laws.

(5) Objection to Commission regulation

(A) Filing of petition for review

The Board may obtain review of any final regulation described in paragraph (2) in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, not later than 60 days after the date of publication of the final regulation, a written petition requesting that the regulation be set aside. Any proceeding to challenge any such rule shall be expedited by the Court of Appeals.

(B) Transmittal of petition and record

A copy of a petition described in subparagraph (A) shall be transmitted as soon as possible by the Clerk of the Court to an officer or employee of the Commission designated for that purpose. Upon receipt of the petition, the Commission shall file with the court the regulation under review and any documents referred to therein, and any other relevant materials prescribed by the court.

(C) Exclusive jurisdiction

On the date of the filing of the petition under subparagraph (A), the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in subparagraph (B), to affirm and enforce or to set aside the regulation at issue.

(D) Standard of review

The court shall determine to affirm and enforce or set aside a regulation of the Commission under this subsection, based on the determination of the court as to whether—

(i) the subject product is a new hybrid product, as defined in this subsection;

(ii) the subject product is a security; and

(iii) imposing a requirement to register as a broker or dealer for banks engaging in transactions in such product is appropriate in light of the history, purpose, and extent of regulation under the Federal securities laws and under the Federal banking laws, giving deference neither to the views of the Commission nor the Board.

(E) Judicial stay

The filing of a petition by the Board pursuant to subparagraph (A) shall operate as a judicial stay, until the date on which the determination of the court is final (including any appeal of such determination).

(F) Other authority to challenge

Any aggrieved party may seek judicial review of the Commission's rulemaking under this subsection pursuant to section 78y of this title.

(6) Definitions

For purposes of this subsection:

(A) New hybrid product

The term "new hybrid product" means a product that—

(i) was not subjected to regulation by the Commission as a security prior to the date of the enactment of the Gramm-Leach-Bliley Act [Nov. 12, 1999];

(ii) is not an identified banking product as such term is defined in section 206 of such Act; and

(iii) is not an equity swap within the meaning of section 206(a)(6) of such Act.

(B) Board

The term "Board" means the Board of Governors of the Federal Reserve System.

(j) [5] Limitation on Commission authority

The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 78c–1(b) of this title.

(k) [6] Registration or succession to a United States broker or dealer

In determining whether to permit a foreign person or an affiliate of a foreign person to register as a United States broker or dealer, or succeed to the registration of a United States broker or dealer, the Commission may consider whether, for a foreign person, or an affiliate of a foreign person that presents a risk to the stability of the United States financial system, the home country of the foreign person has adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(l) [7] Termination of a United States broker or dealer

For a foreign person or an affiliate of a foreign person that presents such a risk to the stability of the United States financial system, the Commission may determine to terminate the registration of such foreign person or an affiliate of such foreign person as a broker or dealer in the United States, if the Commission determines that the home country of the foreign person has not adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(k) [8] Standard of conduct

(1) In general

Notwithstanding any other provision of this chapter or the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–11]. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

(2) Disclosure of range of products offered

Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).

(l) [9] Other matters

The Commission shall—

(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

(m) Harmonization of enforcement

The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer shall include—

(1) the enforcement authority of the Commission with respect to such violations provided under this chapter; and

(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under this chapter to [10] same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to an investment advisor under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.].

(n) Disclosures to retail investors

(1) In general

Notwithstanding any other provision of the securities laws, the Commission may issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.

(2) Considerations

In developing any rules under paragraph (1), the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation.

(3) Form and contents of documents and information

Any documents or information designated under a rule promulgated under paragraph (1) shall—

(A) be in a summary format; and

(B) contain clear and concise information about—

(i) investment objectives, strategies, costs, and risks; and

(ii) any compensation or other financial incentive received by a broker, dealer, or other intermediary in connection with the purchase of retail investment products.

(o) Authority to restrict mandatory pre-dispute arbitration

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

(June 6, 1934, ch. 404, title I, §15, 48 Stat. 895; May 27, 1936, ch. 462, §3, 49 Stat. 1377; June 25, 1938, ch. 677, §2, 52 Stat. 1075; Pub. L. 88–467, §6, Aug. 20, 1964, 78 Stat. 570; Pub. L. 91–598, §11(d), formerly §7(d), Dec. 30, 1970, 84 Stat. 1653, renumbered §11(d), Pub. L. 95–283, §9, May 21, 1978, 92 Stat. 260; Pub. L. 94–29, §11, June 4, 1975, 89 Stat. 121; Pub. L. 95–213, title II, §204, Dec. 19, 1977, 91 Stat. 1500; Pub. L. 98–38, §3(a), June 6, 1983, 97 Stat. 206; Pub. L. 98–376, §§4, 6(b), Aug. 10, 1984, 98 Stat. 1265; Pub. L. 99–571, title I, §102(e), (f), Oct. 28, 1986, 100 Stat. 3218; Pub. L. 100–181, title III, §317, Dec. 4, 1987, 101 Stat. 1256; Pub. L. 100–704, §3(b)(1), Nov. 19, 1988, 102 Stat. 4679; Pub. L. 101–429, title V, §§504(a), 505, Oct. 15, 1990, 104 Stat. 952, 953; Pub. L. 101–550, title II, §203(a), (c)(1), Nov. 15, 1990, 104 Stat. 2715, 2718; Pub. L. 103–202, title I, §§105, 106(b)(2)(B), 109(b)(2), 110, Dec. 17, 1993, 107 Stat. 2348, 2350, 2353; Pub. L. 104–67, title I, §103(a), Dec. 22, 1995, 109 Stat. 756; Pub. L. 104–290, title I, §103(a), Oct. 11, 1996, 110 Stat. 3420; Pub. L. 105–353, title III, §301(b)(8), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–102, title II, §205, Nov. 12, 1999, 113 Stat. 1391; Pub. L. 106–554, §1(a)(5) [title II, §§203(a)(1), (b), 206

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 16 - INFORMATION REQUIREMENTS FOR THE SECTION 8-1111(15) ~~NOTICE~~ ~~SECTION 8-1111(15) NOTICE~~AGRICULTURAL COOPERATIVE EXEMPTION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to the authority delegated to the Director in Sections 8-1120(3) and 8-1111(15) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to Section 8-1111(15) is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 NOTICE FILING REQUIREMENT. The notice required by Section 8-1111(15) of the Act will be satisfied if the conditions of this Rule are met.

002.01 Such notice shall be filed with the Nebraska Department of Banking and Finance, ~~Suite 311, The Atrium, 1200 N Street,~~ P.O. Box 95006, Lincoln, Nebraska 68509-5006.

002.02 Such notice shall be filed prior to the issuance of any security made in reliance upon this exemption.

003 ~~NOTICE~~ CONTENTS OF NOTICE. The notice shall contain the following information:

003.01 The name and address of the agricultural cooperative;

003.02 The date of incorporation and the statute under which the agricultural cooperative was organized;

003.03 The amount of its authorized capital stock;

003.04 The type of security being issued: identify whether it is a certificate of participation or interest, a certificate of indebtedness, common stock, preferred stock, or other;

003.05 The total amount of the securities to be sold by the issuer in Nebraska;

003.06 An indication as to whom sales will be made: present members, patrons, or the general public;

003.07 A brief description of the methods by which the securities will be sold;

003.08 The names and addresses of the persons who will be selling the securities and their relationship to the cooperative;

003.09 A complete copy of the financial statements for the past two years;

003.10 A brief description of the intended use of the proceeds;

003.11 The interest rate to be paid, if the offering involves debt securities; and

003.12 A copy of the disclosure document to be provided to prospective investors, if the agricultural cooperative does not have a past history of offering securities.

004 AMENDMENTS. If, during the offering period, there shall occur an event which would materially affect the issuer, its prospects or properties, or otherwise materially affect the accuracy or completeness of the information required in Section 003, above, the notice shall be promptly revised to reflect such event and filed with the ~~Department~~Director.

005 EFFECTIVENESS. A notice of exemption filed pursuant to Section 8-1111(15) of the Act remains in effect until the earliest of the following occurrences:

005.01 The amount of securities stated in the notice submitted to the ~~Department~~ Director is sold;

005.02 Until the issue is discontinued by resolution of the Board of Directors of the agricultural cooperative; or

005.03 Three years from the date of the initial filing of the notice under this Rule.

006 BURDEN OF PROOF. In any proceeding involving this Rule, the burden of proving the exemption ~~or an exemption from a definition or condition~~ from registration is upon the person claiming ~~it~~the exemption.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 17 - CONDITIONS AND INFORMATION REQUIREMENTS FOR THE SECTION 8-1111(16) UNIFORM LIMITED OFFERING EXEMPTION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1111(16) and Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to exemptions from registration is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rule referenced in this Rule is attached hereto.

002 CONDITIONS OF EXEMPTION.

002.01 Any offer or sale of securities offered or sold in compliance with the Securities Act of 1933, Regulation D, Rules 230.501 - 230.503, 230.505, and 230.507 - 230.508, 17 CFR 230.501-503, 17 CFR 230.505, and 17 CFR 230.507-508~~as made effective in Release No. 33-6389, and as amended in Release Nos. 33-6437, 33-6663, 33-6758 and 33-6825~~, which satisfies the following further conditions and limitations shall be deemed exempt from the registration provisions of the Act.

002.02 The issuer shall file the following with the Director within thirty ~~(30)~~ days of the first sale made in Nebraska in reliance on the exemption contained in this Rule.

002.02A A SEC Form D notice manually signed by a person duly authorized by the issuer;

002.02B A copy of the disclosure statement given to investors in compliance with this Rule;

002.02C The date of the first sale of a security made in reliance on this exemption;

002.02D A check in the amount of two hundred dollars ($200.00), payable to "Nebraska Department of Banking and Finance";

002.01E A representation by an officer, director, general partner, managing member or legal counsel of the issuer that all of the conditions of Section 8-1111(16) of the Act have been or will be met; and

002.02F A consent to service of process in Nebraska.

002.03 No commission, finder's fee, or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser or in connection with sales of securities in reliance on this ~~regulation~~Rule, unless such person is a Nebraska-registered agent of a Nebraska-registered broker-dealer or issuer-dealer.

003 DISQUALIFICATION.

003.01 The exemption under this Rule shall not be available for the securities of any issuer if a party or interest described in the Securities Act of 1933, Regulation A, Rule 230.262, Section (a), (b) or (c), 17 CFR 230.262:

003.01A Has filed a registration statement which is the subject of a currently effective stop order entered pursuant to any federal or state securities laws within five years prior to the commencement of the offering.

003.01B Has been convicted within five years prior to the commencement of the offering of any felony or misdemeanor in connection with the offer, purchase, or sale of any security, or any felony involving fraud or deceit, including, but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud.

003.01C Is currently subject to an administrative enforcement order or judgment entered by any state securities administrator or the Securities and Exchange Commission within five years prior to the commencement of the offering.

003.01D Is subject to any federal, state, or foreign governmental agency administrative enforcement order or judgment in which fraud or deceit, including, but not limited to, making untrue statements of material facts and omitting to state material facts, was found, and the order or judgment was entered within five years prior to the commencement of the offering.

003.01E Is currently subject to any states administrative order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities of the issuer.

003.01F Is subject to any order, judgment, or decree of any court of competent jurisdiction which temporarily or preliminarily restrains or enjoins, or which was entered within five years prior to the commencement of the offering and permanently restrained or enjoined such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with any state or with the Securities and Exchange Commission.

003.02 The prohibitions of Section 003.01, above, shall not apply if the party or interest subject to the disqualification is duly licensed to conduct securities related business in the state in which the administrative order or judgment was entered against such party or interest.

003.03 Any disqualification caused by this section is automatically waived if the state which created the basis for disqualification, or the Director, determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

003.04 An offering involving debt securities or preferred stock cannot qualify under this Rule if the offering would be disallowed under 48 NAC 29 or 48 NAC 30.

004 QUALIFICATION OF CERTAIN ISSUERS. An issuer offering securities pursuant to Regulation D, Rule 230.505, 17 CFR 230.505 can rely on such exemption only if the issuer:

~~004.01 Is a corporation:~~

~~004.01A Incorporated under the laws of the United States or any state and has, or proposes to have, its principal business operations in the United States; or~~

~~004.01B Incorporated under the laws of Canada, or province therefore, and has, or proposes to have, its principal business operations in Canada or the United States;~~

004.012 Is not an investment company as defined by Section 3 of the Investment Company Act of 1940, 15 USC § 80-3; and

004.023 Is not a majority owned subsidiary of an issuer which does not meet the qualifications for use of this Rule as specified herein.

005 DISCLOSURE. Nothing in this exemption is intended to, or should be construed as, in any way relieving issuers or persons acting on behalf of issuers from providing to prospective investors disclosure adequate to satisfy the anti-fraud provisions of the Act.

006 AVAILABILITY OF EXEMPTION.

006.01 Offers and sales which are exempt under this Rule may not be combined with offers and sales exempt under any other Rule or section of the Act; however, nothing in this limitation shall act as an election. Should, for any reason, the offer and sale fail to comply with all of the conditions for this exemption, the issuer may claim the availability of any other applicable exemption.

006.02 This exemption is not available to any issuer with respect to any transaction which, although in technical compliance with this Rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this Rule.

007 BURDEN OF PROOF. In any proceeding involving this Rule, the burden of proving the exemption ~~or an exception from a definition or condition~~ from registration is upon the person claiming ~~it~~the exemption.

008 CURE ORDER. An issuer which fails to file a notice within thirty ~~(30)~~ days of the first sale made in Nebraska in reliance on this exemption may request the late filing be cured by complying with 48 NAC 19.

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 30, 2015

Title 17 → Chapter II → Part 230 → §230.501

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.501 Definitions and terms used in Regulation D.

As used in Regulation D (§230.500 *et seq.* of this chapter), the following terms shall have the meaning indicated:

(a) *Accredited investor. Accredited investor* shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

(1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1,000,000.

(i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):

(A) The person's primary residence shall not be included as an asset;

(B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(A) Such right was held by the person on July 20, 2010;

(B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(C) The person held securities of the same issuer, other than such right, on July 20, 2010.

(6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of $5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in §230.506(b)(2)(ii); and

(8) Any entity in which all of the equity owners are accredited investors.

(b) *Affiliate.* An *affiliate* of, or person *affiliated* with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

(c) *Aggregate offering price. Aggregate offering price* shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.

(d) *Business combination. Business combination* shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

(e) *Calculation of number of purchasers.* For purposes of calculating the number of purchasers under §§230.505(b) and 230.506(b) only, the following shall apply:

(1) The following purchasers shall be excluded:

(i) Any relative, spouse or relative of the spouse of a purchaser who has the same primary residence as the purchaser;

(ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interests);

(iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(ii) of this section collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and

(iv) Any accredited investor.

(2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this section, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (§§230.501-230.508), except to the extent provided in paragraph (e)(1) of this section.

(3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

NOTE: The issuer must satisfy all the other provisions of Regulation D for all purchasers whether or not they are included in calculating the number of purchasers. Clients of an investment adviser or customers of a broker or dealer shall be considered the "purchasers" under Regulation D regardless of the amount of discretion given to the investment adviser or broker or dealer to act on behalf of the client or customer.

(f) *Executive officer. Executive officer* shall mean 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 issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.

(g) *Final order. Final order* shall mean a written directive or declaratory statement issued by a federal or state agency described in §230.506(d)(1)(iii) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.

(h) *Issuer.* The definition of the term *issuer* in section 2(a)(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 *et seq.*), the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.

(i) *Purchaser representative. Purchaser representative* shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:

(1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:

(i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;

(ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or

(iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this section collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;

(2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;

(3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and

(4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

NOTE 1 TO §230.501: A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 (*Exchange Act*) (15 U.S.C. 78a *et seq.*, as amended) and relating to investment advisers under the Investment Advisers Act of 1940.

NOTE 2 TO §230.501: The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this section must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for *all securities transactions* or *all private placements,* is not sufficient.

NOTE 3 TO §230.501: Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

[47 FR 11262, Mar. 16, 1982, as amended at 53 FR 7868, Mar. 10, 1988; 54 FR 11372, Mar. 20, 1989; 76 FR 81806, Dec. 29, 2011; 77 FR 18685, Mar. 28, 2012; 78 FR 44770, 44804, July 24, 2013]

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 30, 2015

Title 17 → Chapter II → Part 230 → §230.502

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.502 General conditions to be met.

The following conditions shall be applicable to offers and sales made under Regulation D (§230.500 *et seq.* of this chapter):

(a) *Integration.* All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the Act (17 CFR 230.405).

NOTE: The term *offering* is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this §230.502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (*i.e.*, are considered *integrated*) depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S. See Release No. 33-6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

(a) Whether the sales are part of a single plan of financing;

(b) Whether the sales involve issuance of the same class of securities;

(c) Whether the sales have been made at or about the same time;

(d) Whether the same type of consideration is being received; and

(e) Whether the sales are made for the same general purpose.

See Release 33-4552 (November 6, 1962) [27 FR 11316].

(b) *Information requirements*—(1) *When information must be furnished.* If the issuer sells securities under §230.505 or §230.506(b) to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (b)(2) of this section to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under §230.504, or to any accredited investor.

NOTE: When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) *Type of information to be furnished.* (i) If the issuer is not subject to the reporting requirements of section 13 or 15 (d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business and the securities being offered:

(A) *Non-financial statement information.* If the issuer is eligible to use Regulation A (§230.251-263), the same kind of information as would be required in Part II of Form 1-A (§239.90 of this chapter). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.

(B) *Financial statement information—(1) Offerings up to $2,000,000.* The information required in Article 8 of Regulation S-X (§210.8 of this chapter), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.

(2) *Offerings up to $7,500,000.* The financial statement information required in Form S-1 (§239.10 of this chapter) for smaller reporting companies. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(3) *Offerings over $7,500,000.* The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(C) If the issuer is a foreign private issuer eligible to use Form 20-F (§249.220f of this chapter), the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i) (B) (*1*), (*2*) or (*3*) of this section, as appropriate.

(ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(ii) (A) or (B) of this section, and in either event the information specified in paragraph (b)(2)(ii)(C) of this section:

(A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of Rules 14a-3 or 14c-3 under the Exchange Act (§240.14a-3 or §240.14c-3 of this chapter), the definitive proxy statement filed in connection with that annual report, and if requested by the purchaser in writing, a copy of the issuer's most recent Form 10-K (§249.310 of this chapter) under the Exchange Act.

(B) The information contained in an annual report on Form 10-K (§249.310 of this chapter) under the Exchange Act or in a registration statement on Form S-1 (§239.11 of this chapter) or S-11 (§239.18 of this chapter) under the Act or on Form 10 (§249.210 of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.

(C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14 (a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraphs (b)(2)(ii) (A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.

(D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraph (b) (2)(ii) (A) or (B) of this section, the information contained in its most recent filing on Form 20-F or Form F-1 (§239.31 of the chapter).

(iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10-K report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his or her written request, a reasonable time before his or her purchase.

(iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under §230.505 or §230.506(b), the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.

(v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under §230.505 or §230.506(b) the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2) (i) or (ii) of this section.

(vi) For business combinations or exchange offers, in addition to information required by Form S-4 (17 CFR 239.25), the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S-4 by compliance with paragraph (b)(2)(i) of this §230.502.

(vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under §230.505 or §230.506(b), the issuer shall advise the purchaser of the limitations on resale in the manner

contained in paragraph (d)(2) of this section. Such disclosure may be contained in other materials required to be provided by this paragraph.

(c) *Limitation on manner of offering.* Except as provided in §230.504(b)(1) or §230.506(c), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; *Provided, however,* that publication by an issuer of a notice in accordance with §230.135c or filing with the Commission by an issuer of a notice of sales on Form D (17 CFR 239.500) in which the issuer has made a good faith and reasonable attempt to comply with the requirements of such form, shall not be deemed to constitute general solicitation or general advertising for purposes of this section; *Provided further,* that, if the requirements of §230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

(d) *Limitations on resale.* Except as provided in §230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(a)(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(a)(11) of the Act, which reasonable care may be demonstrated by the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;

(2) Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and

(3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, §230.502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

[47 FR 11262, Mar. 16, 1982, as amended at 47 FR 54771, Dec. 6, 1982; 53 FR 7869, Mar. 11, 1988; 54 FR 11372, Mar. 20, 1989; 55 FR 18322, May 2, 1990; 56 FR 30054, 30055, July 1, 1991; 57 FR 47409, Oct. 16, 1992; 58 FR 26514, May 4, 1993; 59 FR 21650, Apr. 26, 1994; 62 FR 53954, Oct. 17, 1997; 73 FR 969, Jan. 4, 2008; 73 FR 10615, Feb. 27, 2008; 77 FR 18685, Mar. 28, 2012; 78 FR 44804, July 24, 2013]

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 30, 2015

Title 17 → Chapter II → Part 230 → §230.503

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.503 Filing of notice of sales.

(a) *When notice of sales on Form D is required and permitted to be filed.* (1) An issuer offering or selling securities in reliance on §230.504, §230.505, or §230.506 must file with the Commission a notice of sales containing the information required by Form D (17 CFR 239.500) for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering, unless the end of that period falls on a Saturday, Sunday or holiday, in which case the due date would be the first business day following.

(2) An issuer may file an amendment to a previously filed notice of sales on Form D at any time.

(3) An issuer must file an amendment to a previously filed notice of sales on Form D for an offering:

(i) To correct a material mistake of fact or error in the previously filed notice of sales on Form D, as soon as practicable after discovery of the mistake or error;

(ii) To reflect a change in the information provided in the previously filed notice of sales on Form D, as soon as practicable after the change, except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:

(A) The address or relationship to the issuer of a related person identified in response to Item 3 of the notice of sales on Form D;

(B) An issuer's revenues or aggregate net asset value;

(C) The minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in a decrease of more than 10%;

(D) Any address or state(s) of solicitation shown in response to Item 12 of the notice of sales on Form D;

(E) The total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%;

(F) The amount of securities sold in the offering or the amount remaining to be sold;

(G) The number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;

(H) The total number of investors who have invested in the offering; or

(I) The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%; and

(iii) Annually, on or before the first anniversary of the filing of the notice of sales on Form D or the filing of the most recent amendment to the notice of sales on Form D, if the offering is continuing at that time.

(4) An issuer that files an amendment to a previously filed notice of sales on Form D must provide current information in response to all requirements of the notice of sales on Form D regardless of why the amendment is filed.

(b) *How notice of sales on Form D must be filed and signed.* (1) A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) Every notice of sales on Form D must be signed by a person duly authorized by the issuer.

[73 FR 10615, Feb. 27, 2008]

Need assistance?

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 30, 2015

Title 17 → Chapter II → Part 230 → §230.505

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.505 Exemption for limited offers and sales of securities not exceeding $5,000,000.

(a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this section by an issuer that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) *Conditions to be met*—(1) *General conditions.* To qualify for exemption under this section, offers and sales must satisfy the terms and conditions of §§230.501 and 230.502.

(2) *Specific conditions*—(i) *Limitation on aggregate offering price.* The aggregate offering price for an offering of securities under this §230.505, as defined in §203.501(c), shall not exceed $5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this section in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act.

NOTE: The calculation of the aggregate offering price is illustrated as follows:

Example 1: If an issuer sold $2,000,000 of its securities on June 1, 1982 under this §230.505 and an additional $1,000,000 on September 1, 1982, the issuer would be permitted to sell only $2,000,000 more under this §230.505 until June 1, 1983. Until that date the issuer must count both prior sales towards the $5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell $4,000,000 of its securities because the June 1, 1982 sale would not be within the preceding twelve months.

Example 2: If an issuer sold $500,000 of its securities on June 1, 1982 under §230.504 and an additional $4,500,000 on December 1, 1982 under this section, then the issuer could not sell any of its securities under this section until June 1, 1983. At that time it could sell an additional $500,000 of its securities.

(ii) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

(iii) *Disqualifications.* No exemption under this section shall be available for the securities of any issuer described in §230.262 of Regulation A, except that for purposes of this section only:

(A) The term *filing of the offering statement* as used in §230.262 shall mean the first sale of securities under this section;

(B) The term *underwriter* as used in §230.262(a) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

(C) Paragraph (b)(2)(iii) of this section shall not apply to any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

[47 FR 11262, Mar. 16, 1982, as amended at 54 FR 11373, Mar. 20, 1989; 57 FR 36473, Aug. 13, 1992; 80 FR 21902, Apr. 20, 2015]

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ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 17 → Chapter II → Part 230 → §230.507

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.507 Disqualifying provision relating to exemptions under §§230.504, 230.505 and 230.506.

(a) No exemption under §230.505, §230.505 or §230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with §230.503.

(b) Paragraph (a) of this section shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied.

[54 FR 11374, Mar. 20, 1989]

Need assistance?

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 30, 2015

Title 17 → Chapter II → Part 230 → §230.508

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.508 Insignificant deviations from a term, condition or requirement of Regulation D.

(a) A failure to comply with a term, condition or requirement of §230.504, §230.505 or §230.506 will not result in the loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity, if the person relying on the exemption shows:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of §230.502, paragraph (b)(2) of §230.504, paragraphs (b)(2)(i) and (ii) of §230.505 and paragraph (b)(2)(i) of §230.506 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of §230.504, §230.505 or §230.506.

(b) A transaction made in reliance on §230.504, §230.505 or §230.506 shall comply with all applicable terms, conditions and requirements of Regulation D. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.

[54 FR 11374, Mar. 20, 1989, as amended at 57 FR 36473, Aug. 13, 1992]

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ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of November 30, 2015

Title 17 → Chapter II → Part 230 → §230.262

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.262 Disqualification provisions.

(a) *Disqualification events.* No exemption under this Regulation A shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of filing, any offer after qualification, or such sale; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such solicitor; or any director, executive officer or other officer participating in the offering of any such solicitor or general partner or managing member of such solicitor:

(1) Has been convicted, within ten years before the filing of the offering statement (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(2) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before the filing of the offering statement, that, at the time of such filing, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(i) In connection with the purchase or sale of any security;

(ii) Involving the making of any false filing with the Commission; or

(iii) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(3) Is subject to a final order (as defined in Rule 261 (§230.261)) of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(i) At the time of the filing of the offering statement, bars the person from:

(A) Association with an entity regulated by such commission, authority, agency, or officer;

(B) Engaging in the business of securities, insurance or banking; or

(C) Engaging in savings association or credit union activities; or

(ii) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such filing of the offering statement;

(4) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b) or 78o-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3 (e) or (f)) that, at the time of the filing of the offering statement:

(i) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(ii) Places limitations on the activities, functions or operations of such person; or

(iii) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(5) Is subject to any order of the Commission entered within five years before the filing of the offering statement that, at the time of such filing, orders the person to cease and desist from committing or causing a violation or future violation of:

(i) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(ii) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(6) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(7) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or offering statement filed with the Commission that, within five years before the filing of the offering statement, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such filing, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(8) Is subject to a United States Postal Service false representation order entered within five years before the filing of the offering statement, or is, at the time of such filing, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(b) *Transition, waivers, reasonable care exception.* Paragraph (a) of this section shall not apply:

(1) With respect to any order under §230.262(a)(3) or (5) that occurred or was issued before June 19, 2015;

(2) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(3) If, before the filing of the offering statement, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (a) of this section should not arise as a consequence of such order, judgment or decree; or

(4) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (a) of this section.

NOTE TO PARAGRAPH (b)(4). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(c) *Affiliated issuers.* For purposes of paragraph (a) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(1) In control of the issuer; or

(2) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(d) *Disclosure of prior "bad actor" events.* The issuer must include in the offering circular a description of any matters that would have triggered disqualification under paragraphs (a)(3) and (5) of this section but occurred before June 19, 2015. The failure to provide such information shall not prevent an issuer from relying on Regulation A if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

[80 FR 21895, Apr. 20, 2015]

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15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER I - INVESTMENT COMPANIES
Sec. 80a-3 - Definition of investment company
From the U.S. Government Publishing Office, www.gpo.gov

§80a–3. Definition of investment company

(a) Definitions

(1) When used in this subchapter, "investment company" means any issuer which—

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c) of this section.

(b) Exemption from provisions

Notwithstanding paragraph (1)(C) of subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this subchapter applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Further exemptions

Notwithstanding subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. Such issuer shall be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a–12(d)(1) of this title governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer. For purposes of this paragraph:

(A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, and is or, but for the exception provided for in this paragraph or paragraph (7), would be an investment company, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper).

(B) Beneficial ownership by any person who acquires securities or interests in securities of an issuer described in the first sentence of this paragraph shall be deemed to be beneficial ownership by the person from whom such transfer was made, pursuant to such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter, where the transfer was caused by legal separation, divorce, death, or other involuntary event.

(2)(A) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as broker, and acting as market intermediary, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(B) For purposes of this paragraph—

(i) the term "market intermediary" means any person that regularly holds itself out as being willing contemporaneously to engage in, and that is regularly engaged in, the business of entering into transactions on both sides of the market for a financial contract or one or more such financial contracts; and

(ii) the term "financial contract" means any arrangement that—

(I) takes the form of an individually negotiated contract, agreement, or option to buy, sell, lend, swap, or repurchase, or other similar individually negotiated transaction commonly entered into by participants in the financial markets;

(II) is in respect of securities, commodities, currencies, interest or other rates, other measures of value, or any other financial or economic interest similar in purpose or function to any of the foregoing; and

(III) is entered into in response to a request from a counter party for a quotation, or is otherwise entered into and structured to accommodate the objectives of the counter party to such arrangement.

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; or any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian, if—

(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4), and (5) of this subsection, or in one or more of such businesses (from which not less than 25 per centum of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7)(A) Any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Securities that are owned by persons who received the securities from a qualified purchaser as a gift or bequest, or in a case in which the transfer was caused by legal separation, divorce, death, or other involuntary event, shall be deemed to be owned by a qualified purchaser, subject to such rules, regulations, and orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) Notwithstanding subparagraph (A), an issuer is within the exception provided by this paragraph if—

(i) in addition to qualified purchasers, outstanding securities of that issuer are beneficially owned by not more than 100 persons who are not qualified purchasers, if—

(I) such persons acquired any portion of the securities of such issuer on or before September 1, 1996; and

(II) at the time at which such persons initially acquired the securities of such issuer, the issuer was excepted by paragraph (1); and

(ii) prior to availing itself of the exception provided by this paragraph—

(I) such issuer has disclosed to each beneficial owner, as determined under paragraph (1), that future investors will be limited to qualified purchasers, and that ownership in such issuer is no longer limited to not more than 100 persons; and

(II) concurrently with or after such disclosure, such issuer has provided each beneficial owner, as determined under paragraph (1), with a reasonable opportunity to redeem any part or all of their interests in the issuer, notwithstanding any agreement to the contrary between the issuer and such persons, for that person's proportionate share of the issuer's net assets.

(C) Each person that elects to redeem under subparagraph (B)(ii)(II) shall receive an amount in cash equal to that person's proportionate share of the issuer's net assets, unless the issuer elects to provide such person with the option of receiving, and such person agrees to receive, all or a portion of such person's share in assets of the issuer. If the issuer elects to provide such persons

with such an opportunity, disclosure concerning such opportunity shall be made in the disclosure required by subparagraph (B)(ii)(I).

(D) An issuer that is excepted under this paragraph shall nonetheless be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a–12(d)(1) of this title relating to the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer.

(E) For purposes of determining compliance with this paragraph and paragraph (1), an issuer that is otherwise excepted under this paragraph and an issuer that is otherwise excepted under paragraph (1) shall not be treated by the Commission as being a single issuer for purposes of determining whether the outstanding securities of the issuer excepted under paragraph (1) are beneficially owned by not more than 100 persons or whether the outstanding securities of the issuer excepted under this paragraph are owned by persons that are not qualified purchasers. Nothing in this subparagraph shall be construed to establish that a person is a bona fide qualified purchaser for purposes of this paragraph or a bona fide beneficial owner for purposes of paragraph (1).

(8) [Repealed] Pub. L. 111–203, title IX, §986(c)(2), July 21, 2010, 124 Stat. 1936.

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10)(A) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes—

(i) no part of the net earnings of which inures to the benefit of any private shareholder or individual; or

(ii) which is or maintains a fund described in subparagraph (B).

(B) For the purposes of subparagraph (A)(ii), a fund is described in this subparagraph if such fund is a pooled income fund, collective trust fund, collective investment fund, or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of one or more of the following:

(i) assets of the general endowment fund or other funds of one or more charitable organizations;

(ii) assets of a pooled income fund;

(iii) assets contributed to a charitable organization in exchange for the issuance of charitable gift annuities;

(iv) assets of a charitable remainder trust or of any other trust, the remainder interests of which are irrevocably dedicated to any charitable organization;

(v) assets of a charitable lead trust;

(vi) assets of a trust, the remainder interests of which are revocably dedicated to or for the benefit of 1 or more charitable organizations, if the ability to revoke the dedication is limited to circumstances involving—

(I) an adverse change in the financial circumstances of a settlor or an income beneficiary of the trust;

(II) a change in the identity of the charitable organization or organizations having the remainder interest, provided that the new beneficiary is also a charitable organization; or

(III) both the changes described in subclauses (I) and (II);

(vii) assets of a trust not described in clauses (i) through (v), the remainder interests of which are revocably dedicated to a charitable organization, subject to subparagraph (C); or

(viii) such assets as the Commission may prescribe by rule, regulation, or order in accordance with section 80a–6(c) of this title.

(C) A fund that contains assets described in clause (vii) of subparagraph (B) shall be excluded from the definition of an investment company for a period of 3 years after December 8, 1995, but only if—

(i) such assets were contributed before the date which is 60 days after December 8, 1995; and

(ii) such assets are commingled in the fund with assets described in one or more of clauses (i) through (vi) and (viii) of subparagraph (B).

(D) For purposes of this paragraph—

(i) a trust or fund is "maintained" by a charitable organization if the organization serves as a trustee or administrator of the trust or fund or has the power to remove the trustees or administrators of the trust or fund and to designate new trustees or administrators;

(ii) the term "pooled income fund" has the same meaning as in section 642(c)(5) of title 26;

(iii) the term "charitable organization" means an organization described in paragraphs (1) through (5) of section 170(c) or section 501(c)(3) of title 26;

(iv) the term "charitable lead trust" means a trust described in section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of title 26;

(v) the term "charitable remainder trust" means a charitable remainder annuity trust or a charitable remainder unitrust, as those terms are defined in section 664(d) of title 26; and

(vi) the term "charitable gift annuity" means an annuity issued by a charitable organization that is described in section 501(m)(5) of title 26.

(11) Any employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of title 26; or any governmental plan described in section 77c(a)(2)(C) of this title; or any collective trust fund maintained by a bank consisting solely of assets of one or more of such trusts, government plans, or church plans, companies or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of section 401 of title 26 or the requirements for deduction of the employer's contribution under section 404(a)(2) of title 26, (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 77e of this title by section 77c(a)(2)(C) of this title, and (C) advances made by an insurance company in connection with the operation of such separate account.

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and short-term paper.

(14) Any church plan described in section 414(e) of title 26, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is—

(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of title 26; and

(B) substantially all of the activities of which consist of—

(i) managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under title 26; or

(ii) administering or providing benefits pursuant to church plans.

(Aug. 22, 1940, ch. 686, title I, §3, 54 Stat. 797; Oct. 21, 1942, ch. 619, title I, §162(e), 56 Stat. 867; Pub. L. 89–485, §13(i), July 1, 1966, 80 Stat. 243; Pub. L. 91–547, §3(a), (b), Dec. 14, 1970, 84 Stat. 1414; Pub. L. 94–210, title III, §308(c), Feb. 5, 1976, 90 Stat. 57; Pub. L. 96–477, title I, §102, title VII, §703, Oct. 21, 1980, 94 Stat. 2276, 2295; Pub. L. 100–181, title VI, §§604–606, Dec. 4, 1987,

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 18 - INFORMATION REQUIREMENTS FOR THE SECTION 8-1111(20) NEBRASKA INTRASTATE ISSUER EXEMPTION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1111(20) and Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule regarding intrastate offerings is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected parties, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rule referenced in this Rule is attached hereto.

002 CONDITIONS OF EXEMPTION. Transactions meeting the conditions of this Rule will be deemed exempt from the registration provisions of the Act.

002.01 The offer or sale of securities pursuant to this Rule may be made only to Nebraska residents. No offers or sales may be made to persons who are not residents of Nebraska nor may offers or sales be made outside Nebraska.

002.02 An issuer relying on the Rule must have, both before and upon completion of the offering, its principal office and more than fifty percent ~~(50%)~~ of its employees located in Nebraska.

002.03 No commission, finder's fee, or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser or in connection with sales of securities in reliance on this Rule, unless such person is registered in this state as a broker-dealer or issuer-dealer, or agent of such.

002.04 The offering price for the securities, ~~(~~and the exercise price, if the securities offered are options, warrants or rights for common stock, and the conversion price if the securities are convertible into common stock,~~)~~ must be equal to or greater than five dollars ($5.00) per share or unit offered.

002.05 The total aggregate amount of proceeds collected in a twelve-month period shall not exceed ~~seven hundred fifty thousand~~ one million dollars ~~($750,000.00).~~ ($1,000,000.00).

002.06 At least eighty percent ~~(80%)~~ of the net proceeds from the sale of the offering shall be used in Nebraska.

002.07 The issuer shall file a notice, as specified in Section 003, below, with the Nebraska Department of Banking and Finance, P.O. Box 95006, ~~Suite 311, 1200 "N" Street,~~ Lincoln, Nebraska 68509-5006, no later than twenty ~~(20)~~ days prior to any sales for which an exemption under this Rule is claimed.

002.07A The Director shall notify the issuer of the date on which the notice of exemption becomes effective.

002.07B Such notice shall be effective for a period of twelve ~~(12)~~ consecutive months from the effective date established by the Director.

002.08 The issuer shall, within thirty ~~(30)~~ days after the completion of the offering, file with the ~~Department~~ Director a statement indicating the number of investors, the total dollar amount raised, and ~~disclosure of~~ the use of proceeds.

002.09 The issuer must have reasonable belief that the securities purchased are taken for investment. Investment intent may be manifested by, but is not limited to, a restriction which shall be stated on the face of the security that it shall be held by the purchaser until the earlier of two years from the date of purchase from the issuer or the date the issuer of the securities becomes subject to the reporting requirements of Sections 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m or 15 U.S.C. § 78o(d).

003 CONTENTS OF NOTICE.

003.01 The notice shall include the following information:

003.01A The name and address of the issuer;

003.01B The names and addresses of the broker-dealer or issuer-dealer, and any individuals selling or promoting the offering;

003.01C The business in which the issuer is to be engaged;

003.01D The type of security being issued (common stock, limited partnership interests, debentures, etc.);

003.01E The total dollar amount of such securities;

~~003.01F The date of the first sale of a security in reliance on the exemption, if applicable;~~

~~003.01G~~ 003.01F The Securities Offering Disclosure Document ("Form SODD");

~~003.01H~~ 003.01G The financial statements prepared in accordance with Section 005 below;

~~003.01I~~ 003.01H A representation ~~stating~~ that all of the conditions of Section 8-1111(20) have been or will be met by the issuer; and

~~003.01J~~ 003.01I A check in the amount of two hundred dollars ($200.00), payable to ~~"~~Nebraska Department of Banking and Finance.~~"~~

003.02 Every notice and disclosure document filed with the Director shall be manually signed by a person duly authorized by the issuer.

003.03 The Director may require the filing of additional information if he or she deems it material to the offering.

004 DELIVERY OF DISCLOSURE DOCUMENT. A copy of the offering disclosure document and the financial statements prepared in accordance with Section 005, below, shall be given to prospective investors at least twenty-four ~~24~~ hours prior to signing any agreement to purchase the securities or paying any consideration for the securities.

005 FINANCIAL REPORTING REQUIREMENTS.

005.01 The issuer shall provide the following financial statements for itself and its consolidated subsidiaries, if applicable:

005.01A A balance sheet as of the end of the most recent fiscal year, or, as of a date within one hundred twenty ~~120~~ days of the date of the first sale, if the issuer has been in existence for less than one fiscal year; and

005.01B An income statement for the immediate past fiscal year or such shorter period as the issuer (including predecessors) has been in existence.

005.01C If the issuer has not conducted significant operations, a statement of receipts and disbursements shall be included in lieu of a statement of income.

005.02 Except as otherwise provided, the financial statements shall be:

005.02A Prepared in accordance with generally accepted accounting principles and audited by an independent accountant; or

005.02B Reviewed by an independent accountant.

005.02B1 ~~financial~~ Financial statements shall be accompanied by an accountant's review report signed by the independent accountant after completion of his or her review performed in accordance with the standards prescribed by the American Institute of Certified Public Accountants.

005.02B2 The review shall be dated within one hundred twenty ~~120~~ days of the date of the first sale.

005.02B3 If the Director deems it to be in the public interest and necessary for the protection of investors, audited financial statements will be required.

005.03 An issuer with no prior operating history may elect not to have an accounting review prepared by an independent accountant if the issuer deems the information not material to an investor's understanding of the issuer, its business, and the securities being offered.

005.03A Financial statements which are neither audited nor subjected to an accounting review must be accompanied by an affirmative representation by the issuer, signed by an officer, director or person occupying a similar position, that the statements provide all material information relating to the financial condition of the issuer and are true and accurate to the best of the signer's knowledge and belief.

005.03B All financial statements shall be prepared in accordance with generally accepted accounting principles.

005.04 The issuer shall provide the financial statement required by Section 005.01, above, in connection with income producing assets and/or income producing real property to be purchased with the proceeds of the offering by the issuer.

~~005.05 Upon request by the issuer, the Director may, where consistent with the protection of investors, permit the omission of one or more of the statements required under this Rule, and the inclusion, in substitution thereof, of appropriate statements with financial information having comparable relevance to an investor in determining whether he or she should invest in the program.~~

006 CORRECTION. If, during the offering period under this Rule, there shall occur an event which would materially affect the issuer, its prospects or properties, or otherwise materially affect the accuracy or completeness of the information contained in the disclosure document, the disclosure document shall be promptly revised to reflect such event and filed with the ~~Department~~ Director. The revised document shall be used for all sales of securities claiming the exemption thereafter. All investors who have purchased in this offering must be given a copy of the revised document with the option of affirming their investment decision or receiving their money back.

007 SOLICITATION RESTRICTION. Neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

007.01 Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio;

007.02 Any advertisement, article, notice, spam or junk electronic mail, or other general communication placed on, or delivered by means of, the Internet; and

007.03 Any seminar or meeting to which attendees have been invited by any general solicitation or general advertising.

008 MINIMUM OFFERING AMOUNT. The issuer must specify in the disclosure document the minimum amount of funds necessary to achieve the results outlined in the disclosure document. This shall be the minimum amount of funds to be raised through the offering.

009 ESCROW REQUIREMENT. The issuer must establish a separate interest bearing account with a financial institution office located in Nebraska for all funds received from sales of securities under this exemption until at least the minimum amount has been raised. If the minimum amount of funds is not raised within twelve ~~12~~ months of the beginning of the offering, then all funds, including any interest thereon, shall be promptly returned to the investors, and the issuer shall immediately notify the ~~Department~~ Director of such action.

010 LIMITATIONS ON AVAILABILITY. The exemption provided by this Rule is available only to an issuer of the securities. The exemption is not available for:

010.01 Affiliates of the issuer or any other person for resale of the issuer's securities; or

010.02 Transactions by existing security holders of the issuer.

010.03 An issuer that is either before or because of the offering, an investment company as defined in Section 3 of the Investment Company Act of 1940, 15 U.S.C. 80a-3, an entity that would be an investment company but for the exclusions provided in section 3(c) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c), or subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m or 15 U.S.C. 78o(d);~~An issuer which is an investment company subject to the Investment Company Act of 1940, or subject to the reporting requirements of Section 13 or Section 15(d) of the Securities Exchange Act of 1934.~~

010.04 Debt offerings unless the issuer can demonstrate reasonable historical ability to service its debt.

010.05 Offerings which are "blind pool offerings" or other offerings for which the specific business to be engaged in or specific property to be acquired by the issuer is not identified.

011 DISQUALIFICATION FACTORS. This Rule shall not be available for the securities of any issuer, if the issuer or any of its officers, directors, general partners, managing members, beneficial owners of ten percent ~~(10%)~~ or more of any class of its equity securities, promoters or any selling agents of the securities to be offered, or any officer, director, managing member, or partner of such selling agent:

011.01 Has filed a registration statement which is the subject of a currently effective stop order entered pursuant to any federal or state securities laws within five years prior to the commencement of the offering;

011.02 Has been convicted within five years prior to the commencement of the offering of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit, including, but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud;

011.03 Is currently subject to any state administrative enforcement order or judgment entered by ~~that state's~~ a state securities administrator or the Securities and Exchange Commission ("SEC") within five years prior to the commencement of the offering;

011.04 Is subject to any federal, state, or foreign governmental agency administrative enforcement order or judgment in which fraud or deceit, including, but not limited to, making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within five years prior to the commencement of the offering;

011.05 Is currently subject to ~~any state's~~ an administrative enforcement order or judgment of a state securities administrator which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities of the issuer; or

011.06 Is currently subject to any order, judgment, or decree of any court of competent jurisdiction which temporarily or preliminarily restrains or enjoins, or which was entered within five years prior to the commencement of the offering, and permanently restrained or enjoined such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with any state, or with the ~~Securities and Exchange Commission.~~ SEC.

011.07 Any disqualification caused by this Section may be waived if the Director determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied.

011.08 For purposes of this Section, beneficial ownership means the power to vote or direct the vote and/or the power to dispose or direct the disposition of such securities.

012 DISCLOSURE. Nothing in this exemption is intended to or should be construed as in any way relieving issuers or persons acting on behalf of issuers from providing to prospective investors disclosure adequate to satisfy the provisions of Section 8-1102(1) of the Act.

013 AVAILABILITY OF EXEMPTION.

013.01 Offers and sales which are exempt under this Rule may not be combined with offers and sales exempt under any other Rule or Section of the Act; however, nothing in this limitation shall act as an election. Should the offer and sale fail to comply with all of the conditions for this exemption, the issuer may claim the availability of any other applicable exemption.

013.02 The exemption is not available to any issuer with respect to any transaction which, although in technical compliance with this Rule, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this Rule.

014 BURDEN OF PROOF. In any proceeding involving this Rule, the burden of proving the exemption ~~or any exception from a definition or condition~~ from registration is upon the person claiming ~~it~~ the exemption.

015 INTEGRATION. All offers or sales that are part of the same offering must meet all of the terms and conditions of this Rule. Offers and sales that are made more than six months before the start, or more than six months after completion, of an offering~~;~~ made in reliance on this Rule, will not be considered part of that offering, provided no offers or sales of securities are made by or for the issuer during such periods. ~~The Department's Interpretative Opinion Number 1~~48 NAC 001.06 identifies the factors that will be considered in determining whether offers and sales should be integrated.

016 CURE ORDER. An issuer which fails to file the notice at least twenty ~~(20)~~ days prior to any sale made in reliance on this exemption may request the late filing be cured by complying with 48 NAC 19.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2B - SECURITIES EXCHANGES
Sec. 78m - Periodical and other reports
From the U.S. Government Publishing Office, www.gpo.gov

§78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this chapter or the Securities Act of 1933 [15 U.S.C. 77a et seq.] and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Form of report; books, records, and internal accounting; directives

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent

with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

(c) Alternative reports

If in the judgment of the Commission any report required under subsection (a) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such reports of comparable character as it may deem applicable to such class or classes of issuers.

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.] or any equity security issued by a Native Corporation pursuant to section 1629c(d)(6) of title 43, or otherwise becomes or is deemed to become a beneficial owner of any of the foregoing upon the purchase or sale of a security-based swap that the Commission may define by rule, and is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition or within such shorter time as the Commission may establish by rule, file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the Commission, in accordance with such rules and regulations as

the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933 [15 U.S.C. 77a et seq.];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Purchase of securities by issuer

(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78l of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to paragraph (1) of this subsection, the person making the filing shall pay to the Commission a fee at a rate that, subject to paragraph (4), is equal to $92 per $1,000,000 of the value of securities proposed

to be purchased. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to any securities issued in connection with the proposed transaction under section 6 (b) of the Securities Act of 1933 [15 U.S.C. 77f(b)], or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this paragraph.

(4) ANNUAL ADJUSTMENT.—For each fiscal year, the Commission shall by order adjust the rate required by paragraph (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 [15 U.S.C. 77f(b)] for such fiscal year.

(5) FEE COLLECTIONS.—Fees collected pursuant to this subsection for fiscal year 2012 and each fiscal year thereafter shall be deposited and credited as general revenue of the Treasury and shall not be available for obligation.

(6) EFFECTIVE DATE; PUBLICATION.—In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5. An adjusted rate prescribed under paragraph (4) shall be published and take effect in accordance with section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)).

(7) PRO RATA APPLICATION.—The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(f) Reports by institutional investment managers

(1) Every institutional investment manager which uses the mails, or any means or instrumentality of interstate commerce in the course of its business as an institutional investment manager and which exercises investment discretion with respect to accounts holding equity securities of a class described in subsection (d)(1) of this section or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule, having an aggregate fair market value on the last trading day in any of the preceding twelve months of at least $100,000,000 or such lesser amount (but in no case less than $10,000,000) as the Commission, by rule, may determine, shall file reports with the Commission in such form, for such periods, and at such times after the end of such periods as the Commission, by rule, may prescribe, but in no event shall such reports be filed for periods longer than one year or shorter than one quarter. Such reports shall include for each such equity security held on the last day of the reporting period by accounts (in aggregate or by type as the Commission, by rule, may prescribe) with respect to which the institutional investment manager exercises investment discretion (other than securities held in amounts which the Commission, by rule, determines to be insignificant for purposes of this subsection), the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value of each such security. Such reports may also include for accounts (in aggregate or by type) with respect to which the institutional investment manager exercises investment discretion such of the following information as the Commission, by rule, prescribes—

(A) the name of the issuer and the title, class, CUSIP number, number of shares or principal amount, and aggregate fair market value or cost or amortized cost of each other security (other than an exempted security) held on the last day of the reporting period by such accounts;

(B) the aggregate fair market value or cost or amortized cost of exempted securities (in aggregate or by class) held on the last day of the reporting period by such accounts;

(C) the number of shares of each equity security of a class described in subsection (d)(1) of this section held on the last day of the reporting period by such accounts with respect to which the institutional investment manager possesses sole or shared authority to exercise the voting rights evidenced by such securities;

(D) the aggregate purchases and aggregate sales during the reporting period of each security (other than an exempted security) effected by or for such accounts; and

(E) with respect to any transaction or series of transactions having a market value of at least $500,000 or such other amount as the Commission, by rule, may determine, effected during the

reporting period by or for such accounts in any equity security of a class described in subsection (d)(1) of this section—

(i) the name of the issuer and the title, class, and CUSIP number of the security;
(ii) the number of shares or principal amount of the security involved in the transaction;
(iii) whether the transaction was a purchase or sale;
(iv) the per share price or prices at which the transaction was effected;
(v) the date or dates of the transaction;
(vi) the date or dates of the settlement of the transaction;
(vii) the broker or dealer through whom the transaction was effected;
(viii) the market or markets in which the transaction was effected; and
(ix) such other related information as the Commission, by rule, may prescribe.

(2) The Commission shall prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period. At a minimum, such public disclosure shall occur every month.

(3) The Commission, by rule, or order, may exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder.

(4) The Commission shall make available to the public for a reasonable fee a list of all equity securities of a class described in subsection (d)(1) of this section, updated no less frequently than reports are required to be filed pursuant to paragraph (1) of this subsection. The Commission shall tabulate the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State authorities and the public. Promptly after the filing of any such report, the Commission shall make the information contained therein conveniently available to the public for a reasonable fee in such form as the Commission, by rule, may prescribe, except that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with section 552 of title 5. Notwithstanding the preceding sentence, any such information identifying the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public.

(5) In exercising its authority under this subsection, the Commission shall determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets or, in granting an exemption, that its action is consistent with the protection of investors and the purposes of this subsection. In exercising such authority the Commission shall take such steps as are within its power, including consulting with the Comptroller General of the United States, the Director of the Office of Management and Budget, the appropriate regulatory agencies, Federal and State authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection, national securities exchanges, and registered securities associations, (A) to achieve uniform, centralized reporting of information concerning the securities holdings of and transactions by or for accounts with respect to which institutional investment managers exercise investment discretion, and (B) consistently with the objective set forth in the preceding subparagraph, to avoid unnecessarily duplicative reporting by, and minimize the compliance burden on, institutional investment managers. Federal authorities which, directly or indirectly, require reports from institutional investment managers of information substantially similar to that called for by this subsection shall cooperate with the Commission in the performance of its responsibilities under the preceding sentence. An institutional investment manager which is a bank, the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.], shall file with

the appropriate regulatory agency a copy of every report filed with the Commission pursuant to this subsection.

(6)(A) For purposes of this subsection the term "institutional investment manager" includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person.

(B) The Commission shall adopt such rules as it deems necessary or appropriate to prevent duplicative reporting pursuant to this subsection by two or more institutional investment managers exercising investment discretion with respect to the same amount.[1]

(g) Statement of equity security ownership

(1) Any person who is directly or indirectly the beneficial owner of more than 5 per centum of any security of a class described in subsection (d)(1) of this section or otherwise becomes or is deemed to become a beneficial owner of any security of a class described in subsection (d)(1) upon the purchase or sale of a security-based swap that the Commission may define by rule shall file with the Commission a statement setting forth, in such form and at such time as the Commission may, by rule, prescribe—

(A) such person's identity, residence, and citizenship; and

(B) the number and description of the shares in which such person has an interest and the nature of such interest.

(2) If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) In exercising its authority under this subsection, the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors (A) to achieve centralized reporting of information regarding ownership, (B) to avoid unnecessarily duplicative reporting by and minimize the compliance burden on persons required to report, and (C) to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to other Federal and State agencies and the public.

(6) The Commission may, by rule or order, exempt, in whole or in part, any person or class of persons from any or all of the reporting requirements of this subsection as it deems necessary or appropriate in the public interest or for the protection of investors.

(h) Large trader reporting

(1) Identification requirements for large traders

For the purpose of monitoring the impact on the securities markets of securities transactions involving a substantial volume or a large fair market value or exercise value and for the purpose of otherwise assisting the Commission in the enforcement of this chapter, each large trader shall—

(A) provide such information to the Commission as the Commission may by rule or regulation prescribe as necessary or appropriate, identifying such large trader and all accounts in or through which such large trader effects such transactions; and

(B) identify, in accordance with such rules or regulations as the Commission may prescribe as necessary or appropriate, to any registered broker or dealer by or through whom such large trader directly or indirectly effects securities transactions, such large trader and all accounts

directly or indirectly maintained with such broker or dealer by such large trader in or through which such transactions are effected.

(2) Recordkeeping and reporting requirements for brokers and dealers

Every registered broker or dealer shall make and keep for prescribed periods such records as the Commission by rule or regulation prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, with respect to securities transactions that equal or exceed the reporting activity level effected directly or indirectly by or through such registered broker or dealer of or for any person that such broker or dealer knows is a large trader, or any person that such broker or dealer has reason to know is a large trader on the basis of transactions in securities effected by or through such broker or dealer. Such records shall be available for reporting to the Commission, or any self-regulatory organization that the Commission shall designate to receive such reports, on the morning of the day following the day the transactions were effected, and shall be reported to the Commission or a self-regulatory organization designated by the Commission immediately upon request by the Commission or such a self-regulatory organization. Such records and reports shall be in a format and transmitted in a manner prescribed by the Commission (including, but not limited to, machine readable form).

(3) Aggregation rules

The Commission may prescribe rules or regulations governing the manner in which transactions and accounts shall be aggregated for the purpose of this subsection, including aggregation on the basis of common ownership or control.

(4) Examination of broker and dealer records

All records required to be made and kept by registered brokers and dealers pursuant to this subsection with respect to transactions effected by large traders are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

(5) Factors to be considered in Commission actions

In exercising its authority under this subsection, the Commission shall take into account—

(A) existing reporting systems;

(B) the costs associated with maintaining information with respect to transactions effected by large traders and reporting such information to the Commission or self-regulatory organizations; and

(C) the relationship between the United States and international securities markets.

(6) Exemptions

The Commission, by rule, regulation, or order, consistent with the purposes of this chapter, may exempt any person or class of persons or any transaction or class of transactions, either conditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection, and the rules and regulations thereunder.

(7) Authority of Commission to limit disclosure of information

Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be kept or reported under this subsection. Nothing in this subsection shall authorize the Commission to withhold information from Congress, or prevent the Commission from complying with a request for information from any other Federal department or agency requesting information for purposes within the scope of its jurisdiction, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(8) Definitions

For purposes of this subsection—

(A) the term "large trader" means every person who, for his own account or an account for which he exercises investment discretion, effects transactions for the purchase or sale of any publicly traded security or securities by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of a national securities exchange, directly or indirectly by or through a registered broker or dealer in an aggregate amount equal to or in excess of the identifying activity level;

(B) the term "publicly traded security" means any equity security (including an option on individual equity securities, and an option on a group or index of such securities) listed, or admitted to unlisted trading privileges, on a national securities exchange, or quoted in an automated interdealer quotation system;

(C) the term "identifying activity level" means transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule or regulation, specifying the time interval during which such transactions shall be aggregated;

(D) the term "reporting activity level" means transactions in publicly traded securities at or above a level of volume, fair market value, or exercise value as shall be fixed from time to time by the Commission by rule, regulation, or order, specifying the time interval during which such transactions shall be aggregated; and

(E) the term "person" has the meaning given in section 78c(a)(9) of this title and also includes two or more persons acting as a partnership, limited partnership, syndicate, or other group, but does not include a foreign central bank.

(i) Accuracy of financial reports

Each financial report that contains financial statements, and that is required to be prepared in accordance with (or reconciled to) generally accepted accounting principles under this chapter and filed with the Commission shall reflect all material correcting adjustments that have been identified by a registered public accounting firm in accordance with generally accepted accounting principles and the rules and regulations of the Commission.

(j) Off-balance sheet transactions

Not later than 180 days after July 30, 2002, the Commission shall issue final rules providing that each annual and quarterly financial report required to be filed with the Commission shall disclose all material off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of the issuer with unconsolidated entities or other persons, that may have a material current or future effect on financial condition, changes in financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.

(k) Prohibition on personal loans to executives

(1) In general

It shall be unlawful for any issuer (as defined in section 7201 of this title), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on July 30, 2002, shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after July 30, 2002.

(2) Limitation

Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 1464 of title 12), consumer credit (as defined in section 1602 of this title), or any extension of credit under an open end credit plan (as defined in section 1602 of this title), or a charge card (as defined in section 1637(c)(4)(e) of this title), or any extension of credit by a broker or dealer registered under section 78o of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 78g of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—

(A) made or provided in the ordinary course of the consumer credit business of such issuer;

(B) of a type that is generally made available by such issuer to the public; and

(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

(3) Rule of construction for certain loans

Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 375b of title 12.

(l) Real time issuer disclosures

Each issuer reporting under subsec. (a) of this section or section 78o(d) of this title shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.

(m) Public availability of security-based swap transaction data

(1) In general

(A) Definition of real-time public reporting

In this paragraph, the term "real-time public reporting" means to report data relating to a security-based swap transaction, including price and volume, as soon as technologically practicable after the time at which the security-based swap transaction has been executed.

(B) Purpose

The purpose of this subsection is to authorize the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery.

(C) General rule

The Commission is authorized to provide by rule for the public availability of security-based swap transaction, volume, and pricing data as follows:

(i) With respect to those security-based swaps that are subject to the mandatory clearing requirement described in section 78c–3(a)(1) of this title (including those security-based swaps that are excepted from the requirement pursuant to section 78c–3(g) of this title), the Commission shall require real-time public reporting for such transactions.

(ii) With respect to those security-based swaps that are not subject to the mandatory clearing requirement described in section 78c–3(a)(1) of this title, but are cleared at a registered clearing agency, the Commission shall require real-time public reporting for such transactions.

(iii) With respect to security-based swaps that are not cleared at a registered clearing agency and which are reported to a security-based swap data repository or the Commission under section 78c–3(a)(6) of this title,[2] the Commission shall require real-time public reporting for such transactions, in a manner that does not disclose the business transactions and market positions of any person.

(iv) With respect to security-based swaps that are determined to be required to be cleared under section 78c–3(b) of this title but are not cleared, the Commission shall require real-time public reporting for such transactions.

(D) Registered entities and public reporting

The Commission may require registered entities to publicly disseminate the security-based swap transaction and pricing data required to be reported under this paragraph.

(E) Rulemaking required

With respect to the rule providing for the public availability of transaction and pricing data for security-based swaps described in clauses (i) and (ii) of subparagraph (C), the rule promulgated by the Commission shall contain provisions—

(i) to ensure such information does not identify the participants;

(ii) to specify the criteria for determining what constitutes a large notional security-based swap transaction (block trade) for particular markets and contracts;

(iii) to specify the appropriate time delay for reporting large notional security-based swap transactions (block trades) to the public; and

(iv) that take into account whether the public disclosure will materially reduce market liquidity.

(F) Timeliness of reporting

Parties to a security-based swap (including agents of the parties to a security-based swap) shall be responsible for reporting security-based swap transaction information to the appropriate registered entity in a timely manner as may be prescribed by the Commission.

(G) Reporting of swaps to registered security-based swap data repositories

Each security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository.

(H) Registration of clearing agencies

A clearing agency may register as a security-based swap data repository.

(2) Semiannual and annual public reporting of aggregate security-based swap data

(A) In general

In accordance with subparagraph (B), the Commission shall issue a written report on a semiannual and annual basis to make available to the public information relating to—

(i) the trading and clearing in the major security-based swap categories; and

(ii) the market participants and developments in new products.

(B) Use; consultation

In preparing a report under subparagraph (A), the Commission shall—

(i) use information from security-based swap data repositories and clearing agencies; and

(ii) consult with the Office of the Comptroller of the Currency, the Bank for International Settlements, and such other regulatory bodies as may be necessary.

(C) Authority of Commission

The Commission may, by rule, regulation, or order, delegate the public reporting responsibilities of the Commission under this paragraph in accordance with such terms and conditions as the Commission determines to be appropriate and in the public interest.

(n) Security-based swap data repositories

(1) Registration requirement

It shall be unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository.

(2) Inspection and examination

Each registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.

(3) Compliance with core principles

(A) In general

To be registered, and maintain registration, as a security-based swap data repository, the security-based swap data repository shall comply with—

(i) the requirements and core principles described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation.

(B) Reasonable discretion of security-based swap data repository

Unless otherwise determined by the Commission, by rule or regulation, a security-based swap data repository described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the security-based swap data repository complies with the core principles described in this subsection.

(4) Standard setting

(A) Data identification

(i) In general

In accordance with clause (ii), the Commission shall prescribe standards that specify the data elements for each security-based swap that shall be collected and maintained by each registered security-based swap data repository.

(ii) Requirement

In carrying out clause (i), the Commission shall prescribe consistent data element standards applicable to registered entities and reporting counterparties.

(B) Data collection and maintenance

The Commission shall prescribe data collection and data maintenance standards for security-based swap data repositories.

(C) Comparability

The standards prescribed by the Commission under this subsection shall be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps.

(5) Duties

A security-based swap data repository shall—

(A) accept data prescribed by the Commission for each security-based swap under subsection (b);

(B) confirm with both counterparties to the security-based swap the accuracy of the data that was submitted;

(C) maintain the data described in subparagraph (A) in such form, in such manner, and for such period as may be required by the Commission;

(D)(i) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity); and

(ii) provide the information described in subparagraph (A) in such form and at such frequency as the Commission may require to comply with the public reporting requirements set forth in subsection (m);

(E) at the direction of the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(F) maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any other registered entity; and

(G) on a confidential basis pursuant to section 78x of this title, upon request, and after notifying the Commission of the request, make available all data obtained by the security-based swap data repository, including individual counterparty trade and position data, to—

(i) each appropriate prudential regulator;

(ii) the Financial Stability Oversight Council;

(iii) the Commodity Futures Trading Commission;

(iv) the Department of Justice; and

(v) any other person that the Commission determines to be appropriate, including—

(I) foreign financial supervisors (including foreign futures authorities);

(II) foreign central banks; and

(III) foreign ministries.

(H) CONFIDENTIALITY AND INDEMNIFICATION AGREEMENT.—Before the security-based swap data repository may share information with any entity described in subparagraph (G)—

(i) the security-based swap data repository shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 78x of this title relating to the information on security-based swap transactions that is provided; and

(ii) each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 78x of this title.

(6) Designation of chief compliance officer

(A) In general

Each security-based swap data repository shall designate an individual to serve as a chief compliance officer.

(B) Duties

The chief compliance officer shall—

(i) report directly to the board or to the senior officer of the security-based swap data repository;

(ii) review the compliance of the security-based swap data repository with respect to the requirements and core principles described in this subsection;

(iii) in consultation with the board of the security-based swap data repository, a body performing a function similar to the board of the security-based swap data repository, or the senior officer of the security-based swap data repository, resolve any conflicts of interest that may arise;

(iv) be responsible for administering each policy and procedure that is required to be established pursuant to this section;

(v) ensure compliance with this chapter (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;

(vi) establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(I) compliance office review;

(II) look-back;

(III) internal or external audit finding;

(IV) self-reported error; or
(V) validated complaint; and

(vii) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(C) Annual reports

(i) In general

In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(I) the compliance of the security-based swap data repository of the chief compliance officer with respect to this chapter (including regulations); and

(II) each policy and procedure of the security-based swap data repository of the chief compliance officer (including the code of ethics and conflict of interest policies of the security-based swap data repository).

(ii) Requirements

A compliance report under clause (i) shall—

(I) accompany each appropriate financial report of the security-based swap data repository that is required to be furnished to the Commission pursuant to this section; and

(II) include a certification that, under penalty of law, the compliance report is accurate and complete.

(7) Core principles applicable to security-based swap data repositories

(A) Antitrust considerations

Unless necessary or appropriate to achieve the purposes of this chapter, the swap data repository shall not—

(i) adopt any rule or take any action that results in any unreasonable restraint of trade; or

(ii) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.

(B) Governance arrangements

Each security-based swap data repository shall establish governance arrangements that are transparent—

(i) to fulfill public interest requirements; and

(ii) to support the objectives of the Federal Government, owners, and participants.

(C) Conflicts of interest

Each security-based swap data repository shall—

(i) establish and enforce rules to minimize conflicts of interest in the decision-making process of the security-based swap data repository; and

(ii) establish a process for resolving any conflicts of interest described in clause (i).

(D) Additional duties developed by Commission

(i) In general

The Commission may develop 1 or more additional duties applicable to security-based swap data repositories.

(ii) Consideration of evolving standards

In developing additional duties under subparagraph (A),[3] the Commission may take into consideration any evolving standard of the United States or the international community.

(iii) Additional duties for Commission designees

The Commission shall establish additional duties for any registrant described in subsection (m)(2)(C) in order to minimize conflicts of interest, protect data, ensure compliance, and guarantee the safety and security of the security-based swap data repository.

(8) Required registration for security-based swap data repositories

Any person that is required to be registered as a security-based swap data repository under this subsection shall register with the Commission, regardless of whether that person is also licensed under the Commodity Exchange Act [7 U.S.C. 1 et seq.] as a swap data repository.

(9) Rules

The Commission shall adopt rules governing persons that are registered under this subsection.

(o) Beneficial ownership

For purposes of this section and section 78p of this title, a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission, by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security.

(p) Disclosures relating to conflict minerals originating in the Democratic Republic of the Congo

(1) Regulations

(A) In general

Not later than 270 days after July 21, 2010, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—

(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ("DRC conflict free" is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

(B) Certification

The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

(C) Unreliable determination

If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

(D) DRC conflict free

For purposes of this paragraph, a product may be labeled as "DRC conflict free" if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

(E) Information available to the public

Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

(2) Person described

A person is described in this paragraph if—

(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) Revisions and waivers

The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that—

(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and

(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

(4) Termination of disclosure requirements

The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than the date that is one day after the end of the 5-year period beginning on July 21, 2010, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

(5) Definitions

For purposes of this subsection, the terms "adjoining country", "appropriate congressional committees", "armed group", and "conflict mineral" have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(q) Disclosure of payments by resource extraction issuers

(1) Definitions

In this subsection—

(A) the term "commercial development of oil, natural gas, or minerals" includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;

(B) the term "foreign government" means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;

(C) the term "payment"—

(i) means a payment that is—

(I) made to further the commercial development of oil, natural gas, or minerals; and
(II) not de minimis; and

(ii) includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals;

(D) the term "resource extraction issuer" means an issuer that—
(i) is required to file an annual report with the Commission; and
(ii) engages in the commercial development of oil, natural gas, or minerals;

(E) the term "interactive data format" means an electronic data format in which pieces of information are identified using an interactive data standard; and

(F) the term "interactive data standard" means [4] standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.

(2) Disclosure

(A) Information required

Not later than 270 days after July 21, 2010, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—

(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals; and
(ii) the type and total amount of such payments made to each government.

(B) Consultation in rulemaking

In issuing rules under subparagraph (A), the Commission may consult with any agency or entity that the Commission determines is relevant.

(C) Interactive data format

The rules issued under subparagraph (A) shall require that the information included in the annual report of a resource extraction issuer be submitted in an interactive data format.

(D) Interactive data standard

(i) In general

The rules issued under subparagraph (A) shall establish an interactive data standard for the information included in the annual report of a resource extraction issuer.

(ii) Electronic tags

The interactive data standard shall include electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the Federal Government—

(I) the total amounts of the payments, by category;
(II) the currency used to make the payments;
(III) the financial period in which the payments were made;
(IV) the business segment of the resource extraction issuer that made the payments;
(V) the government that received the payments, and the country in which the government is located;
(VI) the project of the resource extraction issuer to which the payments relate; and

(VII) such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors.

(E) International transparency efforts

To the extent practicable, the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.

(F) Effective date

With respect to each resource extraction issuer, the final rules issued under subparagraph (A) shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year of the resource extraction issuer that ends not earlier than 1 year after the date on which the Commission issues final rules under subparagraph (A).

(3) Public availability of information

(A) In general

To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted under the rules issued under paragraph (2)(A).

(B) Other information

Nothing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the rules issued under paragraph (2)(A).

(4) Authorization of appropriations

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out this subsection.

(r) Disclosure of certain activities relating to Iran

(1) In general

Each issuer required to file an annual or quarterly report under subsection (a) shall disclose in that report the information required by paragraph (2) if, during the period covered by the report, the issuer or any affiliate of the issuer—

(A) knowingly engaged in an activity described in subsection (a) or (b) of section 5 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note);

(B) knowingly engaged in an activity described in subsection (c)(2) of section 8513 of title 22 or a transaction described in subsection (d)(1) of that section;

(C) knowingly engaged in an activity described in section 8514a(b)(2) of title 22; or

(D) knowingly conducted any transaction or dealing with—

(i) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13224 (66 Fed. Reg. 49079; relating to blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism);

(ii) any person the property and interests in property of which are blocked pursuant to Executive Order No. 13382 (70 Fed. Reg. 38567; relating to blocking of property of weapons of mass destruction proliferators and their supporters); or

(iii) any person or entity identified under section 560.304 of title 31, Code of Federal Regulations (relating to the definition of the Government of Iran) without the specific authorization of a Federal department or agency.

(2) Information required

If an issuer or an affiliate of the issuer has engaged in any activity described in paragraph (1), the issuer shall disclose a detailed description of each such activity, including—

(A) the nature and extent of the activity;

(B) the gross revenues and net profits, if any, attributable to the activity; and

(C) whether the issuer or the affiliate of the issuer (as the case may be) intends to continue the activity.

(3) Notice of disclosures

If an issuer reports under paragraph (1) that the issuer or an affiliate of the issuer has knowingly engaged in any activity described in that paragraph, the issuer shall separately file with the Commission, concurrently with the annual or quarterly report under subsection (a), a notice that the disclosure of that activity has been included in that annual or quarterly report that identifies the issuer and contains the information required by paragraph (2).

(4) Public disclosure of information

Upon receiving a notice under paragraph (3) that an annual or quarterly report includes a disclosure of an activity described in paragraph (1), the Commission shall promptly—

(A) transmit the report to—

(i) the President;

(ii) the Committee on Foreign Affairs and the Committee on Financial Services of the House of Representatives; and

(iii) the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate; and

(B) make the information provided in the disclosure and the notice available to the public by posting the information on the Internet website of the Commission.

(5) Investigations

Upon receiving a report under paragraph (4) that includes a disclosure of an activity described in paragraph (1) (other than an activity described in subparagraph (D)(iii) of that paragraph), the President shall—

(A) initiate an investigation into the possible imposition of sanctions under the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note), section 8513 or 8514a of title 22, an Executive order specified in clause (i) or (ii) of paragraph (1)(D), or any other provision of law relating to the imposition of sanctions with respect to Iran, as applicable; and

(B) not later than 180 days after initiating such an investigation, make a determination with respect to whether sanctions should be imposed with respect to the issuer or the affiliate of the issuer (as the case may be).

(6) Sunset

The provisions of this subsection shall terminate on the date that is 30 days after the date on which the President makes the certification described in section 8551(a) of title 22.

(June 6, 1934, ch. 404, title I, §13, 48 Stat. 894; Pub. L. 88–467, §4, Aug. 20, 1964, 78 Stat. 569; Pub. L. 90–439, §2, July 29, 1968, 82 Stat. 454; Pub. L. 91–567, §§1, 2, Dec. 22, 1970, 84 Stat. 1497; Pub. L. 94–29, §10, June 4, 1975, 89 Stat. 119; Pub. L. 94–210, title III, §308(b), Feb. 5, 1976, 90 Stat. 57; Pub. L. 95–213, title I, §102, title II, §§202, 203, Dec. 19, 1977, 91 Stat. 1494, 1498, 1499; Pub. L. 98–38, §2(a), June 6, 1983, 97 Stat. 205; Pub. L. 100–181, title III, §§315, 316, Dec. 4, 1987, 101 Stat. 1256; Pub. L. 100–241, §12(d), Feb. 3, 1988, 101 Stat. 1810; Pub. L. 100–418, title V, §5002, Aug. 23, 1988, 102 Stat. 1415; Pub. L. 101–432, §3, Oct. 16, 1990, 104 Stat. 964; Pub. L. 107–123, §5, Jan. 16, 2002, 115 Stat. 2395; Pub. L. 107–204, title I, §109(i), formerly §109(h), title IV, §§401(a), 402(a), 409, July 30, 2002, 116 Stat. 771, 785, 787, 791, renumbered §109(i), Pub. L. 111–203, title IX, §982(h)(3), July 21, 2010, 124 Stat. 1930; Pub. L. 111–203, title VII, §§763(i), 766(b), (c), (e), title IX, §§929R(a), 929X(a), 985(b)(4), 991(b)(2), title XV, §§1502(b), 1504, July 21, 2010, 124 Stat. 1779, 1799, 1866, 1870, 1933, 1952, 2213, 2220; Pub. L. 112–106, title I, §102 (b)(2), Apr. 5, 2012, 126 Stat. 309; Pub. L. 112–158, title II, §219(a), Aug. 10, 2012, 126 Stat. 1235.)

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Title 15 - COMMERCE AND TRADE
CHAPTER 2B - SECURITIES EXCHANGES
Sec. 78o - Registration and regulation of brokers and dealers
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§78*o*. Registration and regulation of brokers and dealers

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b) Manner of registration of brokers and dealers

(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this subsection.

(2)(A) An application for registration of a broker or dealer to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application, in such form as the Commission, by rule, may prescribe, shall contain such information and documents concerning the applicant, the successor, and any persons associated with

the applicant or the successor, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The grant or denial of registration to such an applicant shall be in accordance with the procedures set forth in paragraph (1) of this subsection. If the Commission grants such registration, the registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt the application for registration as its own.

(B) Any person who is a broker or dealer solely by reason of acting as a municipal securities dealer or municipal securities broker, who so acts through a separately identifiable department or division, and who so acted in such a manner on June 4, 1975, may, in accordance with such terms and conditions as the Commission, by rule, prescribes as necessary and appropriate in the public interest and for the protection of investors, register such separately identifiable department or division in accordance with this subsection. If any such department or division is so registered, the department or division and not such person himself shall be the broker or dealer for purposes of this chapter.

(C) Within six months of the date of the granting of registration to a broker or dealer, the Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange of which such broker or dealer is a member, shall conduct an inspection of the broker or dealer to determine whether it is operating in conformity with the provisions of this chapter and the rules and regulations thereunder: *Provided, however*, That the Commission may delay such inspection of any class of brokers or dealers for a period not to exceed six months.

(3) Any provision of this chapter (other than section 78e of this title and subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered broker or dealer or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds—

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer municipal advisor,,[1] government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the

above, or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.) or any substantially equivalent foreign statute or regulation;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18 or a violation of a substantially equivalent foreign statute.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer municipal advisor,,[1] government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker, dealer, security-based swap dealer, or a major security-based swap participant;

(G) has been found by a foreign financial regulatory authority to have—

(i) made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(ii) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade;

(iii) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision; or

(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(5) Pending final determination whether any registration under this subsection shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer.

(6)(A) With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person—

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection;

(ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(B) It shall be unlawful—

(i) for any person as to whom an order under subparagraph (A) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order, or to participate in an offering of penny stock in contravention of such order;

(ii) for any broker or dealer to permit such a person, without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order; or

(iii) for any broker or dealer to permit such a person, without the consent of the Commission, to participate in an offering of penny stock in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order and of such participation.

(C) For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from such term.

(7) No registered broker or dealer or government securities broker or government securities dealer registered (or required to register) under section 78o–5(a)(1)(A) of this title shall effect any transaction in, or induce the purchase or sale of, any security unless such broker or dealer meets such standards of operational capability and such broker or dealer and all natural persons associated with such broker or dealer meet such standards of training, experience, competence, and such other qualifications as the Commission finds necessary or appropriate in the public interest or for the protection of investors. The Commission shall establish such standards by rules and regulations, which may—

(A) specify that all or any portion of such standards shall be applicable to any class of brokers and dealers and persons associated with brokers and dealers;

(B) require persons in any such class to pass tests prescribed in accordance with such rules and regulations, which tests shall, with respect to any class of partners, officers, or supervisory employees (which latter term may be defined by the Commission's rules and regulations and as so defined shall include branch managers of brokers or dealers) engaged in the management of the broker or dealer, include questions relating to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matters; and

(C) provide that persons in any such class other than brokers and dealers and partners, officers, and supervisory employees of brokers or dealers, may be qualified solely on the basis of compliance with such standards of training and such other qualifications as the Commission finds appropriate.

The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this paragraph, including, but not limited to, fees for any test administered by it or under its direction. The Commission may cooperate with registered securities associations and national securities exchanges in devising and administering tests and may require registered brokers and dealers and persons associated with such brokers and dealers to pass tests administered by or on behalf of any such association or exchange and to pay such association or exchange reasonable fees or charges to defray the costs incurred by such association or exchange in administering such tests.

(8) It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or [2] commercial paper, bankers'

acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78o–3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

(9) The Commission by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (8) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(10) For the purposes of determining whether a person is subject to a statutory disqualification under section 78f(c)(2), 78o–3(g)(2), or 78q–1(b)(4)(A) of this title, the term "Commission" in paragraph (4)(B) of this subsection shall mean "exchange", "association", or "clearing agency", respectively.

(11) BROKER/DEALER REGISTRATION WITH RESPECT TO TRANSACTIONS IN SECURITY FUTURES PRODUCTS.—

(A) NOTICE REGISTRATION.—

(i) CONTENTS OF NOTICE.—Notwithstanding paragraphs (1) and (2), a broker or dealer required to register only because it effects transactions in security futures products on an exchange registered pursuant to section 78f(g) of this title may register for purposes of this section by filing with the Commission a written notice in such form and containing such information concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. A broker or dealer may not register under this paragraph unless that broker or dealer is a member of a national securities association registered under section 78o–3(k) of this title.

(ii) IMMEDIATE EFFECTIVENESS.—Such registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission, except that such registration shall not be effective if the registration would be subject to suspension or revocation under paragraph (4).

(iii) SUSPENSION.—Such registration shall be suspended immediately if a national securities association registered pursuant to section 78o–3(k) of this title suspends the membership of that broker or dealer.

(iv) TERMINATION.—Such registration shall be terminated immediately if any of the above stated conditions for registration set forth in this paragraph are no longer satisfied.

(B) EXEMPTIONS FOR REGISTERED BROKERS AND DEALERS.—A broker or dealer registered pursuant to the requirements of subparagraph (A) shall be exempt from the following provisions of this chapter and the rules thereunder with respect to transactions in security futures products:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3) and (c)(5) of this section.

(iv) Section 78o–4 of this title.

(v) Section 78o–5 of this title.

(vi) Subsections (d), (e), (f), (g), (h), and (i) [3] of section 78q of this title.

(12) EXEMPTION FOR SECURITY FUTURES PRODUCT EXCHANGE MEMBERS.—

(A) REGISTRATION EXEMPTION.—A natural person shall be exempt from the registration requirements of this section if such person—

(i) is a member of a designated contract market registered with the Commission as an exchange pursuant to section 78f(g) of this title;

(ii) effects transactions only in securities on the exchange of which such person is a member; and

(iii) does not directly accept or solicit orders from public customers or provide advice to public customers in connection with the trading of security futures products.

(B) OTHER EXEMPTIONS.—A natural person exempt from registration pursuant to subparagraph (A) shall also be exempt from the following provisions of this chapter and the rules thereunder:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3), (c)(5), and (e) of this section.

(iv) Section 78o–4 of this title.

(v) Section 78o–5 of this title.

(vi) Subsections (d), (e), (f), (g), (h), and (i) [3] of section 78q of this title.

(c) Use of manipulative or deceptive devices; contravention of rules and regulations

(1)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security or any security-based swap agreement involving a municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or to attempt to induce the purchase or sale of, any government security or any security-based swap agreement involving a government security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(2)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such broker, dealer, or municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security in connection with which such government securities broker or government securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(D) The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(E) The Commission shall, prior to adopting any rule or regulation under subparagraph (C), consult with and consider the views of the Secretary of the Treasury and each appropriate regulatory agency. If the Secretary of the Treasury or any appropriate regulatory agency comments in writing on a proposed rule or regulation of the Commission under such subparagraph (C) that has been published for comment, the Commission shall respond in writing to such written comment before adopting the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission,

that such rule or regulation, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule or regulation, find that such rule or regulation is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(3)(A) No broker or dealer (other than a government securities broker or government securities dealer, except a registered broker or dealer) shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall (A) require the maintenance of reserves with respect to customers' deposits or credit balances, and (B) no later than September 1, 1975, establish minimum financial responsibility requirements for all brokers and dealers.

(B) Consistent with this chapter, the Commission, in consultation with the Commodity Futures Trading Commission, shall issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to any broker or dealer registered with the Commission pursuant to subsection (b) of this section (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act [7 U.S.C. 6f(a)] (except paragraph (2) thereof), with respect to the application of: (i) the provisions of section 78h of this title, subsection (c)(3) of this section, and section 78q of this title and the rules and regulations thereunder related to the treatment of customer funds, securities, or property, maintenance of books and records, financial reporting, or other financial responsibility rules, involving security futures products; and (ii) similar provisions of the Commodity Exchange Act [7 U.S.C. 1 et seq.] and rules and regulations thereunder involving security futures products.

(C) Notwithstanding any provision of sections 2(a)(1)(C)(i) or 4d(a)(2) of the Commodity Exchange Act [7 U.S.C. 2(a)(1)(C)(i), 6d(a)(2)] and the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 78mm of this title or pursuant to a rule or regulation, cash and securities may be held by a broker or dealer registered pursuant to subsection (b)(1) and also registered as a futures commission merchant pursuant to section 4f(a)(1) of the Commodity Exchange Act [7 U.S.C. 6f(a)(1)], in a portfolio margining account carried as a futures account subject to section 4d of the Commodity Exchange Act [7 U.S.C. 6d] and the rules and regulations thereunder, pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission, and subject to subchapter IV of chapter 7 of title 11 and the rules and regulations thereunder. The Commission shall consult with the Commodity Futures Trading Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practicable for similar products.

(4) If the Commission finds, after notice and opportunity for a hearing, that any person subject to the provisions of section 78l, 78m, 78n of this title or subsection (d) of this section or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person, and any person who was a cause of the failure to comply due to an act or omission the person knew or should have known would contribute to the failure to comply, to comply, or to take steps to effect compliance, with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

(5) No dealer (other than a specialist registered on a national securities exchange) acting in the capacity of market maker or otherwise shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or a municipal security) in contravention of such specified and appropriate standards with respect to dealing as the Commission, by rule, shall prescribe as necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to remove impediments to and perfect the mechanism of a national market system. Under the rules of the Commission a dealer in a security may be prohibited from acting as a broker in that security.

(6) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security, municipal security, commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors or to perfect or remove impediments to a national system for the prompt and accurate clearance and settlement of securities transactions, with respect to the time and method of, and the form and format of documents used in connection with, making settlements of and payments for transactions in securities, making transfers and deliveries of securities, and closing accounts. Nothing in this paragraph shall be construed (A) to affect the authority of the Board of Governors of the Federal Reserve System, pursuant to section 78g of this title, to prescribe rules and regulations for the purpose of preventing the excessive use of credit for the purchase or carrying of securities, or (B) to authorize the Commission to prescribe rules or regulations for such purpose.

(7) In connection with any bid for or purchase of a government security related to an offering of government securities by or on behalf of an issuer, no government securities broker, government securities dealer, or bidder for or purchaser of securities in such offering shall knowingly or willfully make any false or misleading written statement or omit any fact necessary to make any written statement made not misleading.

(8) PROHIBITION OF REFERRAL FEES.—No broker or dealer, or person associated with a broker or dealer, may solicit or accept, directly or indirectly, remuneration for assisting an attorney in obtaining the representation of any person in any private action arising under this chapter or under the Securities Act of 1933 [15 U.S.C. 77a et seq.].

(d) Supplementary and periodic information

(1) In general

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended [15 U.S.C. 77a et seq.], shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78l of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than 300 persons, or, in the case of bank [4] or a bank holding company, as such term is defined in section 1841 of title 12, 1,200 persons persons.[1] For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar

rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

(2) Asset-backed securities

(A) Suspension of duty to file

The Commission may, by rule or regulation, provide for the suspension or termination of the duty to file under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(B) Classification of issuers

The Commission may, for purposes of this subsection, classify issuers and prescribe requirements appropriate for each class of issuers of asset-backed securities.

(e) Notices to customers regarding securities lending

Every registered broker or dealer shall provide notice to its customers that they may elect not to allow their fully paid securities to be used in connection with short sales. If a broker or dealer uses a customer's securities in connection with short sales, the broker or dealer shall provide notice to its customer that the broker or dealer may receive compensation in connection with lending the customer's securities. The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, may prescribe the form, content, time, and manner of delivery of any notice required under this paragraph.

(f) Compliance with this chapter by members not required to be registered

The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors or to assure equal regulation, may require any member of a national securities exchange not required to register under this section and any person associated with any such member to comply with any provision of this chapter (other than subsection (a) of this section) or the rules or regulations thereunder which by its terms regulates or prohibits any act, practice, or course of business by a "broker or dealer" or "registered broker or dealer" or a "person associated with a broker or dealer," respectively.

(g) Prevention of misuse of material, nonpublic information

Every registered broker or dealer shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse in violation of this chapter, or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, shall adopt rules or regulations to require specific policies or procedures reasonably designed to prevent misuse in violation of this chapter (or the rules or regulations thereunder) of material, nonpublic information.

(h) Requirements for transactions in penny stocks

(1) In general

No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any penny stock by any customer except in accordance with the requirements of this subsection and the rules and regulations prescribed under this subsection.

(2) Risk disclosure with respect to penny stocks

Prior to effecting any transaction in any penny stock, a broker or dealer shall give the customer a risk disclosure document that—

(A) contains a description of the nature and level of risk in the market for penny stocks in both public offerings and secondary trading;

(B) contains a description of the broker's or dealer's duties to the customer and of the rights and remedies available to the customer with respect to violations of such duties or other requirements of Federal securities laws;

(C) contains a brief, clear, narrative description of a dealer market, including "bid" and "ask" prices for penny stocks and the significance of the spread between the bid and ask prices;

(D) contains the toll free telephone number for inquiries on disciplinary actions established pursuant to section 78o–3(i) of this title;

(E) defines significant terms used in the disclosure document or in the conduct of trading in penny stocks; and

(F) contains such other information, and is in such form (including language, type size, and format), as the Commission shall require by rule or regulation.

(3) Commission rules relating to disclosure

The Commission shall adopt rules setting forth additional standards for the disclosure by brokers and dealers to customers of information concerning transactions in penny stocks. Such rules—

(A) shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors—

(i) the bid and ask prices for penny stock, or such other information as the Commission may, by rule, require to provide customers with more useful and reliable information relating to the price of such stock;

(ii) the number of shares to which such bid and ask prices apply, or other comparable information relating to the depth and liquidity of the market for such stock; and

(iii) the amount and a description of any compensation that the broker or dealer and the associated person thereof will receive or has received in connection with such transaction;

(B) shall require brokers and dealers to provide, to each customer whose account with the broker or dealer contains penny stocks, a monthly statement indicating the market value of the penny stocks in that account or indicating that the market value of such stock cannot be determined because of the unavailability of firm quotes; and

(C) may, as the Commission finds necessary or appropriate in the public interest or for the protection of investors, require brokers and dealers to disclose to customers additional information concerning transactions in penny stocks.

(4) Exemptions

The Commission, as it determines consistent with the public interest and the protection of investors, may by rule, regulation, or order exempt in whole or in part, conditionally or unconditionally, any person or class of persons, or any transaction or class of transactions, from the requirements of this subsection. Such exemptions shall include an exemption for brokers and dealers based on the minimal percentage of the broker's or dealer's commissions, commission-equivalents, and markups received from transactions in penny stocks.

(5) Regulations

It shall be unlawful for any person to violate such rules and regulations as the Commission shall prescribe in the public interest or for the protection of investors or to maintain fair and orderly markets—

(A) as necessary or appropriate to carry out this subsection; or

(B) as reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

(i) Limitations on State law

(1) Capital, margin, books and records, bonding, and reports

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this chapter. The Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this chapter.

(2) Funding portals

(A) Limitation on State laws

Except as provided in subparagraph (B), no State or political subdivision thereof may enforce any law, rule, regulation, or other administrative action against a registered funding portal with respect to its business as such.

(B) Examination and enforcement authority

Subparagraph (A) does not apply with respect to the examination and enforcement of any law, rule, regulation, or administrative action of a State or political subdivision thereof in which the principal place of business of a registered funding portal is located, provided that such law, rule, regulation, or administrative action is not in addition to or different from the requirements for registered funding portals established by the Commission.

(C) Definition

For purposes of this paragraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) De minimis transactions by associated persons

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof may prohibit an associated person of a broker or dealer from effecting a transaction described in paragraph (3) for a customer in such State if—

(A) such associated person is not ineligible to register with such State for any reason other than such a transaction;

(B) such associated person is registered with a registered securities association and at least one State; and

(C) the broker or dealer with which such person is associated is registered with such State.

(4) Described transactions

(A) In general

A transaction is described in this paragraph if—

(i) such transaction is effected—

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) by an associated person of the broker or dealer—

(aa) to which the customer was assigned for 14 days prior to the day of the transaction; and

(bb) who is registered with a State in which the customer was a resident or was present for at least 30 consecutive days during the 1-year period prior to the day of the transaction; or

(ii) the transaction is effected—

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) during the period beginning on the date on which such associated person files an application for registration with the State in which the transaction is effected and ending on the earlier of—

(aa) 60 days after the date on which the application is filed; or

(bb) the date on which such State notifies the associated person that it has denied the application for registration or has stayed the pendency of the application for cause.

(B) Rules of construction

For purposes of subparagraph (A)(i)(II)—

(i) each of up to 3 associated persons of a broker or dealer who are designated to effect transactions during the absence or unavailability of the principal associated person for a customer may be treated as an associated person to which such customer is assigned; and

(ii) if the customer is present in another State for 30 or more consecutive days or has permanently changed his or her residence to another State, a transaction is not described in this paragraph, unless the associated person of the broker or dealer files an application for registration with such State not later than 10 business days after the later of the date of the transaction, or the date of the discovery of the presence of the customer in the other State for 30 or more consecutive days or the change in the customer's residence.

(j) [5] Rulemaking to extend requirements to new hybrid products

(1) Consultation

Prior to commencing a rulemaking under this subsection, the Commission shall consult with and seek the concurrence of the Board concerning the imposition of broker or dealer registration requirements with respect to any new hybrid product. In developing and promulgating rules under this subsection, the Commission shall consider the views of the Board, including views with respect to the nature of the new hybrid product; the history, purpose, extent, and appropriateness of the regulation of the new product under the Federal banking laws; and the impact of the proposed rule on the banking industry.

(2) Limitation

The Commission shall not—

(A) require a bank to register as a broker or dealer under this section because the bank engages in any transaction in, or buys or sells, a new hybrid product; or

(B) bring an action against a bank for a failure to comply with a requirement described in subparagraph (A),

unless the Commission has imposed such requirement by rule or regulation issued in accordance with this section.

(3) Criteria for rulemaking

The Commission shall not impose a requirement under paragraph (2) of this subsection with respect to any new hybrid product unless the Commission determines that—

(A) the new hybrid product is a security; and

(B) imposing such requirement is necessary and appropriate in the public interest and for the protection of investors.

(4) Considerations

In making a determination under paragraph (3), the Commission shall consider—

(A) the nature of the new hybrid product; and

(B) the history, purpose, extent, and appropriateness of the regulation of the new hybrid product under the Federal securities laws and under the Federal banking laws.

(5) Objection to Commission regulation

(A) Filing of petition for review

The Board may obtain review of any final regulation described in paragraph (2) in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, not later than 60 days after the date of publication of the final regulation, a written petition requesting that the regulation be set aside. Any proceeding to challenge any such rule shall be expedited by the Court of Appeals.

(B) Transmittal of petition and record

A copy of a petition described in subparagraph (A) shall be transmitted as soon as possible by the Clerk of the Court to an officer or employee of the Commission designated for that purpose. Upon receipt of the petition, the Commission shall file with the court the regulation under review and any documents referred to therein, and any other relevant materials prescribed by the court.

(C) Exclusive jurisdiction

On the date of the filing of the petition under subparagraph (A), the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in subparagraph (B), to affirm and enforce or to set aside the regulation at issue.

(D) Standard of review

The court shall determine to affirm and enforce or set aside a regulation of the Commission under this subsection, based on the determination of the court as to whether—

(i) the subject product is a new hybrid product, as defined in this subsection;

(ii) the subject product is a security; and

(iii) imposing a requirement to register as a broker or dealer for banks engaging in transactions in such product is appropriate in light of the history, purpose, and extent of regulation under the Federal securities laws and under the Federal banking laws, giving deference neither to the views of the Commission nor the Board.

(E) Judicial stay

The filing of a petition by the Board pursuant to subparagraph (A) shall operate as a judicial stay, until the date on which the determination of the court is final (including any appeal of such determination).

(F) Other authority to challenge

Any aggrieved party may seek judicial review of the Commission's rulemaking under this subsection pursuant to section 78y of this title.

(6) Definitions

For purposes of this subsection:

(A) New hybrid product

The term "new hybrid product" means a product that—

(i) was not subjected to regulation by the Commission as a security prior to the date of the enactment of the Gramm-Leach-Bliley Act [Nov. 12, 1999];

(ii) is not an identified banking product as such term is defined in section 206 of such Act; and

(iii) is not an equity swap within the meaning of section 206(a)(6) of such Act.

(B) Board

The term "Board" means the Board of Governors of the Federal Reserve System.

(j) [5] Limitation on Commission authority

The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 78c–1(b) of this title.

(k) [6] Registration or succession to a United States broker or dealer

In determining whether to permit a foreign person or an affiliate of a foreign person to register as a United States broker or dealer, or succeed to the registration of a United States broker or dealer, the Commission may consider whether, for a foreign person, or an affiliate of a foreign person that presents a risk to the stability of the United States financial system, the home country of the foreign person has adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(l) [7] Termination of a United States broker or dealer

For a foreign person or an affiliate of a foreign person that presents such a risk to the stability of the United States financial system, the Commission may determine to terminate the registration of such foreign person or an affiliate of such foreign person as a broker or dealer in the United States, if the Commission determines that the home country of the foreign person has not adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(k) [8] Standard of conduct

(1) In general

Notwithstanding any other provision of this chapter or the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–11]. The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

(2) Disclosure of range of products offered

Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).

(l) [9] Other matters

The Commission shall—

(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

(m) Harmonization of enforcement

The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer shall include—

(1) the enforcement authority of the Commission with respect to such violations provided under this chapter; and

(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.], including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under this chapter to [10] same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to an investment advisor under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 et seq.].

(n) Disclosures to retail investors

(1) In general

Notwithstanding any other provision of the securities laws, the Commission may issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.

(2) Considerations

In developing any rules under paragraph (1), the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation.

(3) Form and contents of documents and information

Any documents or information designated under a rule promulgated under paragraph (1) shall—

(A) be in a summary format; and

(B) contain clear and concise information about—

(i) investment objectives, strategies, costs, and risks; and

(ii) any compensation or other financial incentive received by a broker, dealer, or other intermediary in connection with the purchase of retail investment products.

(o) Authority to restrict mandatory pre-dispute arbitration

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

(June 6, 1934, ch. 404, title I, §15, 48 Stat. 895; May 27, 1936, ch. 462, §3, 49 Stat. 1377; June 25, 1938, ch. 677, §2, 52 Stat. 1075; Pub. L. 88–467, §6, Aug. 20, 1964, 78 Stat. 570; Pub. L. 91–598, §11(d), formerly §7(d), Dec. 30, 1970, 84 Stat. 1653, renumbered §11(d), Pub. L. 95–283, §9, May 21, 1978, 92 Stat. 260; Pub. L. 94–29, §11, June 4, 1975, 89 Stat. 121; Pub. L. 95–213, title II, §204, Dec. 19, 1977, 91 Stat. 1500; Pub. L. 98–38, §3(a), June 6, 1983, 97 Stat. 206; Pub. L. 98–376, §§4, 6(b), Aug. 10, 1984, 98 Stat. 1265; Pub. L. 99–571, title I, §102(e), (f), Oct. 28, 1986, 100 Stat. 3218; Pub. L. 100–181, title III, §317, Dec. 4, 1987, 101 Stat. 1256; Pub. L. 100–704, §3(b)(1), Nov. 19, 1988, 102 Stat. 4679; Pub. L. 101–429, title V, §§504(a), 505, Oct. 15, 1990, 104 Stat. 952, 953; Pub. L. 101–550, title II, §203(a), (c)(1), Nov. 15, 1990, 104 Stat. 2715, 2718; Pub. L. 103–202, title I, §§105, 106(b)(2)(B), 109(b)(2), 110, Dec. 17, 1993, 107 Stat. 2348, 2350, 2353; Pub. L. 104–67, title I, §103(a), Dec. 22, 1995, 109 Stat. 756; Pub. L. 104–290, title I, §103(a), Oct. 11, 1996, 110 Stat. 3420; Pub. L. 105–353, title III, §301(b)(8), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–102, title II, §205, Nov. 12, 1999, 113 Stat. 1391; Pub. L. 106–554, §1(a)(5) [title II, §§203(a)(1), (b), 206

15 U.S.C.
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CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER I - INVESTMENT COMPANIES
Sec. 80a-3 - Definition of investment company
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§80a–3. Definition of investment company

(a) Definitions

(1) When used in this subchapter, "investment company" means any issuer which—

(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

(2) As used in this section, "investment securities" includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (7) of subsection (c) of this section.

(b) Exemption from provisions

Notwithstanding paragraph (1)(C) of subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

(2) Any issuer which the Commission, upon application by such issuer, finds and by order declares to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or (A) through majority-owned subsidiaries or (B) through controlled companies conducting similar types of businesses. The filing of an application under this paragraph in good faith by an issuer other than a registered investment company shall exempt the applicant for a period of sixty days from all provisions of this subchapter applicable to investment companies as such. For cause shown, the Commission by order may extend such period of exemption for an additional period or periods. Whenever the Commission, upon its own motion or upon application, finds that the circumstances which gave rise to the issuance of an order granting an application under this paragraph no longer exist, the Commission shall by order revoke such order.

(3) Any issuer all the outstanding securities of which (other than short-term paper and directors' qualifying shares) are directly or indirectly owned by a company excepted from the definition of investment company by paragraph (1) or (2) of this subsection.

(c) Further exemptions

Notwithstanding subsection (a) of this section, none of the following persons is an investment company within the meaning of this subchapter:

(1) Any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities. Such issuer shall be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a–12(d)(1) of this title governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer. For purposes of this paragraph:

(A) Beneficial ownership by a company shall be deemed to be beneficial ownership by one person, except that, if the company owns 10 per centum or more of the outstanding voting securities of the issuer, and is or, but for the exception provided for in this paragraph or paragraph (7), would be an investment company, the beneficial ownership shall be deemed to be that of the holders of such company's outstanding securities (other than short-term paper).

(B) Beneficial ownership by any person who acquires securities or interests in securities of an issuer described in the first sentence of this paragraph shall be deemed to be beneficial ownership by the person from whom such transfer was made, pursuant to such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter, where the transfer was caused by legal separation, divorce, death, or other involuntary event.

(2)(A) Any person primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as broker, and acting as market intermediary, or any one or more of such activities, whose gross income normally is derived principally from such business and related activities.

(B) For purposes of this paragraph—

(i) the term "market intermediary" means any person that regularly holds itself out as being willing contemporaneously to engage in, and that is regularly engaged in, the business of entering into transactions on both sides of the market for a financial contract or one or more such financial contracts; and

(ii) the term "financial contract" means any arrangement that—

(I) takes the form of an individually negotiated contract, agreement, or option to buy, sell, lend, swap, or repurchase, or other similar individually negotiated transaction commonly entered into by participants in the financial markets;

(II) is in respect of securities, commodities, currencies, interest or other rates, other measures of value, or any other financial or economic interest similar in purpose or function to any of the foregoing; and

(III) is entered into in response to a request from a counter party for a quotation, or is otherwise entered into and structured to accommodate the objectives of the counter party to such arrangement.

(3) Any bank or insurance company; any savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, or any receiver, conservator, liquidator, liquidating agent, or similar official or person thereof or therefor; or any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian, if—

(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law.

(4) Any person substantially all of whose business is confined to making small loans, industrial banking, or similar businesses.

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services; and (C) purchasing or otherwise acquiring mortgages and other liens on and interests in real estate.

(6) Any company primarily engaged, directly or through majority-owned subsidiaries, in one or more of the businesses described in paragraphs (3), (4), and (5) of this subsection, or in one or more of such businesses (from which not less than 25 per centum of such company's gross income during its last fiscal year was derived) together with an additional business or businesses other than investing, reinvesting, owning, holding, or trading in securities.

(7)(A) Any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities. Securities that are owned by persons who received the securities from a qualified purchaser as a gift or bequest, or in a case in which the transfer was caused by legal separation, divorce, death, or other involuntary event, shall be deemed to be owned by a qualified purchaser, subject to such rules, regulations, and orders as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(B) Notwithstanding subparagraph (A), an issuer is within the exception provided by this paragraph if—

(i) in addition to qualified purchasers, outstanding securities of that issuer are beneficially owned by not more than 100 persons who are not qualified purchasers, if—

(I) such persons acquired any portion of the securities of such issuer on or before September 1, 1996; and

(II) at the time at which such persons initially acquired the securities of such issuer, the issuer was excepted by paragraph (1); and

(ii) prior to availing itself of the exception provided by this paragraph—

(I) such issuer has disclosed to each beneficial owner, as determined under paragraph (1), that future investors will be limited to qualified purchasers, and that ownership in such issuer is no longer limited to not more than 100 persons; and

(II) concurrently with or after such disclosure, such issuer has provided each beneficial owner, as determined under paragraph (1), with a reasonable opportunity to redeem any part or all of their interests in the issuer, notwithstanding any agreement to the contrary between the issuer and such persons, for that person's proportionate share of the issuer's net assets.

(C) Each person that elects to redeem under subparagraph (B)(ii)(II) shall receive an amount in cash equal to that person's proportionate share of the issuer's net assets, unless the issuer elects to provide such person with the option of receiving, and such person agrees to receive, all or a portion of such person's share in assets of the issuer. If the issuer elects to provide such persons

with such an opportunity, disclosure concerning such opportunity shall be made in the disclosure required by subparagraph (B)(ii)(I).

(D) An issuer that is excepted under this paragraph shall nonetheless be deemed to be an investment company for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 80a–12(d)(1) of this title relating to the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer.

(E) For purposes of determining compliance with this paragraph and paragraph (1), an issuer that is otherwise excepted under this paragraph and an issuer that is otherwise excepted under paragraph (1) shall not be treated by the Commission as being a single issuer for purposes of determining whether the outstanding securities of the issuer excepted under paragraph (1) are beneficially owned by not more than 100 persons or whether the outstanding securities of the issuer excepted under this paragraph are owned by persons that are not qualified purchasers. Nothing in this subparagraph shall be construed to establish that a person is a bona fide qualified purchaser for purposes of this paragraph or a bona fide beneficial owner for purposes of paragraph (1).

(8) [Repealed] Pub. L. 111–203, title IX, §986(c)(2), July 21, 2010, 124 Stat. 1936.

(9) Any person substantially all of whose business consists of owning or holding oil, gas, or other mineral royalties or leases, or fractional interests therein, or certificates of interest or participation in or investment contracts relative to such royalties, leases, or fractional interests.

(10)(A) Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes—

(i) no part of the net earnings of which inures to the benefit of any private shareholder or individual; or

(ii) which is or maintains a fund described in subparagraph (B).

(B) For the purposes of subparagraph (A)(ii), a fund is described in this subparagraph if such fund is a pooled income fund, collective trust fund, collective investment fund, or similar fund maintained by a charitable organization exclusively for the collective investment and reinvestment of one or more of the following:

(i) assets of the general endowment fund or other funds of one or more charitable organizations;

(ii) assets of a pooled income fund;

(iii) assets contributed to a charitable organization in exchange for the issuance of charitable gift annuities;

(iv) assets of a charitable remainder trust or of any other trust, the remainder interests of which are irrevocably dedicated to any charitable organization;

(v) assets of a charitable lead trust;

(vi) assets of a trust, the remainder interests of which are revocably dedicated to or for the benefit of 1 or more charitable organizations, if the ability to revoke the dedication is limited to circumstances involving—

(I) an adverse change in the financial circumstances of a settlor or an income beneficiary of the trust;

(II) a change in the identity of the charitable organization or organizations having the remainder interest, provided that the new beneficiary is also a charitable organization; or

(III) both the changes described in subclauses (I) and (II);

(vii) assets of a trust not described in clauses (i) through (v), the remainder interests of which are revocably dedicated to a charitable organization, subject to subparagraph (C); or

(viii) such assets as the Commission may prescribe by rule, regulation, or order in accordance with section 80a–6(c) of this title.

(C) A fund that contains assets described in clause (vii) of subparagraph (B) shall be excluded from the definition of an investment company for a period of 3 years after December 8, 1995, but only if—

(i) such assets were contributed before the date which is 60 days after December 8, 1995; and

(ii) such assets are commingled in the fund with assets described in one or more of clauses (i) through (vi) and (viii) of subparagraph (B).

(D) For purposes of this paragraph—

(i) a trust or fund is "maintained" by a charitable organization if the organization serves as a trustee or administrator of the trust or fund or has the power to remove the trustees or administrators of the trust or fund and to designate new trustees or administrators;

(ii) the term "pooled income fund" has the same meaning as in section 642(c)(5) of title 26;

(iii) the term "charitable organization" means an organization described in paragraphs (1) through (5) of section 170(c) or section 501(c)(3) of title 26;

(iv) the term "charitable lead trust" means a trust described in section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of title 26;

(v) the term "charitable remainder trust" means a charitable remainder annuity trust or a charitable remainder unitrust, as those terms are defined in section 664(d) of title 26; and

(vi) the term "charitable gift annuity" means an annuity issued by a charitable organization that is described in section 501(m)(5) of title 26.

(11) Any employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of title 26; or any governmental plan described in section 77c(a)(2)(C) of this title; or any collective trust fund maintained by a bank consisting solely of assets of one or more of such trusts, government plans, or church plans, companies or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection; or any separate account the assets of which are derived solely from (A) contributions under pension or profit-sharing plans which meet the requirements of section 401 of title 26 or the requirements for deduction of the employer's contribution under section 404(a)(2) of title 26, (B) contributions under governmental plans in connection with which interests, participations, or securities are exempted from the registration provisions of section 77e of this title by section 77c(a)(2)(C) of this title, and (C) advances made by an insurance company in connection with the operation of such separate account.

(12) Any voting trust the assets of which consist exclusively of securities of a single issuer which is not an investment company.

(13) Any security holders' protective committee or similar issuer having outstanding and issuing no securities other than certificates of deposit and short-term paper.

(14) Any church plan described in section 414(e) of title 26, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is—

(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of title 26; and

(B) substantially all of the activities of which consist of—

(i) managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under title 26; or

(ii) administering or providing benefits pursuant to church plans.

(Aug. 22, 1940, ch. 686, title I, §3, 54 Stat. 797; Oct. 21, 1942, ch. 619, title I, §162(e), 56 Stat. 867; Pub. L. 89–485, §13(i), July 1, 1966, 80 Stat. 243; Pub. L. 91–547, §3(a), (b), Dec. 14, 1970, 84 Stat. 1414; Pub. L. 94–210, title III, §308(c), Feb. 5, 1976, 90 Stat. 57; Pub. L. 96–477, title I, §102, title VII, §703, Oct. 21, 1980, 94 Stat. 2276, 2295; Pub. L. 100–181, title VI, §§604–606, Dec. 4, 1987,

NEBRASKA ADMINISTRATIVE CODE

Title 48 - ~~Department of Banking and Finance~~DEPARTMENT OF BANKING AND FINANCE

Chapter 19 - REQUESTS FOR ORDERS CURING LATE NOTICE FILINGS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to the authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to requests to cure late filings of an exemption notice pursuant to Section 8-1110(5), 8-1111(9), 8-1111(16), ~~and~~ 8-1111(20) and 8-1111(23) under the Act is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to this Rule, unless otherwise specified.

001.05 For purposes of this ~~Chapter~~Rule, the term "seller" shall include any issuer or other person on whose behalf a notice of exemption from registration under Sections 8-1110(5), 8-1111(9), 8-1111(16), ~~or~~ 8-1111(20), and 8-1111(23) is filed with the ~~Department~~ Director.

002 ~~REQUEST~~ FILING REQUIREMENT. A seller that does not file an exemption notice within the time period specified in ~~Sections 8-1110(5), 8-1111(9), 8-1111(16) or 8-1111(20)~~ the above applicable statutory provisions of the Act, or any Rule promulgated thereunder, shall file a written request with the ~~Department~~ Director for an Order curing the late filing of the exemption notice.

002.01 The request shall be signed and dated by an officer, director, general partner, managing member or legal counsel of the seller.

002.02 The request shall accompany the exemption notice.

003 ~~REQUEST~~ CONTENTS OF REQUEST.

003.01 If the exemption notice is filed thirty ~~(30)~~ days or less after the time period specified for the exemption claimed, the request shall include:

003.01A The date (day, month, year) of the first Nebraska sale in reliance on the applicable exemption, and dates of any subsequent sales;

003.01B An explanation as to why the filing was late;

003.01C A representation that the conditions of the exemption have been met, except for the timely filing of the notice;

003.01D A representation that there have been no adverse material changes in the financial condition of the issuer since the original date of the offering or first sale; ~~and~~

003.01E A representation that there have been no civil suits or complaints filed by investors against the seller, or investor complaints since the date of the first Nebraska sale; and

003.01F A representation that no administrative actions have been initiated by any state or federal regulatory authority in connection with the offering or any other investment-related activity by the issuer. For purposes of this Rule, investment-related shall mean pertaining to securities, commodities, banking, insurance, or real estate, including, but not limited to, acting as, or being associated with, a broker-dealer, issuer, investment company, investment adviser, futures sponsor, or depository institution.

003.02 If the exemption notice is filed thirty-one ~~(31)~~ to sixty ~~(60)~~ days after the time period specified for the exemption claimed, the request shall include:

003.02A The information required by Section 003.01, above;

003.02B The names and addresses of all Nebraska investors as of the filing date;

003.02C The date of each Nebraska investor's investment; and

003.02D A statement by the ~~sellers~~ seller(s), and its officers, managers and selling agents, in which they, in their individual and corporate capacity, discuss their prior securities offering experience, if any.

003.03 If the exemption notice is filed more than sixty days after the time period specified for the exemption claimed, the request shall include:

003.03A The information by Section 003.02, above; and

003.03B If represented by counsel, the date counsel was retained by the seller, and the date when discussions on the Nebraska offering began.

004 INVESTIGATIONS. If an exemption notice is filed more than ninety ~~(90)~~ days ~~late~~ after the time period specified for the exemption claimed, the Department may commence an independent investigation of the matter. The Department specifically reserves the right to assess the expense of its investigation to the seller pursuant to Section 8-1115(1) of the Act or to assess a fine pursuant to Section 8-1108.01(4) of the Act.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - ~~Department of Banking and Finance~~DEPARTMENT OF BANKING AND FINANCE

Chapter 20 - FEDERAL COVERED SECURITIES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Sections 8-1108.02 and 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to filing requirements for issuers of federal covered securities is consistent with investor protection and is in the public interest.

001.03 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.04 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rule referenced in this Rule is attached hereto.

002 OFFERINGS BY INVESTMENT COMPANIES.

002.01 Prior to the offer or sale of any security by an investment company registered under the Investment Company Act of 1940, the issuer shall file the following information with the Director:

002.01A A notice, on a uniform form, acceptable to the Director, which shall contain:

002.01A1 The name and address of the issuer; and

002.01A2 The dollar amount of securities which the issuer intends to offer in this state; and

002.01B A consent to service of process, which may incorporate by reference any consent to service of process previously filed with the Director by such issuer;

002.01C A check payable to "Nebraska Department of Banking and Finance" for fees, which shall be calculated in accordance with Section 8-1108.03 of the Act; and

002.01D Any other information which the Director may require, subject to the limitations of Section 18 of the Securities Act of 1933, 15 USC § 77r .

002.02 Such notice shall be effective for a period of one ~~(1)~~ year from the date the notice is received by the Director, unless the issuer shall notify the Director of a later date of effectiveness of the notice.

002.03 A notice filing may be renewed by filing the information specified in Section 002.01, above, with the Director before the expiration of the effectiveness of the previous notice filing, along with any sales report required by Section 8-1108.03 of the Act. A notice filing received pursuant to this subsection shall take effect upon the expiration of the previous notice filing and shall be effective for one year.

003 OFFERINGS PURSUANT TO REGULATION 506.

003.01 An issuer offering a security which is a covered security pursuant to ~~Section 18(b)(4)(D)~~ Section 18(b)(4)(E) of the Securities Act of 1933, 15 U.S.C.§77r(b)(4)(E) shall file the following information with the Director no later than fifteen ~~(15)~~ days after the first sale of such security in this state:

003.01A A copy of the issuer's SEC Form D, including all parts and appendices;

003.02B A consent to service of process~~;, which may incorporate by reference any consent to service of process previously filed with the Director by such issuer;~~ and

003.03C A check in the amount of two hundred dollars ($200.00), payable to "Nebraska Department of Banking and Finance."

003.02 An issuer may file an amendment to a previously filed notice of sales on SEC Form D at any time.

003.03 An issuer shall file an amendment to a previously filed notice of sales on SEC Form D for an offering:

003.03A To correct a material mistake of fact or error in the previously filed notice of sales on SEC Form D, as soon as practicable after discovery of the mistake or error.

003.03B To reflect a change in the information provided in the previously filed notice of sales on SEC Form D, as soon as practicable after the change, except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:

003.03B1 The address or relationship of the issuer or a related person identified in the SEC Form D;

003.03B2 An issuer's revenues or aggregate net asset value;

003.03B3 The minimum investment amount, if the change is an increase, or if the change, together with all other changes in

that amount since the previously filed notice of sales on SEC Form D, does not result in a decrease of more than ten percent.;

003.03B4 Any address or state(s) of solicitation shown on the notice of sales on SEC Form D;

003.03B5 The total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on SEC Form D, does not result in an increase of more than ten percent;

003.03B6 The amount of securities sold in the offering or the amount remaining to be sold;

003.03B7 The number of nonaccredited investors who have invested in the offering, as long as the change does not increase the number to more than thirty-five;

003.03B8 The total number of investors who have invested in the offering; and

003.03B9 The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on SEC Form D, does not result in an increase of more than ten percent.

003.03C Annually, on or before the first anniversary of the filing of the notice of sales on SEC Form D or the filing of the most recent amendment to the notice of sales on SEC From D, if the offering is continuing at that time.

003.04 An issuer that files an amendment to a previously filed notice of sales on SEC Form D must provide current information in response to all requirements of the notice of sales on SEC Form D regardless of why the amendment is filed.

004 OFFERINGS BY AGRICULTURAL CO-OPERATIVES. An issuer offering a security which is a covered security pursuant to Section 18(b)(4)(C) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(4)(C) and which is exempt from federal registration pursuant to Section 3(a)(5)(B), 15 U.S.C. § 77c(a)(5)(B), thereof, shall file the following information with the Director prior to the issuance of such security in this state:

004.01 The name and address of the issuer;

004.02 The place and date of incorporation;

004.03 The type of security being issued;

004.04 The total amount of securities to be sold by the issuer, both in Nebraska and nationwide;

004.05 An indication as to whom sales will be made: present members, patrons, or the general public;

004.06 A description of the method by which the securities will be sold;

004.07 The name and address of the registered broker-dealer who will be selling the securities;

004.08 A balance sheet and income statement for the past two years;

004.09 A description of the intended use of the proceeds;

004.10 The interest rate to be paid, if the offering involves debt securities;

004.11 Evidence of sufficient financial resources to service its debts for the next two years; and

004.12 A check in the amount of two hundred dollars ($200.00), payable to "Nebraska Department of Banking and Finance."

005 OFFERINGS PURSUANT TO REGULATION A, TIER 2. An issuer offering a security which is a covered security pursuant to Section 18(b)(3) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(3) and which is exempt from federal registration pursuant to Tier 2 of federal Regulation A, 17 CFR 230.251(a) shall submit the following prior to the initial offer and/or sale in this state:

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005.01 A completed Regulation A – Tier 2 notice filing form or copies of all documents filed with the Securities and Exchange Commission;

005.02 A consent to service of process on Form U-2 if not filing on the Regulation A – Tier 2 notice filing form; and

005.03 A check or money order in the amount of two hundred dollars ($200.00), payable to "Nebraska Department of Banking and Finance."

~~005~~006 RESTRICTION ON SALES. All sales of federal covered securities must be effected through a Nebraska-registered agent of a Nebraska-registered broker-dealer, except that this Section shall not apply to sales of securities covered by Section 003, above, provided no commissions or other remuneration are paid directly or indirectly for soliciting any prospective buyer.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES
Sec. 77r - Exemption from State regulation of securities offerings
From the U.S. Government Publishing Office, www.gpo.gov

§77r. Exemption from State regulation of securities offerings

(a) Scope of exemption

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

(2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of—

(A) with respect to a covered security described in subsection (b) of this section, any offering document that is prepared by or on behalf of the issuer; or

(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission or any national securities organization registered under section 78o–3 of this title, except that this subparagraph does not apply to the laws, rules, regulations, or orders, or other administrative actions of the State of incorporation of the issuer; or

(3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security described in paragraph (1).

(b) Covered securities

For purposes of this section, the following are covered securities:

(1) Exclusive Federal registration of nationally traded securities

A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

(2) Exclusive Federal registration of investment companies

A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.].

(3) Sales to qualified purchasers

A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing such rule, the Commission may define the term "qualified purchaser" differently with respect to different categories of securities, consistent with the public interest and the protection of investors.

(4) Exemption in connection with certain exempt offerings

A security is a covered security with respect to a transaction that is exempt from registration under this subchapter pursuant to—

(A) paragraph (1) or (3) of section 77d [1] of this title, and the issuer of such security files reports with the Commission pursuant to section 78m or 78o(d) of this title;

(B) section 77d(4) [1] of this title;

(C) section 77d(6) [1] of this title;

(D) [2] a rule or regulation adopted pursuant to section 77c(b)(2) of this title and such security is—

(i) offered or sold on a national securities exchange; or

(ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale;

(D) [2] section 77c(a) of this title, other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located; or

(E) Commission rules or regulations issued under section 77d(2) [1] of this title, except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 77d(2) [1] of this title that are in effect on September 1, 1996.

(c) Preservation of authority

(1) Fraud authority

Consistent with this section, the securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions [3]

(A) with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, or funding portal; and

(B) in connection to [4] a transaction described under section 77d(6) [1] of this title, with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, funding portal, or issuer.

(2) Preservation of filing requirements

(A) Notice filings permitted

Nothing in this section prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any document filed with the Commission pursuant to this subchapter, together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.

(B) Preservation of fees

(i) In general

Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof, adopted after October 11, 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before October 11, 1996.

(ii) Schedule

The fees required by this subparagraph shall be paid, and all necessary supporting data on sales or offers for sales required under subparagraph (A), shall be reported on the same schedule as would have been applicable had the issuer not relied on the exemption provided in subsection (a) of this section.

(C) Availability of preemption contingent on payment of fees

(i) In general

During the period beginning on October 11, 1996, and ending 3 years after October 11, 1996, the securities commission (or any agency or office performing like functions) of any State may require the registration of securities issued by any issuer who refuses to pay the fees required by subparagraph (B).

(ii) Delays

For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

(D) Fees not permitted on listed securities

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(1) of this section, or will be such a covered security upon completion of the transaction, or is a security of the same issuer that is equal in seniority or that is a senior security to a security that is a covered security pursuant to subsection (b)(1) of this section.

(F) [5] Fees not permitted on crowdfunded securities

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(4)(B), or will be such a covered security upon completion of the transaction, except for the securities commission (or any agency or office performing like functions) of the State of the principal place of business of the issuer, or any State in which purchasers of 50 percent or greater of the aggregate amount of the issue are residents, provided that for purposes of this subparagraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) Enforcement of requirements

Nothing in this section shall prohibit the securities commission (or any agency or office performing like functions) of any State from suspending the offer or sale of securities within such State as a result of the failure to submit any filing or fee required under law and permitted under this section.

(d) Definitions

For purposes of this section, the following definitions shall apply:

(1) Offering document

The term "offering document"—

(A) has the meaning given the term "prospectus" in section 77b(a)(10) of this title, but without regard to the provisions of subparagraphs (a) and (b) of that section; and

(B) includes a communication that is not deemed to offer a security pursuant to a rule of the Commission.

(2) Prepared by or on behalf of the issuer

Not later than 6 months after October 11, 1996, the Commission shall, by rule, define the term "prepared by or on behalf of the issuer" for purposes of this section.

(3) State

The term "State" has the same meaning as in section 78c of this title.

(4) Senior security

The term "senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends.

(May 27, 1933, ch. 38, title I, §18, 48 Stat. 85; Pub. L. 104–290, title I, §102(a), Oct. 11, 1996, 110 Stat. 3417; Pub. L. 105–353, title III, §§301(a)(4), 302, Nov. 3, 1998, 112 Stat. 3235, 3237; Pub. L. 111–203, title IX, §985(a)(2), July 21, 2010, 124 Stat. 1933; Pub. L. 112–106, title III, §305(a), (b)(2), (c), (d)(2), title IV, §401(b), Apr. 5, 2012, 126 Stat. 322, 323, 325.)

REFERENCES IN TEXT

The Investment Company Act of 1940, referred to in subsec. (b)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

Section 77d(1), (2), (3), (4), and (6) of this title, referred to in subsecs. (b)(4)(A) to (C), (E) and (c)(1)(B), were redesignated section 77d(a)(1), (2), (3), (4), and (6), respectively, of this title by Pub. L. 112–106, title II, §201(b)(1), (c)(1), Apr. 5, 2012, 126 Stat. 314.

AMENDMENTS

2012—Subsec. (b)(4)(C). Pub. L. 112–106, §305(a)(2), added subpar. (C). Former subpar. (C) redesignated (D).

Subsec. (b)(4)(D). Pub. L. 112–106, §401(b), added subpar. (D) relating to section 77c(b)(2) of this title.

Pub. L. 112–106, §305(a)(1), redesignated subpar. (C), relating to section 77c(a) of this title, as (D). Former subpar (D) redesignated (E).

Subsec. (b)(4)(E). Pub. L. 112–106, §305(a)(1), redesignated subpar. (D) as (E).

Subsec. (c)(1). Pub. L. 112–106, §305(b)(2), substituted ", in connection with securities or securities transactions" for "with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions." and added subpars. (A) and (B).

Subsec. (c)(1)(A)(ii). Pub. L. 112–106, §305(d)(2), which directed amendment of subsec. (c)(1) by substituting ", dealer, or funding portal" for "or dealer", was executed by making the substitution in subpar. (A)(ii) as added by Pub. L. 112–106, §305(b)(2).

Subsec. (c)(2)(F). Pub. L. 112–106, §305(c), added subpar. (F).

2010—Subsec. (b)(1)(C). Pub. L. 111–203, §985(a)(2)(A), substituted "(C) a security" for "(C) is a security".

Subsec. (c)(2)(B)(i). Pub. L. 111–203, §985(a)(2)(B), substituted "State or" for "State, or".

1998—Subsec. (b)(1)(A). Pub. L. 105–353, §301(a)(4)(A), inserted ", or authorized for listing," after "Exchange, or listed".

Subsec. (b)(4)(C). Pub. L. 105–353, §302, substituted "paragraph (4), (10), or (11)" for "paragraph (4) or (11)".

Subsec. (c)(2)(B)(i), (C)(i). Pub. L. 105–353, §301(a)(4)(B), (C), made technical amendments to references in original act which appear in text as references to October 11, 1996.

Subsec. (d)(1)(A). Pub. L. 105–353, §301(a)(4)(D), substituted "section 77b(a)(10)" for "section 77b(10)" and "subparagraphs (a) and (b)" for "subparagraphs (A) and (B)".

Subsec. (d)(2). Pub. L. 105–353, §301(a)(4)(E), made technical amendment to reference in original act which appears in text as reference to October 11, 1996.

Subsec. (d)(4). Pub. L. 105–353, §301(a)(4)(F), substituted "The term" for "For purposes of this paragraph, the term".

ELECTRONIC CODE OF FEDERAL REGULATIONS

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Title 17 → Chapter II → Part 230 → §230.506

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.506 Exemption for limited offers and sales without regard to dollar amount of offering.

(a) *Exemption.* Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) or (c) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(a)(2) of the Act.

(b) *Conditions to be met in offerings subject to limitation on manner of offering*—(1) *General conditions.* To qualify for an exemption under this section, offers and sales must satisfy all the terms and conditions of §§230.501 and 230.502.

(2) *Specific conditions*—(i) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

NOTE TO PARAGRAPH (b)(2)(i): See §230.501(e) for the calculation of the number of purchasers and §230.502(a) for what may or may not constitute an offering under paragraph (b) of this section.

(ii) *Nature of purchasers.* Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

(c) *Conditions to be met in offerings not subject to limitation on manner of offering*—(1) *General conditions.* To qualify for exemption under this section, sales must satisfy all the terms and conditions of §§230.501 and 230.502(a) and (d).

(2) *Specific conditions*—(i) *Nature of purchasers.* All purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors.

(ii) *Verification of accredited investor status.* The issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors. The issuer shall be deemed to take reasonable steps to verify if the issuer uses, at its option, one of the following non-exclusive and non-mandatory methods of verifying that a natural person who purchases securities in such offering is an accredited investor; provided, however, that the issuer does not have knowledge that such person is not an accredited investor:

(A) In regard to whether the purchaser is an accredited investor on the basis of income, reviewing any Internal Revenue Service form that reports the purchaser's income for the two most recent years (including, but not limited to, Form W-2, Form 1099, Schedule K-1 to Form 1065, and Form 1040) and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year;

(B) In regard to whether the purchaser is an accredited investor on the basis of net worth, reviewing one or more of the following types of documentation dated within the prior three months and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed:

(*1*) With respect to assets: Bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and

(*2*) With respect to liabilities: A consumer report from at least one of the nationwide consumer reporting agencies; or

(C) Obtaining a written confirmation from one of the following persons or entities that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor:

(*1*) A registered broker-dealer;

(*2*) An investment adviser registered with the Securities and Exchange Commission;

(*3*) A licensed attorney who is in good standing under the laws of the jurisdictions in which he or she is admitted to practice law; or

(*4*) A certified public accountant who is duly registered and in good standing under the laws of the place of his or her residence or principal office.

(D) In regard to any person who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to September 23, 2013 and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor.

Instructions to paragraph (c)(2)(ii)(A) through (D) of this section:

1. The issuer is not required to use any of these methods in verifying the accredited investor status of natural persons who are purchasers. These methods are examples of the types of non-exclusive and non-mandatory methods that satisfy the verification requirement in §230.506(c)(2)(ii).

2. In the case of a person who qualifies as an accredited investor based on joint income with that person's spouse, the issuer would be deemed to satisfy the verification requirement in §230.506(c)(2)(ii)(A) by reviewing copies of Internal Revenue Service forms that report income for the two most recent years in regard to, and obtaining written representations from, both the person and the spouse.

3. In the case of a person who qualifies as an accredited investor based on joint net worth with that person's spouse, the issuer would be deemed to satisfy the verification requirement in §230.506(c)(2)(ii)(B) by reviewing such documentation in regard to, and obtaining written representations from, both the person and the spouse.

(d) *"Bad Actor" disqualification.* (1) No exemption under this section shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of such sale; any investment manager of an issuer that is a pooled investment fund; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such investment manager or solicitor; or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor:

(i) Has been convicted, within ten years before such sale (or five years, in the case of issuers, their predecessors and affiliated issuers), of any felony or misdemeanor:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(ii) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(iii) Is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(A) At the time of such sale, bars the person from:

(*1*) Association with an entity regulated by such commission, authority, agency, or officer;

(*2*) Engaging in the business of securities, insurance or banking; or

(*3*) Engaging in savings association or credit union activities; or

(B) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;

(iv) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(b) or 78*o*-4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3 (e) or (f)) that, at the time of such sale:

(A) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(B) Places limitations on the activities, functions or operations of such person; or

(C) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(v) Is subject to any order of the Commission entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(A) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(vi) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(vii) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(viii) Is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(2) Paragraph (d)(1) of this section shall not apply:

(i) With respect to any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013;

(ii) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(iii) If, before the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (d)(1) of this section should not arise as a consequence of such order, judgment or decree; or

(iv) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1) of this section.

Instruction to paragraph (d)(2)(iv). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(3) For purposes of paragraph (d)(1) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(i) In control of the issuer; or

(ii) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(e) *Disclosure of prior "bad actor" events.* The issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under paragraph (d)(1) of this section but occurred before September 23, 2013. The failure to furnish such information timely shall not prevent an issuer from relying on this section if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed matter or matters.

Instruction to paragraph (e). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

[47 FR 11262, Mar. 6, 1982, as amended at 54 FR 11373, Mar. 20, 1989; 78 FR 44770, 44804, July 24, 2013]

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15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES
Sec. 77c - Classes of securities under this subchapter
From the U.S. Government Publishing Office, www.gpo.gov

§77c. Classes of securities under this subchapter

(a) Exempted securities

Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(1) Reserved.

(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(3)]; or any security which is an industrial development bond (as defined in section 103(c)(2) [1] of title 26) the interest on which is excludable from gross income under section 103(a)(1) [1] of title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) [1] of title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)),[1] paragraph (1) of such section 103(c) [1] does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of title 26, (B) an annuity plan which meets the requirements for the deduction of the employer's contributions under section 404(a)(2) of title 26, (C) a governmental plan as defined in section 414(d) of title 26 which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (D) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)], other than any plan described in subparagraph (A), (B), (C), or (D) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of title 26 (other than a person participating in a church plan who is described in section 414(e)

(3)(B) of title 26), or (iii) which is a plan funded by an annuity contract described in section 403(b) of title 26 (other than a retirement income account described in section 403(b)(9) of title 26, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of title 26 establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account). The Commission, by rules and regulations or order, shall exempt from the provisions of section 77e of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of title 26, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.];

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual, or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)];

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of title 26, (ii) a corporation described in section 501(c)(16) of title 26 and exempt from tax under section 501(a) of title 26, or (iii) a corporation described in section 501(c)(2) of title 26 which is exempt from tax under section 501(a) of title 26 and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii);

(6) Any interest in a railroad equipment trust. For purposes of this paragraph "interest in a railroad equipment trust" means any interest in an equipment trust, lease, conditional sales contract, or other similar arrangement entered into, issued, assumed, guaranteed by, or for the benefit of, a common carrier to finance the acquisition of rolling stock, including motive power;

(7) Certificates issued by a receiver or by a trustee or debtor in possession in a case under title 11, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9) Except with respect to a security exchanged in a case under title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(12) Any equity security issued in connection with the acquisition by a holding company of a bank under section 1842(a) of title 12 or a savings association under section 1467a(e) of title 12, if—

(A) the acquisition occurs solely as part of a reorganization in which security holders exchange their shares of a bank or savings association for shares of a newly formed holding company with no significant assets other than securities of the bank or savings association and the existing subsidiaries of the bank or savings association;

(B) the security holders receive, after that reorganization, substantially the same proportional share interests in the holding company as they held in the bank or savings association, except for nominal changes in shareholders' interests resulting from lawful elimination of fractional interests and the exercise of dissenting shareholders' rights under State or Federal law;

(C) the rights and interests of security holders in the holding company are substantially the same as those in the bank or savings association prior to the transaction, other than as may be required by law; and

(D) the holding company has substantially the same assets and liabilities, on a consolidated basis, as the bank or savings association had prior to the transaction.

For purposes of this paragraph, the term "savings association" means a savings association (as defined in section 1813(b) of title 12) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(13) Any security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)].

(14) Any security futures product that is—

(A) cleared by a clearing agency registered under section 78q–1 of this title or exempt from registration under subsection (b)(7) of such section 78q–1; and

(B) traded on a national securities exchange or a national securities association registered pursuant to section 78o–3(a) of this title.

(b) Additional exemptions

(1) Small issues exemptive authority

The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $5,000,000.

(2) Additional issues

The Commission shall by rule or regulation add a class of securities to the securities exempted pursuant to this section in accordance with the following terms and conditions:

(A) The aggregate offering amount of all securities offered and sold within the prior 12-month period in reliance on the exemption added in accordance with this paragraph shall not exceed $50,000,000.

(B) The securities may be offered and sold publicly.

(C) The securities shall not be restricted securities within the meaning of the Federal securities laws and the regulations promulgated thereunder.

(D) The civil liability provision in section 77l(a)(2) of this title shall apply to any person offering or selling such securities.

(E) The issuer may solicit interest in the offering prior to filing any offering statement, on such terms and conditions as the Commission may prescribe in the public interest or for the protection of investors.

(F) The Commission shall require the issuer to file audited financial statements with the Commission annually.

(G) Such other terms, conditions, or requirements as the Commission may determine necessary in the public interest and for the protection of investors, which may include—

(i) a requirement that the issuer prepare and electronically file with the Commission and distribute to prospective investors an offering statement, and any related documents, in such form and with such content as prescribed by the Commission, including audited financial statements, a description of the issuer's business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters; and

(ii) disqualification provisions under which the exemption shall not be available to the issuer or its predecessors, affiliates, officers, directors, underwriters, or other related persons, which shall be substantially similar to the disqualification provisions contained in the regulations adopted in accordance with section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note).

(3) Limitation

Only the following types of securities may be exempted under a rule or regulation adopted pursuant to paragraph (2): equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities.

(4) Periodic disclosures

Upon such terms and conditions as the Commission determines necessary in the public interest and for the protection of investors, the Commission by rule or regulation may require an issuer of a class of securities exempted under paragraph (2) to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters, and also may provide for the suspension and termination of such a requirement with respect to that issuer.

(5) Adjustment

Not later than 2 years after April 5, 2012,[1] and every 2 years thereafter, the Commission shall review the offering amount limitation described in paragraph (2)(A) and shall increase such amount as the Commission determines appropriate. If the Commission determines not to increase such amount, it shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on its reasons for not increasing the amount.

(c) Securities issued by small investment company

The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section

any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.] if it finds, having regard to the purposes of that Act, that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors.

(May 27, 1933, ch. 38, title I, §3, 48 Stat. 75; June 6, 1934, ch. 404, title II, §202, 48 Stat. 906; Feb. 4, 1887, ch. 104, title II, §214, as added Aug. 9, 1935, ch. 498, 49 Stat. 557; amended June 29, 1938, ch. 811, §15, 52 Stat. 1240; May 15, 1945, ch. 122, 59 Stat. 167; Aug. 10, 1954, ch. 667, title I, §5, 68 Stat. 684; Pub. L. 85–699, title III, §307(a), Aug. 21, 1958, 72 Stat. 694; Pub. L. 91–373, title IV, §401(a), Aug. 10, 1970, 84 Stat. 718; Pub. L. 91–547, §27(b), (c), Dec. 14, 1970, 84 Stat. 1434; Pub. L. 91–565, Dec. 19, 1970, 84 Stat. 1480; Pub. L. 91–567, §6(a), Dec. 22, 1970, 84 Stat. 1498; Pub. L. 94–210, title III, §308(a)(1), (3), Feb. 5, 1976, 90 Stat. 56, 57; Pub. L. 95–283, §18, May 21, 1978, 92 Stat. 275; Pub. L. 95–425, §2, Oct. 6, 1978, 92 Stat. 962; Pub. L. 95–598, title III, §306, Nov. 6, 1978, 92 Stat. 2674; Pub. L. 96–477, title III, §301, title VII, §701, Oct. 21, 1980, 94 Stat. 2291, 2294; Pub. L. 97–261, §19(d), Sept. 20, 1982, 96 Stat. 1121; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 100–181, title II, §§203, 204, Dec. 4, 1987, 101 Stat. 1252; Pub. L. 103–325, title III, §320, Sept. 23, 1994, 108 Stat. 2225; Pub. L. 104–62, §3, Dec. 8, 1995, 109 Stat. 684; Pub. L. 104–290, title V, §508(b), Oct. 11, 1996, 110 Stat. 3447; Pub. L. 106–102, title II, §221(a), Nov. 12, 1999, 113 Stat. 1401; Pub. L. 106–554, §1(a)(5) [title II, §208(a)(2)], Dec. 21, 2000, 114 Stat. 2763, 2763A–435; Pub. L. 108–359, §1(b), Oct. 25, 2004, 118 Stat. 1666; Pub. L. 111–203, title IX, §985(a)(1), July 21, 2010, 124 Stat. 1933; Pub. L. 112–106, title IV, §401(a), Apr. 5, 2012, 126 Stat. 323; Pub. L. 112–142, §2, July 9, 2012, 126 Stat. 989.)

REFERENCES IN TEXT

Section 103 of title 26, referred to in subsec. (a)(2), which related to interest on certain governmental obligations was amended generally by Pub. L. 99–514, title XIII, §1301(a), Oct. 22, 1986, 100 Stat. 2602, and as so amended relates to interest on State and local bonds. Section 103(b)(2) (formerly section 103(c)(2)), which prior to the general amendment defined industrial development bond, relates to the applicability of the interest exclusion to arbitrage bonds.

The Investment Company Act of 1940, referred to in subsec. (a)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, referred to in subsec. (b)(2)(G)(ii), is section 926 of Pub. L. 111–203, which is set out as a note under section 77d of this title.

April 5, 2012, referred to in subsec. (b)(5), was in the original "the date of enactment of the Small Company Capital Formation Act of 2011", and was translated as meaning the date of enactment of the Jumpstart Our Business Startups Act, Pub. L. 112–106, which enacted subsec. (b)(5), to reflect the probable intent of Congress.

The Small Business Investment Act of 1958, referred to in subsec. (c), is Pub. L. 85–699, Aug. 21, 1958, 72 Stat. 689, as amended, which is classified principally to chapter 14B (§661 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

2012—Subsec. (a)(2). Pub. L. 112–142 inserted "(other than a retirement income account described in section 403(b)(9) of title 26, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of title 26 establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account)" after "403(b) of title 26" and "(other than a person participating in a church plan who is described in section 414(e)(3)(B) of title 26)" after "(ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of title 26".

Subsec. (b). Pub. L. 112–106 inserted subsec. heading, designated existing provisions as par. (1), inserted par. heading, and added pars. (2) to (5).

2010—Subsec. (a)(4). Pub. L. 111–203 substituted "individual," for "individual;".

Code of Federal Regulations

Title 17 - Commodity and Securities Exchanges

Volume: 3
Date: 2015-04-01
Original Date: 2015-04-01
Title: Section 230.251 - Scope of exemption.
Context: Title 17 - Commodity and Securities Exchanges. CHAPTER II - SECURITIES AND EXCHANGE COMMISSION. PART 230 - GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933. - Regulation A-Conditional Small Issues Exemption.

§ 230.251 Scope of exemption.

A public offer or sale of securities that meets the following terms and conditions shall be exempt under section 3(b) from the registration requirements of the Securities Act of 1933 (the "Securities Act"):

(a) *Issuer.* The issuer of the securities:

(1) Is an entity organized under the laws of the United States or Canada, or any State, Province, Territory or possession thereof, or the District of Columbia, with its principal place of business in the United States or Canada;

(2) Is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78a *et seq.*) immediately before the offering;

(3) Is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge with an unidentified company or companies;

(4) Is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*);

(5) Is not issuing fractional undivided interests in oil or gas rights as defined in § 230.300, or a similar interest in other mineral rights; and

(6) Is not disqualified because of § 230.262.

(b) *Aggregate offering price.* The sum of all cash and other consideration to be received for the securities ("aggregate offering price") shall not exceed $5,000,000, including no more than $1,500,000 offered by all selling security holders, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities in reliance upon Regulation A. No affiliate resales are permitted if the issuer has not had net income from continuing operations in at least one of its last two fiscal years.

Note:
Where a mixture of cash and non-cash consideration is to be received, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at a currency exchange rate in effect on or at a reasonable time prior to the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Valuations of non-cash consideration must be reasonable at the time made.

(c) *Integration with other offerings.* Offers and sales made in reliance on this Regulation A will not be integrated with:

(1) Prior offers or sales of securities; or

(2) Subsequent offers or sales of securities that are:

(i) Registered under the Securities Act, except as provided in § 230.254(d);

(ii) Made in reliance on § 230.701;

(iii) Made pursuant to an employee benefit plan;

(iv) Made in reliance on Regulation S (§ 230.901-904); or

(v) Made more than six months after the completion of the Regulation A offering.

Note:
If the issuer offers or sells securities for which the safe harbor rules are unavailable, such offers and sales still may not be integrated with the Regulation A offering, depending on the particular facts and circumstances. See Securities Act Release No. 4552 (November 6, 1962) [27 FR 11316].

(d) *Offering conditions*—(1) *Offers.* (i) Except as allowed by § 230.254, no offer of securities shall be made unless a Form 1-A offering statement has been filed with the Commission.

(ii) After the Form 1-A offering statement has been filed:

(A) Oral offers may be made;

(B) Written offers under § 230.255 may be made;

(C) Printed advertisements may be published or radio or television broadcasts made, if they state from whom a Preliminary Offering Circular or Final Offering Circular may be obtained, and contain no more than the following information:

(*1*) The name of the issuer of the security;

(*2*) The title of the security, the amount being offered and the per unit offering price to the public;

(*3*) The general type of the issuer's business; and

(*4*) A brief statement as to the general character and location of its property.

(iii) After the Form 1-A offering statement has been qualified, other written offers may be made, but only if accompanied with or preceded by a Final Offering Circular.

(2) *Sales.* (i) No sale of securities shall be made until:

(A) The Form 1-A offering statement has been qualified;

(B) A Preliminary Offering Circular or Final Offering Circular is furnished to the prospective purchaser at least 48 hours prior to the mailing of the confirmation of sale to that person; and

(C) A Final Offering Circular is delivered to the purchaser with the confirmation of sale, unless it has been delivered to that person at an earlier time.

(ii) Sales by a dealer (including an underwriter no longer acting in that capacity for the security involved in such transaction) that take place within

90 days after the qualification of the Regulation A offering statement may be made only if the dealer delivers a copy of the current offering circular to the purchaser before or with the confirmation of sale. The issuer or underwriter of the offering shall provide requesting dealers with reasonable quantities of the offering circular for this purpose.

(3) *Continuous or delayed offerings.* Continuous or delayed offerings may be made under this Regulation A if permitted by § 230.415.

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 21 - UNDERWRITING EXPENSES, UNDERWRITER'S WARRANTS, SELLING EXPENSES, AND SELLING SECURITY HOLDERS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to underwriting expenses, selling expenses and selling security holders is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

~~002 LIMITATION ON UNDERWRITING EXPENSES AND SELLING SECURITIES. An offer or sale of securities may be disallowed if the direct and indirect selling expenses related to the public offering exceed:~~

~~002.01 Seventeen percent (17%) of the gross proceeds on public offerings of $7,500,000 or less;~~

~~002.02 Fifteen percent (15%) of the gross proceeds on public offerings that exceed $7,500,000.~~

~~002.03 Selling expenses include but are not limited to:~~

~~002.03A Commissions to underwriters or broker-dealers;~~

~~002.03B Non-accountable fees or expenses to be paid to the underwriter or broker-dealer;~~

~~002.03C Underwriter's warrants, which shall be valued at twenty percent (20%) of the public offering price, unless a public market exists for the issuer's warrants;~~

~~002.03D Future registration rights of underwriter's options, warrants, or shares at the issuer's expense, which shall be valued at one percent (1%) of the public offering;~~

~~002.03E Rights of first refusal, which shall be valued at one percent (1%) of the public offering;~~

~~002.03F Solicitation fees, which shall be valued at the lesser of actual cost or one percent (1%) if the fees are payable within one year of the offering;~~

~~002.03G Financial consulting or financial advisory agreements or any other similar type of agreement or fees, however designated, which shall be valued at actual cost;~~

~~002.03H Due diligence expenses;~~

~~002.03I Attorneys' fees for services in connection with the issue and sale of the securities and their qualification for sale under applicable laws and regulations;~~

~~002.03J Auditors' and accountants' fees;~~

~~002.03K The cost of printing prospectuses, circulars and other documents required to comply with securities laws and regulations;~~

~~002.03L Charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers and other experts;~~

~~002.03M The cost of authorizing and preparing the securities, including issue taxes and stamps; and~~

~~002.03N Other expenses incurred in connection with the public offering of securities as determined by the Director.~~

002 DEFINITIONS. The following definitions, in addition to definitions contained in 48 NAC 2, shall apply to this Rule:

002.01 Selling expenses include, but are not limited to:

002.01A Commissions to underwriters or broker-dealers;

002.01B Non-accountable fees or expenses to be paid to the underwriter or broker-dealer;

002.01C Underwriter's warrants, which shall be valued at twenty percent of the public offering price, unless a public market exists for the issuer's warrants;

002.01D Future registration rights of underwriter's options, warrants, or shares at the issuer's expense, which shall be valued at one percent of the public offering;

002.01E Rights of first refusal, which shall be valued at one percent of the public offering;

002.01F Solicitation fees, which shall be valued at the lesser of actual cost or one percent if the fees are payable within one year of the offering;

002.01G Financial consulting or financial advisory agreements or any other similar type of agreement or fees, however designated, which shall be valued at actual cost;

002.01H Due diligence expenses;

002.01I Attorneys' fees for services in connection with the issuance and sale of the securities and their qualification for sale under applicable laws and regulations;

002.01J Auditors' and accountants' fees;

002.01K The cost of printing offering documents, circulars and other documents required to comply with securities laws and regulations;

002.01L Charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers and other experts;

002.01M The cost of authorizing and preparing the securities, including issue taxes and stamps; and

002.01N Other expenses incurred in connection with the public offering of securities as determined by the Director.

002.02 Selling security holders means persons currently owning securities of the issuer and who will offer all or a portion of those securities for sale as a part of the offering being registered.

002.03 The term Underwriting expenses include, but are not limited to,

002.03A Commissions to underwriters or broker dealers;

002.03B Non-accountable fees or expenses paid to underwriters or broker dealers;

002.03C The value of underwriter's warrants;

002.03D Rights of first refusal, to be valued at one percent of the public offering or the amount payable to the underwriter if the issuer terminates the right of first refusal;

002.03E Solicitation fees payable to the underwriter, to be valued at the lesser of actual cost or one percent of the public offering if the fees are payable within one year of the offering;

002.03F Financial consulting or financial advisory agreements with an underwriter or any other similar type of agreement or fees, however designated, to be valued at actual cost;

002.03G Underwriter's due diligence expenses;

002.03H Payments made either six months prior to or required to be made six months following the offering to investor relations firms that the underwriter designated; and

002.03I Other underwriting expenses incurred in connection with the public offering of securities as determined by the Director.

003 GROUNDS FOR DENIAL OF SECURITIES REGISTRATIONS. The Director may deny the registration of securities if:

003.01 The underwriting expenses exceed seventeen percent of the gross proceeds from the public offering;

003.02 The selling expenses of the offering exceed twenty percent of the gross proceeds from the public offering; or

003.03 Selling security holders are offering more than ten percent of the securities for sale in the public offering.

~~003~~004 ~~EXPENSES PAID BY~~ SELLING SECURITY HOLDERS. ~~A public offering or sale of securities, that includes selling security holders, may be disallowed unless:~~ The Director may permit a public offering or sale of securities to include securities offered for sale by existing security holders if the offering document discloses the amount of selling expenses which the selling security holders shall pay and one of the following circumstances apply:

~~003.01~~ 004.01 The selling security holders pay a pro rata share of all selling expenses that are the result of the inclusion of their shares in the public offering; ~~and~~or

004.02 The selling security holders have a written agreement with the issuer that was entered into in an arm's-length transaction, under which the issuer agreed to pay all of the selling security holders'' selling expenses, with the exception of underwriter's or broker-dealer's compensation.

~~003.02 The disclosure document discloses the amount of selling expenses which the selling security holders shall pay.~~

~~003.03 With the exception of underwriter's or broker-dealer's compensation, the provisions of this Section shall not apply if:~~

~~003.03A The security holders have a written agreement with the issuer, that was entered into at least one year prior to the filing of the public offering, whereby the issuer has agreed to pay all of the selling security holders' selling expenses;~~

~~003.03B The agreement was arrived at through arm's-length negotiations and approved by a majority of the members of the issuer's board of directors who do not have an interest in the transactions; and~~

~~003.03C The selling securities holders have held their securities for at least two years prior to the filing of the public offering.~~

005 RESTRICTIONS ON WARRANTS GRANTED TO UNDERWRITERS. Warrants granted to underwriters are subject to the following restrictions:

005.01 The underwriter must be a managing underwriter.

005.02 The public offering must be either a firmly underwritten offering or a "minimum-maximum" offering. Options or warrants may be issued in a "minimum-maximum" public offering only if:

005.02A The options or warrants are issued on a pro rata basis~~,~~; and

005.02B The "minimum" amount of securities has been sold.

005.03 The exercise price of the warrants must be at least equal to the public offering price.

005.04 The number of shares covered by the underwriter's options or warrants must not exceed ten percent of the shares of common stock actually sold in the public offering.

005.05 The options or warrants must not be exercisable more than five years after the public offering is completed.

005.06 The options or warrants must not be exercisable during the first year after the public offering is completed.

005.07 Option or warrants may not be transferred, except:

005.07A To partners of the underwriter, if the underwriter is a partnership;

005.07B To officers and employees of the underwriter, who are also shareholders of the underwriter, if the underwriter is a corporation~~,~~; or

005.07C By will, under the laws of descent and distribution, or by operation of law.

005.08 The warrant agreement may not allow for a reduction in the exercise price of the options or warrants resulting from the issuer subsequently issuing shares except if the issuer issues shares under a stock dividend or stock split, or a merger, consolidation, reclassification, reorganization, recapitalization, or sale of assets.

006 EXCLUDED UNDERWRITING EXPENSES. Underwriting expenses shall not include expenses paid under financial consulting or financial advisory agreements with the underwriter payable at the time the services are rendered which agreements were entered into at least twelve months before the issuer filed the registration statement with the Securities and Exchange Commission.

007 VALUATION OF UNDERWRITER'S WARRANTS. The value of underwriter's warrants must be determined by the following formula: one hundred sixty-five percent of the aggregate offering price less the exercise price multiplied by the number of shares offered to the public, all divided by two, multiplied by the number of shares with underlying warrants divided by the number shares offered to the public

$$\frac{A - B}{2} \quad X \quad \frac{C}{D}$$

where: A equals one hundred sixty-five percent of the aggregate offering price
B equals the exercise price multiplied by the number of shares offered to the public;
C equals the number of shares with underlying -warrants, and
D equals the number of shares offered to the public

~~004~~ 008 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 22 - PROMOTIONAL SHARES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the promotional shares is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes referenced herein shall mean those statutes as amended on or before the effective date of this Rule. A copy of the statutes referenced in this Rule is attached hereto.

~~002 CONDITIONS. The proposed offering of securities in which promotional shares have been or will be issued must be justified by the applicant. Promotional shares shall not be considered justified unless all of the following conditions are met:~~

~~002.01 The shares are sold or issued by a promotional or developmental stage company.~~

~~002.02 The number of shares sold or issued shall be reasonable in amount and the consideration shall have a reasonable relationship to the proposed public offering price.~~

~~003 ESCROW. The Director may require all promotional shares to be deposited in escrow under such terms and conditions as the Director shall prescribe.~~

002 ESCROW OF PROMOTIONAL SHARES. As a condition to registering a public offering of equity securities, the Director may require that some or all of the promoters deposit promotional shares into an escrow account with an escrow agent, as provided by an escrow agreement. Promoters who deposit promotional shares into the escrow account will be collectively referred to as "depositors."

002.01 Except as provided in Section 002.02, below, the number of promotional shares required to be deposited in the escrow account shall equal the total number of shares that the promoters hold less the number of fully paid shares.

002.01A The number of fully paid shares shall be equal to the total

amount that the promoters paid for the shares divided by eighty-five percent of the public offering price per share.

002.01B In determining the amount that the promoters paid for the shares, the promoters cannot use consideration other than cash unless the Director accepts the value of the consideration.

002.02 If the issuer's most recent audited financial statements contain an auditor's report or footnote that contains an opinion or statement regarding the ability of the issuer to continue as a going concern, the promoters must deposit all promotional shares in the escrow account.

002.03 The Director may require the promoters to deposit promotional shares into the escrow account on a pro rata basis.

003 RELEASE OF PROMOTIONAL SHARES.

003.01 The escrow agent must release the promotional shares held in the escrow account in the manner set out in the table below:

003.01A If the issuer's aggregate revenues are five hundred thousand dollars ($500,000.00) or more, and neither the auditor's opinion nor any footnote to the issuer's most recent audited financial statements contain an opinion or statement regarding the ability of the issuer to continue as a going concern, then the required release of the escrow account or lock-in shares is as follows:

003.01A1 Year 1 - none

003.01A2 Year 2 - two and one-half percent pro rata per quarter

003.01A3 Year 3 - all

003.01B If the issuer's aggregate revenues are less than five hundred thousand dollars ($500,000.00), then the required release of the escrow account or lock-in shares is as follows:

003.01B1 Year 1 - none

003.01B2 Year 2 - none

003.01B3 Year 3 - two and one-half percent pro rata per quarter

003.01B4 Year 4 - two and one-half percent pro rata per quarter

003.01B5 Year 5 - all

003.02 In the event securities in the escrow account become federal "Covered

Securities," as defined in Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. § 77r, the escrow agent must release all securities in the escrow account.

003.03 If the public offering is terminated, and no securities were sold, the escrow agent must release all securities in the escrow account.

003.04 If the public offering is terminated, and all of the gross proceeds of the offering have been returned to the public investors, the escrow agent must release all securities in the escrow account.

004 DISTRIBUTION OF THE ISSUER'S ASSETS OR SECURITIES. The depositors agree that, if any transaction or proceeding results in a distribution of the issuer's assets or securities ("distribution"), while the escrow agreement remains in effect, one of the following will occur:

004.01 If the transaction is with a person that is not a promoter:

004.01A Holders of the issuer's equity securities initially share in the distribution on a pro rata basis, depending on the price the holders paid per share. This continues until the public shareholders are paid out in full. For the purpose of this Rule, the public shareholders are paid out in full when they have received, or have had irrevocably set aside for them, an amount equal to the price per share in the public offering times the number of shares the public shareholders purchased under the public offering and still hold at the time of the distribution.

004.01B Once the public shareholders are paid out under Section 004.01A, above, holders of the issuer's equity securities participate on a pro rata basis, depending on the number of shares of equity securities they hold at the time of the distribution.

004.01C A distribution may proceed on lesser terms and conditions than those stated in Sections 004.01A and 004.01B above, if the holders of a majority of the equity securities, not including securities held by promoters or their associates or affiliates, approve the lesser terms and conditions at a special meeting called for that specific purpose.

004.01D The number of shares calculated for distribution under Sections 004.01A and 004.01B, above, may be adjusted if there is a stock split, stock dividend, recapitalization or similar transaction.

004.02 If the transaction is with a promoter, the depositors' promotional shares must remain in the escrow account subject to the terms of the escrow agreement.

005 DOCUMENTATION REGARDING THE TERMINATION OF THE ESCROW AGREEMENT AND/OR THE RELEASE OF PROMOTIONAL SHARES.

005.01 A request for the release of any of the promotional shares from the escrow account must be in writing and forwarded to the escrow agent.

005.02 The issuer must provide the documentation to the escrow agent, showing

that the requirements of Section 003, above, have been met.

005.03 The escrow agent must terminate the escrow agreement and/or release all remaining promotional shares from the escrow account if all the applicable provisions of the escrow agreement have been satisfied. The escrow agent must maintain all records relating to the escrow agreement for a period of three years following the termination of the escrow agreement.

005.04 The escrow agent must forward copies of all retained records to the Director promptly upon written request.

006 NON-EXCLUSIVE RESTRICTIONS ON THE TRANSFER, SALE, OR DISPOSAL OF PROMOTIONAL SHARES.

006.01 A depositor must not transfer any promotional shares held in the escrow account or any interest in the promotional shares in the escrow account.

006.02 Notwithstanding Section 006.01, above, a depositor may transfer promotional shares held in the escrow account to a family member by gift, if the family member agrees that the promotional shares will remain subject to the terms of the escrow agreement.

006.03 For a self-underwritten offering, promoters must not sell any of their promotional shares during the time that the issuer is offering its securities to the public, even if the promotional shares are not subject to the escrow account or would otherwise be released from the escrow account.

007 TERMS OF THE ESCROW ACCOUNT. A summary of the escrow agreement must be included in the offering document, annual reports to shareholders, proxy statements and other disclosure materials used to make investment decisions until the public offering ends.

~~004~~008 APPLICATION. This Rule shall apply to applications for registration of equity securities or securities convertible into equity securities. In the latter case, and in the absence of a public market for the equity securities, the conversion price shall be deemed to be the public offering price.

~~005~~009 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES
Sec. 77r - Exemption from State regulation of securities offerings
From the U.S. Government Publishing Office, www.gpo.gov

§77r. Exemption from State regulation of securities offerings

(a) Scope of exemption

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

(2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of—

(A) with respect to a covered security described in subsection (b) of this section, any offering document that is prepared by or on behalf of the issuer; or

(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission or any national securities organization registered under section 78o–3 of this title, except that this subparagraph does not apply to the laws, rules, regulations, or orders, or other administrative actions of the State of incorporation of the issuer; or

(3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security described in paragraph (1).

(b) Covered securities

For purposes of this section, the following are covered securities:

(1) Exclusive Federal registration of nationally traded securities

A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

(2) Exclusive Federal registration of investment companies

A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.].

(3) Sales to qualified purchasers

A security is a covered security with respect to the offer or sale of the security to qualified purchasers, as defined by the Commission by rule. In prescribing such rule, the Commission may define the term "qualified purchaser" differently with respect to different categories of securities, consistent with the public interest and the protection of investors.

(4) Exemption in connection with certain exempt offerings

A security is a covered security with respect to a transaction that is exempt from registration under this subchapter pursuant to—

(A) paragraph (1) or (3) of section 77d [1] of this title, and the issuer of such security files reports with the Commission pursuant to section 78m or 78o(d) of this title;

(B) section 77d(4) [1] of this title;

(C) section 77d(6) [1] of this title;

(D) [2] a rule or regulation adopted pursuant to section 77c(b)(2) of this title and such security is—

(i) offered or sold on a national securities exchange; or

(ii) offered or sold to a qualified purchaser, as defined by the Commission pursuant to paragraph (3) with respect to that purchase or sale;

(D) [2] section 77c(a) of this title, other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section, except that a municipal security that is exempt from such registration pursuant to paragraph (2) of such section is not a covered security with respect to the offer or sale of such security in the State in which the issuer of such security is located; or

(E) Commission rules or regulations issued under section 77d(2) [1] of this title, except that this subparagraph does not prohibit a State from imposing notice filing requirements that are substantially similar to those required by rule or regulation under section 77d(2) [1] of this title that are in effect on September 1, 1996.

(c) Preservation of authority

(1) Fraud authority

Consistent with this section, the securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions, in connection with securities or securities transactions [3]

(A) with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, or funding portal; and

(B) in connection to [4] a transaction described under section 77d(6) [1] of this title, with respect to—

(i) fraud or deceit; or

(ii) unlawful conduct by a broker, dealer, funding portal, or issuer.

(2) Preservation of filing requirements

(A) Notice filings permitted

Nothing in this section prohibits the securities commission (or any agency or office performing like functions) of any State from requiring the filing of any document filed with the Commission pursuant to this subchapter, together with annual or periodic reports of the value of securities sold or offered to be sold to persons located in the State (if such sales data is not included in documents filed with the Commission), solely for notice purposes and the assessment of any fee, together with a consent to service of process and any required fee.

(B) Preservation of fees

(i) In general

Until otherwise provided by law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof, adopted after October 11, 1996, filing or registration fees with respect to securities or securities transactions shall continue to be collected in amounts determined pursuant to State law as in effect on the day before October 11, 1996.

(ii) Schedule

The fees required by this subparagraph shall be paid, and all necessary supporting data on sales or offers for sales required under subparagraph (A), shall be reported on the same schedule as would have been applicable had the issuer not relied on the exemption provided in subsection (a) of this section.

(C) Availability of preemption contingent on payment of fees

(i) In general

During the period beginning on October 11, 1996, and ending 3 years after October 11, 1996, the securities commission (or any agency or office performing like functions) of any State may require the registration of securities issued by any issuer who refuses to pay the fees required by subparagraph (B).

(ii) Delays

For purposes of this subparagraph, delays in payment of fees or underpayments of fees that are promptly remedied shall not constitute a refusal to pay fees.

(D) Fees not permitted on listed securities

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(1) of this section, or will be such a covered security upon completion of the transaction, or is a security of the same issuer that is equal in seniority or that is a senior security to a security that is a covered security pursuant to subsection (b)(1) of this section.

(F) [5] Fees not permitted on crowdfunded securities

Notwithstanding subparagraphs (A), (B), and (C), no filing or fee may be required with respect to any security that is a covered security pursuant to subsection (b)(4)(B), or will be such a covered security upon completion of the transaction, except for the securities commission (or any agency or office performing like functions) of the State of the principal place of business of the issuer, or any State in which purchasers of 50 percent or greater of the aggregate amount of the issue are residents, provided that for purposes of this subparagraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) Enforcement of requirements

Nothing in this section shall prohibit the securities commission (or any agency or office performing like functions) of any State from suspending the offer or sale of securities within such State as a result of the failure to submit any filing or fee required under law and permitted under this section.

(d) Definitions

For purposes of this section, the following definitions shall apply:

(1) Offering document

The term "offering document"—

(A) has the meaning given the term "prospectus" in section 77b(a)(10) of this title, but without regard to the provisions of subparagraphs (a) and (b) of that section; and

(B) includes a communication that is not deemed to offer a security pursuant to a rule of the Commission.

(2) Prepared by or on behalf of the issuer

Not later than 6 months after October 11, 1996, the Commission shall, by rule, define the term "prepared by or on behalf of the issuer" for purposes of this section.

(3) State

The term "State" has the same meaning as in section 78c of this title.

(4) Senior security

The term "senior security" means any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends.

(May 27, 1933, ch. 38, title I, §18, 48 Stat. 85; Pub. L. 104–290, title I, §102(a), Oct. 11, 1996, 110 Stat. 3417; Pub. L. 105–353, title III, §§301(a)(4), 302, Nov. 3, 1998, 112 Stat. 3235, 3237; Pub. L. 111–203, title IX, §985(a)(2), July 21, 2010, 124 Stat. 1933; Pub. L. 112–106, title III, §305(a), (b)(2), (c), (d)(2), title IV, §401(b), Apr. 5, 2012, 126 Stat. 322, 323, 325.)

REFERENCES IN TEXT

The Investment Company Act of 1940, referred to in subsec. (b)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

Section 77d(1), (2), (3), (4), and (6) of this title, referred to in subsecs. (b)(4)(A) to (C), (E) and (c)(1)(B), were redesignated section 77d(a)(1), (2), (3), (4), and (6), respectively, of this title by Pub. L. 112–106, title II, §201(b)(1), (c)(1), Apr. 5, 2012, 126 Stat. 314.

AMENDMENTS

2012—Subsec. (b)(4)(C). Pub. L. 112–106, §305(a)(2), added subpar. (C). Former subpar. (C) redesignated (D).

Subsec. (b)(4)(D). Pub. L. 112–106, §401(b), added subpar. (D) relating to section 77c(b)(2) of this title.

Pub. L. 112–106, §305(a)(1), redesignated subpar. (C), relating to section 77c(a) of this title, as (D). Former subpar (D) redesignated (E).

Subsec. (b)(4)(E). Pub. L. 112–106, §305(a)(1), redesignated subpar. (D) as (E).

Subsec. (c)(1). Pub. L. 112–106, §305(b)(2), substituted ", in connection with securities or securities transactions" for "with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions." and added subpars. (A) and (B).

Subsec. (c)(1)(A)(ii). Pub. L. 112–106, §305(d)(2), which directed amendment of subsec. (c)(1) by substituting ", dealer, or funding portal" for "or dealer", was executed by making the substitution in subpar. (A)(ii) as added by Pub. L. 112–106, §305(b)(2).

Subsec. (c)(2)(F). Pub. L. 112–106, §305(c), added subpar. (F).

2010—Subsec. (b)(1)(C). Pub. L. 111–203, §985(a)(2)(A), substituted "(C) a security" for "(C) is a security".

Subsec. (c)(2)(B)(i). Pub. L. 111–203, §985(a)(2)(B), substituted "State or" for "State, or".

1998—Subsec. (b)(1)(A). Pub. L. 105–353, §301(a)(4)(A), inserted ", or authorized for listing," after "Exchange, or listed".

Subsec. (b)(4)(C). Pub. L. 105–353, §302, substituted "paragraph (4), (10), or (11)" for "paragraph (4) or (11)".

Subsec. (c)(2)(B)(i), (C)(i). Pub. L. 105–353, §301(a)(4)(B), (C), made technical amendments to references in original act which appear in text as references to October 11, 1996.

Subsec. (d)(1)(A). Pub. L. 105–353, §301(a)(4)(D), substituted "section 77b(a)(10)" for "section 77b(10)" and "subparagraphs (a) and (b)" for "subparagraphs (A) and (B)".

Subsec. (d)(2). Pub. L. 105–353, §301(a)(4)(E), made technical amendment to reference in original act which appears in text as reference to October 11, 1996.

Subsec. (d)(4). Pub. L. 105–353, §301(a)(4)(F), substituted "The term" for "For purposes of this paragraph, the term".

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 24 - LOANS AND OTHER MATERIAL AFFILIATED TRANSACTIONS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to loans and other material affiliated transactions is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

~~002 INDEPENDENT DIRECTORS.~~

~~002.01 Where there have been or will be loans and other material affiliated transactions as described in this Rule, the offer or sale of securities may be disallowed by the Director unless the issuer has, and represents in the prospectus or offering document that it will maintain, at least two independent directors on its board of directors.~~

~~002.02 In the event the issuer has only two independent directors on its board of directors, both independent directors must be disinterested in and approve loans and other material transactions covered by Sections 003.02, 005.01, 006.01 and 006.02 below.~~

002 GROUNDS FOR DENIAL OF SECURITIES REGISTRATIONS. The Director may deny the offer or sale of securities under the following circumstances:

002.01 The issuer or its affiliates have loans outstanding after the offering that are not permitted by this Rule;

002.02 The issuer or its affiliates have engaged in material transactions with promoters that are not permitted by this Rule; or

002.03 Representations and statements required by this Rule are not included in the offering documents.

003 LOANS. The following types of ~~offer or sale of securities may be disallowed by the Director if the issuer or its affiliates will have loans outstanding after the offering to, or intends to make~~ loans to, or loan guarantees on behalf of, promoters of the issuer are permitted:~~, its promoters, other than:~~

003.01 Advances to officers, directors, and employees for travel, business expense, and similar ordinary operating expenditures;

003.02 Loans or loan guarantees ~~made for the purchase of an issuer's securities by its~~ to allow the issuer's officers, directors, and employees to purchase the issuer's securities, and loans for relocation of officers, directors, and employees, provided the loan is approved under Section 005 below; ~~loans or loan guarantees were approved by a majority of the independent directors of the issuer's board of directors who did not have an interest in the transactions and who had access, at the issuer's expense, to issuer's or independent legal counsel; or~~

003.03 Loans made by an issuer or its affiliates whose primary business is that of making loans, provided that:

003.03A The loans ~~will be~~are evidenced by promissory notes naming the lender as payee;

003.03B The loans ~~will~~ bear interest at rates which are comparable to those normally charged by other commercial lenders for similar loans made in the lender's locale;

003.03C The loans ~~will be repaid~~require repayment pursuant to appropriate amortization schedules; ~~and contain default provisions comparable to those normally used by other commercial lenders for similar loans made in the lender's locale;~~

003.03D The loans ~~will be made only if~~ are supported by credit reports and financial statements which ~~show the loans to be collectible and~~ that the issuer or its affiliates can collect the loans and that the borrowers are satisfactory credit risks, in light of the nature and terms of the loans and other circumstances;

003.03E The loans meet the loan policies other commercial lenders normally ~~used by other commercial lenders~~ use for similar loans made in the lender's locale;

003.03F The issuer ~~will~~ reviews purposes of the loans and monitors the disbursements of proceeds ~~will be reviewed and monitored~~ in a manner ~~comparable to~~ that other commercial lenders normally ~~used~~ use ~~by other commercial lenders~~ for similar loans made in the lender's locale; ~~and~~

003.03G The loans ~~will~~ do not violate the requirements of any banking or other financial ~~institution~~ institution's regulatory authority; and~~.~~

003.03H The loans contain default provisions comparable to those other commercial lenders normally use for similar loans made in the lender's locale.

004 REPAYMENT OF LOANS. ~~Except for loans described in Section 003 above, all loans~~ Loans to promoters that exist ~~existing~~ at the time of the application for registration

~~shall~~ must be repaid by the promoters in full; ~~prior to the offering. The Director may waive this requirement if:~~

004.01 ~~Repayment of the loans will be made pursuant to appropriate amortization schedules; or~~ From proceeds of the offering, if a portion of the offering is made on behalf of a promoter;

004.02 Before the offering; or

004.03 After the offering using appropriate amortization schedules, if the Director permits. ~~Any portion of the offering is made on behalf of a promoter and the promoter undertakes to immediately repay the loans from the proceeds of the offering.~~

005 INDEPENDENT DIRECTORS.

005.01 If there have been or will be loans and/or other material affiliated transactions, the issuer will maintain at least two independent directors on its board of directors, which requirement must be disclosed in the offering document.

005.02 The issuer must provide independent directors with access, at the issuer's expense, to legal counsel for the issuer or independent legal counsel.

005.03 Any loan or other material affiliated transaction involving an issuer's promoters requires the approval of a majority of the issuer's independent directors who do not have an interest in the transactions.

005.03A If the issuer has only two independent directors on its board of directors, loans and other material affiliated transactions require the approval of both independent directors. Both independent directors must be disinterested in any loans and/or other material affiliated transactions in question.

006 DISCLOSURE REQUIREMENTS.

006.01 Loans. The issuer must disclose in the offering document whether or not it or its affiliates have made or will make loans to, or have made or will make loan guarantees on behalf of, promoters and the relevant terms and conditions of such loans or loan guarantees.

006.02 Affiliated Transactions. The issuer shall disclose in the offering documents whether or not it or its affiliates have engaged, or will engage, in material transactions with promoters and the relevant terms and conditions of such affiliated transactions.

006.03 Representations. The Director may require the following statements and representations to appear in the offering document.

006.03A A statement that the issuer or its affiliates will make all future material affiliated transactions and enter into all future loans on terms that are no less favorable to the issuer than those that can be obtained from unaffiliated third parties.

006.03B A statement that all future material transactions and loans, and any forgiveness of loans, in accordance with Section 005, above, will require the approval of a majority of the issuer's independent directors.

006.03C A statement that the issuer's officers, directors, and legal counsel will:

006.03C1 Consider their due diligence and assure that there is a reasonable basis for these representations~~,~~; and

006.03C2 Consider whether to embody the representations in the issuer's charter or bylaws.

007~~005~~ ~~MATERIAL~~ AFFILIATED TRANSACTIONS. ~~The offer or sale of securities may be disallowed by the Director if the issuer or its affiliates have engaged in other material transactions with promoters, unless the transactions were on terms no less favorable to the issuer or its affiliates than those that are generally available from unaffiliated third parties, and~~The following types of affiliated transactions are allowed:

007.01 A transaction approved in accordance with Section 005, above, if the offering document discloses the terms of the transactions and indicates whether the terms are as favorable to the issuer or its affiliates as those generally available from unaffiliated third parties.

007.02 A transaction entered into when the issuer had less than two ~~(2)~~ disinterested independent directors, if the offering document:

007.02A Discloses the terms of the transactions;

007.02B Indicates whether the terms are as favorable to the issuer or its affiliates as those generally available from unaffiliated third parties; and

007.02C Discloses that the issuer lacked sufficient disinterested independent directors to approve the transactions at the time the transactions were initiated.

~~005.01 For ongoing transactions, approved by a majority of the issuer's independent directors who did not have an interest in the transactions and who had access at the time of ratification, at the issuer's expense, to issuer's or independent legal counsel; or~~

~~005.02 For past transactions which are now closed, if there were less than two disinterested independent directors at the time of the transactions, the prospectus discloses that the issuer lacked sufficient disinterested independent directors to approve the transactions.~~

~~006 DISCLOSURE. The issuer shall disclose in the prospectus or offering document whether or not it or its affiliates have made or will make loans to, have made or will make loan guarantees on behalf of, or have engaged or will engage in material transactions with promoters and the terms and details relating thereto. If material affiliated transactions or~~

~~loans have been made, or may be made, the Director may require the following representations to appear in the prospectus or offering document:~~

~~006.01 All future material affiliated transactions and loans will be made or entered into on terms that are no less favorable to the issuer than those that can be obtained from unaffiliated third parties; and~~

~~006.02 All future material affiliated transactions and loans, and any forgiveness of loans, must be approved by a majority of the issuer's independent directors who do not have an interest in the transactions and who have access, at the issuer's expense, to issuer's or independent legal counsel.~~

008~~007~~ WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 25 - IMPOUNDMENT OF PROCEEDS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the impoundment of proceeds is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 DENIAL OF SECURITIES REGISTRATION. If an underwriter has not firmly underwritten an offering, the Director may deny a registration unless the issuer has impounded the proceeds.

002003 ~~CONDITIONS~~ DEPOSIT OF PROCEEDS. ~~Whenever a proposed offering is not firmly underwritten by a broker-dealer registered to do business in Nebraska,~~ If the Director has not denied the registration under Section 002, above, the issuer or any other person that receives the proceeds from the sale of the securities must ~~be deposited in~~ deposit the proceeds from the sale of the securities in an interest-bearing escrow or trust account with an impoundment agent. ~~approved by the Director.~~

~~002.01 The impoundment agent must be either a state chartered financial institution or a federally chartered bank, that is domiciled and whose principal place of business is located in the United States and whose deposits are insured by the Federal Deposit Insurance Corporation.~~

~~002.02 The impoundment agent may not be affiliated with the issuer, its affiliates, its officers or directors, the underwriter or any promoter.~~

~~002.03 The Director may not reject an impoundment agent solely because it is located in another state.~~

~~002.04 A summary of the principal terms of the Agreement, including the representation made in the affidavit in Section 003.01C2 below, shall be included in the registration statement.~~

003.01 The following are not eligible to act as an impoundment agent:

003.01A The issuer;

003.01B The issuer's officers and directors;

003.01C The underwriter;

003.01D Any promoter; or

003.01E An affiliate of any of the above.

~~003~~004 AGREEMENT.

~~003.01~~ 004.01 The ~~Agreement~~ impoundment agreement shall be in a form acceptable to the Director and shall include the following:

~~003.01A~~ 004.01A A provision that impounded proceeds ("proceeds") are not subject to claims by creditors of the issuer, affiliates, or associates, or the underwriters until the proceeds have been released to the issuer pursuant to the terms of the ~~Agreement~~ impoundment agreement.

~~003.01B~~ 004.01B A provision that the Director has the right to inspect and make copies of the records of the impoundment agent at any reasonable time wherever the records are located or to require the impoundment agent to provide copies of such records to the Director at the offices of the Department.

~~003.01C~~ 004.01C A provision that the proceeds may be released to the issuer five business days after:

~~003.01C1~~ 004.01C1 The impoundment agent has provided to the Director an affidavit which states that all of the conditions of the ~~Agreement~~ impoundment agreement have been met; and

~~003.01C2~~ 004.01C2 The issuer has provided to the Director an affidavit which states:

~~003.01C2a~~ 004.01C2a There have been no material omissions or changes in the financial condition of the issuer, or other changes of circumstances, that would render the amount of proceeds inadequate to finance the issuer's proposed plan of operations, business, or enterprise; and

~~003.01C2b~~ 004.01C2b There have been no material omissions or changes that would render the representations in the registration statement fraudulent, false, or misleading.

~~003.02~~ 004.02 A copy of the ~~Agreement~~ impoundment agreement, signed by an officer of the issuer, an officer of the underwriter, if applicable, and an officer of the impoundment agent, each with the authority to sign such documents, must be filed with the Department and shall become part of the registration statement.

~~004~~ 005 INSUFFICIENT PROCEEDS. If the proceeds are insufficient to meet the minimum requirements within the time prescribed by the ~~agreement~~ impoundment agreement, the impoundment agent shall notify the Director in writing.

~~004.01~~ 005.01 The impoundment agent must release and return the proceeds directly to the investors; and

~~004.02~~ 005.02 The proceeds shall be returned to the investors with interest, and without deduction for expenses, including impoundment agent fees.

~~005~~ 006 AFFILIATE PURCHASES. If an underwriter or an officer, director, promoter, affiliate, or an associate of the issuer, purchases securities that are a part of the public offering being sold pursuant to the ~~registration statement~~ offering document, and if the proceeds from that purchase are used to complete the impoundment requirements imposed under this Rule, the purchase shall be presumed to be a fraud or a deceit upon the public purchasers of the issuer's securities, unless:

~~005.01~~ 006.01 The person purchases the securities with investment intent and on the same terms as unaffiliated public investors. If a person purchases the securities necessary to complete the impoundment requirements and holds the securities for two years or more, it may be presumed that investment intent has been met.

~~005.02~~ 006.02 The ~~registration statement~~ offering document discloses the intent to purchase securities necessary to complete the impoundment requirements and the maximum amount of the issuer's securities that the person(s) would own upon completion of the purchase.

~~005.02A~~ 006.02A If the ~~registration statement~~ offering document does not disclose the intent to purchase the securities necessary to complete the impoundment requirements, the issuer must file an amended ~~registration statement~~ offering document and disclose the same to investors who have purchased pursuant to the issuer's registration statement.

~~005.02B~~ 006.02B The public investors must be given a reasonable opportunity after disclosure of the purchase of securities by one or more of the aforesaid persons to complete the impoundment requirements and the filing of an amended ~~registration statement~~ offering document to rescind their purchases.

~~005.02C~~ 006.02C If the issuer fails to make a reasonable rescission offer, the Director may treat such an act as a fraud or deceit upon the investors who purchased the issuer's securities pursuant to the public offering.

~~005.03~~ 006.03 Any repurchase, within two years of the completion of the public offering, by the issuer of the securities sold to any of the aforesaid persons to complete the impoundment requirements shall be presumed to be a fraud or deceit upon investors.

~~006~~ 007 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 27 – SPECIFICITY REGARDING USE OF PROCEEDS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to specificity in the use of proceeds is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 CONDITIONS. A registration statement not complying with the requirements of this Rule may be denied registration by the Director.

003 PROCEEDS DISCLOSURE. The issuer must disclose in the offering document for both the minimum and maximum amounts proposed, if applicable, the percentages and dollar amounts of the following, in a tabular form:

003.01 The proceeds the issuer expects to receive from the offering;

003.02 The purposes for which the issuer will use the proceeds;

003.03 The estimated amount to be used for each purpose; and

003.04 The order or priority in which the issuer will use the proceeds for the purposes stated.

~~003.~~004 ~~USE OF PROCEEDS. The issuer's prospectus shall disclose, in tabular form, for both the minimum and maximum amounts proposed, if applicable, the percentages and dollar amounts of the following:~~ DISCLOSURE OF OTHER SOURCES OF FUNDS. The issuer must disclose in the offering document:

~~003.01~~ 004.01 ~~The estimated cash proceeds to be received by the issuer from the offering;~~ The amounts of any funds to be raised from other sources to achieve the purposes stated;

~~003.02~~ 004.02 ~~The purposes for which the proceeds are to be used by the issuer;~~ The sources of any additional funds; and

~~003.03~~ ~~004.03~~ ~~The amount to be used for each purpose; and~~ Whether the sources are firm or contingent and, if contingent, an explanation of the contingency.

~~003.04 The order or priority in which the proceeds will be used for the purposes stated.~~

~~004~~ 005 ~~OTHER SOURCES OF FINANCING. The issuer's prospectus shall disclose:~~ DISCLOSURE OF PROPERTY ACQUISITION.

~~004.01~~ 005.01 ~~The amounts of any funds to be raised from other sources to achieve the purposes stated, whether the sources are firm or contingent, and any contingencies;~~If the issuer will use any part of the proceeds to acquire any property, including goodwill, other than in the ordinary course of business, the issuer must disclose in the offering document:

005.01A The names and addresses of the vendors;

005.01B The purchase price;

005.01C The names of any persons who have received commissions in connection with the acquisition; and

005.01D The amounts of any commissions and any other expense in connection with the acquisition, including the cost of borrowing money to finance the acquisition.

~~004.02~~ 005.02 ~~The sources of any such funds, whether the sources are firm or contingent, and any contingencies;~~If any part of the proceeds will be used to acquire property or a business that is not yet identified, the issuer must disclose in the offering document:

005.02A The type of property or business the issuer is seeking;

005.02B The impact that the anticipated acquisition will have on the issuer's core business; and

005.02C The issuer's acquisition criteria.

~~004.03 If any part of the proceeds is to be used to acquire any property (including goodwill) other than in the ordinary course of business:~~

~~004.03A The names and addresses of the vendors,~~

~~004.03B The purchase price,~~

~~004.03C The names of any persons who have received commissions in connection with the acquisition, and~~

~~004.03D The amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition); and~~

~~004.04 The amount and basis for any proceeds used to pay indebtedness, including unpaid salaries, to promoters.~~

~~005~~006 ~~RESERVE FOR WORKING CAPITAL. The issuer normally may not reserve more than fifteen percent (15%) of the proceeds for working capital, for general corporate purposes, or for any other unspecified use. In the event the issuer's business plans require greater flexibility in the use of unspecified proceeds, the issuer must:~~ DISCLOSURE OF DEBT REPAYMENT. If the issuer plans to use any material part of the proceeds to discharge indebtedness, the issuer must disclose in the offering document:

~~005.01~~ 006.01 ~~Disclose all potential uses of such proceeds with qualifying language that such uses may be subject to change; and~~ The terms of the indebtedness, including interest rate;

~~005.02~~ 006.02 ~~Indicate the specific circumstances leading to reallocation and the potential areas of reallocation.~~ A statement of whether the indebtedness includes unpaid salaries to promoters; and

006.03 The use of proceeds from the indebtedness that was incurred.

~~006~~ 007 ~~SUFFICIENCY OF PROCEEDS.~~ FLEXIBILITY IN USE OF PROCEEDS. The issuer must not reserve more than fifteen percent of the proceeds for working capital or general corporate purposes, or for any other unspecified use. If the issuer's business plans require flexibility in the use of unspecified proceeds, the issuer must:

~~006.01~~ 007.01 ~~The issuer must demonstrate that the offering proceeds, together with all other sources of financing currently available to the issuer, are sufficient to sustain the issuer's proposed activities.~~ Disclose all potential uses of the proceeds with qualifying language that the uses may be subject to change; and

~~006.02~~ 007.02 ~~If the proceeds are insufficient to sustain the issuer's activities for at least 12 months following the offering, the issuer must provide the appropriate risk disclosure in the prospectus.~~ Indicate the circumstances that may lead to reallocation of the proceeds and the potential areas of such reallocation.

008 SUFFICIENCY OF FUNDS. The issuer must demonstrate that the offering proceeds, together with all other sources of financing currently available to the issuer, are sufficient to sustain the issuer's proposed activities. If the proceeds are insufficient to sustain the issuer's activities for at least twelve months following the offering, the appropriate risk disclosure must be included in the offering document.

~~007~~ 009 IMPOUNDMENT OF PROCEEDS. In the event the offering is not firmly underwritten, the issuer must set a minimum amount of proceeds to be raised consistent with the business plan set forth in the ~~prospectus~~ offering document.

~~007.01~~ 009.01 ~~The proceeds from the offering must be impounded until the minimum amount is reached.~~ The issuer or any other person that receives the proceeds from the sale of the securities must deposit the proceeds from the sale of the securities in an interest-bearing escrow or trust account with an impoundment

agent and shall comply with the requirements set forth in 48 NAC 25, Sections 003, 004 and 005.

~~007.02~~ 009.02 The ~~prospectus~~ offering document must disclose if officers, directors or other promoters have the right to purchase shares for the purpose of meeting the impound requirements.

~~008~~ 010 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 28 - UNSOUND FINANCIAL CONDITION

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the offering of securities by issuers in unsound financial condition is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 UNSOUND FINANCIAL CONDITION. An issuer shall be deemed to be in unsound financial condition if the financial statements contain:

002.01 A footnote to the financial statements or an explanatory paragraph in the independent auditor's report regarding the issuer's ability to continue as a going concern; and

002.02 One of the following:

002.02A An accumulated deficit; ~~or~~

002.02B Negative shareholder equity; ~~or~~

002.02C An inability to satisfy current obligations as they come due; or

002.02D Negative cash flow (or revenues not being generated by operations).

002.03 If the application for registration contains audited financial statements which were issued more than ~~90~~ninety days from the date of application, the accompanying interim unaudited financial statements are subject to the conditions of this Rule.

003 CONDITIONS.

003.01 An application for registration by an issuer in unsound financial condition may be denied by the Director, if the Director finds that such denial is necessary for investor protection and is in the best interests of the public.

003.02 An application for registration by an issuer in unsound financial condition may be registered by the Director if the chief financial officer of the issuer provides pro forma financial data acceptable to the Director that:

003.02A Demonstrate that the issuer's financial condition will improve either as a direct result of the offering proceeds, or as a proximate result of the offering proceeds (as part of a long term business plan);

003.02B Demonstrate when profitability is expected to occur; and

003.02C Are supported with documentation of, and the bases for, any assumptions.

004 DISCLOSURE. In addition to satisfying the requirements of Section 003.02 above, the issuer must:

004.01 Include prominent disclosure that the issuer is considered to be in unsound financial condition, and that persons should not invest unless they can afford to lose their entire investment; and

004.02 Disclose the following risk factors, as applicable:

004.02A The presence of an explanatory paragraph in the independent auditor's report;

004.02B ~~If the~~The issuer's ~~has not been generating~~ lack of revenues from operations, and the means by which the issuer has been financing its operations;

004.02C The presence and amount of any accumulated deficit;

004.02D The presence and amount of any negative ~~shareholder's~~ shareholders' equity; and

004.02E The need for future financing.

005 ~~NET WORTH~~SUITABILITY STANDARDS. In addition to the other requirements of this ~~Chapter~~Rule, the Director may impose ~~net worth~~suitability standards or limit the sales of securities to accredited investors in lieu of, or in addition to, the requirements of Sections 003.02 and 004 above.

005.01 The imposition of ~~these minimal net worth~~any suitability standards does not relieve a broker-dealer or agent from the responsibility of making an independent determination of suitability required under industry standards.

005.02 Unless the Director determines that the risks associated with the offering would require ~~lower~~ different standards, public investors shall have one of the following:

005.02A A minimum annual gross income of ~~sixty-five~~seventy thousand dollars ~~($65,000)~~ ($70,000.00) and a minimum net worth of ~~sixty-five~~

seventy thousand dollars ~~($65,000),~~($70,000.00); or ~~exclusive of automobile, home and home furnishings; or~~

005.02B A minimum net worth of ~~one~~ two hundred fifty thousand dollars ~~($150,000)~~($250,000.00)., ~~exclusive of automobile, home and home furnishings.~~

005.02C Net worth shall be determined exclusive of home, home furnishings, and automobiles.

006 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 29 - DEBT SECURITIES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the public offering of debt securities is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rules referenced in this Rule is attached hereto.

002 DEFINITIONS. For purposes of this Rule, the following additional definitions shall apply:

002.01 Adjusted cash flow means the issuer's cash flow adjusted on a pro forma basis to reflect:

002.01A The elimination of interest and fees on debt or debt securities and of cash dividends on preferred stock that are to be retired with the proceeds derived from the public offering;

002.01B The effect of any acquisitions or capital expenditures that were made by the issuer after its last fiscal year, or which are proposed or required for the current fiscal year, which materially affect the issuer's cash flow;

002.01C The effect of interest and fees on debt or debt securities and of cash dividends paid after the issuer's last fiscal year;

002.01D The effect of any interest and fees on debt or debt securities and of cash dividends on preferred stock or common stock that were issued during the issuer's last fiscal year, but which were outstanding for only a portion of such fiscal year, as if such debt, debt securities, preferred stock or common stock had been outstanding for the issuer's entire fiscal year;

002.01E The effect of imputed or deferred charges of zero coupon debt or debt securities for the issuer's last fiscal year and any additional charges on such debt or debt securities issued after the issuer's last fiscal year;

002.01F The effect of accrued dividends on preferred stock for the issuer's last fiscal year and any additional dividends on such preferred stock issued after the issuer's last fiscal year; and

002.01G The effect of any other material changes to the issuer's future cash flow.

002.01H Notwithstanding 002.01F above, accrued dividends of cumulative preferred stock having a stated interest rate may be excluded from adjusted cash flow at the discretion of the Director.

002.02 Cash flow means the issuer's after-tax earnings that are derived from its normal operations, exclusive of extraordinary and nonrecurring items, less interest and dividends, plus certain noncash charges against earnings such as depreciation, depletion and amortization, determined according to generally accepted accounting principles, consistently applied.

003 CASH FLOW REQUIIREMENTS.

003.01 A public offering of debt securities may be disallowed if the issuer's adjusted cash flow for the last fiscal year or its average adjusted cash flow for the last three fiscal years prior to the public offering was insufficient to cover its fixed charges, meet its debt obligations as they became due, and service the debt securities being offered.

003.02 The Director, in his or her discretion, may waive the requirement in Section 003.01 above for public offerings of convertible debt securities that are superior in right of payment of interest and liquidation proceeds to any convertible debt that is or may be legally or beneficially, directly or indirectly, owned by promoters, provided:

003.02A The risks of failure to meet debt service obligations and the equity characteristics of such securities must be disclosed in the prospectus; and

003.02B The offering of such securities is reviewed using the Rules for equity offerings in 48 NAC 21 through 28 and 48 NAC 30 through 31, as applicable.

003.03 If the issuer's cash flow is subject to cyclical fluctuations or if the Director deems it necessary for investor protection, the Director may require that the issuer establish a sinking fund or redemption requirements.

004 TRUST INDENTURE. Unless the Director permits otherwise, public offerings of debt securities shall be offered and sold pursuant to a trust indenture ("indenture") which adequately protects the rights of the purchasers. Such protections shall include, but shall not be limited to, the following:

004.01 The indenture shall comply with the provisions of the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa, et. seq., which shall be disclosed in the offering document;

004.02 The events of default of the indenture shall be disclosed in the offering document;

004.03 The trustee shall be provided with adequate reports, including any compliance reports from independent auditors, to allow the trustee to ensure compliance with the indenture;

004.04 Neither the trustee nor its promoters may be major creditors of the issuer or its affiliates;

004.05 The indenture shall provide that upon any consolidation, merger, recapitalization, reorganization, pledge foreclosure, equity or share exchange, conveyance or transfer of the properties and assets of the issuer substantially as an entirety, or any other transaction having a substantially equivalent effect, the successor person shall expressly assume the payment obligations on the debt securities and the performance of the covenants of the indenture; and

004.06 The indenture shall provide that interest will accrue and be paid to the date(s) of redemption or conversion of the debt securities.

005 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

TRUST INDENTURE ACT OF 1939

[AS AMENDED THROUGH P.L. 111-229, APPROVED AUGUST 11, 2010]

SHORT TITLE

SEC. 301. This title, divided into sections as follows, may be cited as the "Trust Indenture Act of 1939":

TABLE OF CONTENTS

TITLE III

(May 27, 1933, ch. 38, title III, Sec. 301, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149.)

NECESSITY FOR REGULATION

SEC. 302. (a) Upon the basis of facts disclosed by the reports of the Securities and Exchange Commission made to the Congress pursuant to section 211 of the Securities Exchange Act of 1934 and otherwise disclosed and ascertained, it is hereby declared that the national public interest and the interest of investors in notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein, which are offered to the public, are adversely affected—

(1) when the obligor fails to provide a trustee to protect and enforce the rights and to represent the interests of such investors, notwithstanding the fact that (A) individual action by such investors for the purpose of protecting and enforcing their rights is rendered impracticable by reason of the disproportionate expense of taking such action, and (B) concerted action by such investors in their common interest through representatives of their own selection is impeded by reason of the wide dispersion of such investors through many States, and by reason of the fact that information as to the names and addresses of such investors generally is not available to such investors;

(2) when the trustee does not have adequate rights and powers, or adequate duties and responsibilities, in connection with matters relating to the protection and enforcement of the rights of such investors; when, notwithstanding the obstacles to concerted action by such investors, and the general and reasonable assumption by such investors that the trustee is under an affirmative duty to take action for the protection and enforcement of their rights, trust indentures (A) generally provide that the trustee shall be under no duty to take any such action, even in the event of default, unless it receives notice of default, demand for action, and indemnity, from the holders of substantial percentages of the securities outstanding thereunder, and (B) generally relieve the trustee from liability even for its own negligent action or failure to act;

(3) when the trustee does not have resources commensurate with its responsibilities, or has any relationship to or connection with the obligor or any underwriter of any securities of the obligor, or holds, beneficially or otherwise, any interest in the obligor, or any such underwriter, which relationship, connection, or interest involves a material conflict with the interests of such investors;

(4) when the obligor is not obligated to furnish to the trustee under the indenture and to such investors adequate current information as to its financial condition, and as to the performance of its obligations with respect to the securities outstanding under such indenture; or when the communication of such information to such investors is impeded by the fact that information as to the names and addresses of such inves-

tors generally is not available to the trustee and to such investors;

(5) when the indenture contains provisions which are misleading or deceptive, or when full and fair disclosure is not made to prospective investors of the effect of important indenture provisions; or

(6) when, by reason of the fact that trust indentures are commonly prepared by the obligor or underwriter in advance of the public offering of the securities to be issued thereunder, such investors are unable to participate in the preparation thereof, and, by reason of their lack of understanding of the situation, such investors would in any event be unable to procure the correction of the defects enumerated in this subsection.

(b) Practices of the character above enumerated have existed to such an extent that, unless regulated, the public offering of notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein, by the use of means that instruments of transportation and communication in interstate commerce and of the mails, is injurious to the capital markets, to investors, and to the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the practices, enumerated in this section, connected with such public offerings.

(May 27, 1933, ch. 38, title III, Sec. 302, as added Aug. 3, 1939, ch. 411, 53 Stat. 1150.)

DEFINITIONS

SEC. 303. When used in this title, unless the context otherwise requires—

(1) Any term defined in section 2 of the Securities Act of 1933, and not otherwise defined in this section, shall have the meaning assigned to such term in such section 2.

(2) The terms "sale", "sell", "offer to sell", "offer for sale", and "offer" shall include all transactions included in such terms as provided in paragraph (3) of section 2(a) of the Securities Act of 1933, except that an offer or sale of a certificate of interest or participation shall be deemed an offer or sale of the security or securities in which such certificate evidences an interest or participation if and only if such certificate gives the holder thereof the right to convert the same into such security or securities.

(3) The term "prospectus" shall have the meaning assigned to such term in paragraph (10) of section 2(a) of the Securities Act of 1933, except that in the case of securities which are not registered under the Securities Act of 1933, such term shall not include any communication (A) if it is proved that prior to or at the same time with such communication a written statement if any required by section 306 was sent or given to the persons to whom the communication was made, or (B) if such communication states from whom such statement may be ob-

tained (if such statement is required by rules or regulations under paragraphs (1) or (2) of subsection (b) of section 306) and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(4) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission.

(5) The term "director" means any director of a corporation, or any individual performing similar functions with respect to any organization whether incorporated or unincorporated.

(6) The term "executive officer" means the president, every vice president, every trust officer, the cashier, the secretary, and the treasurer of a corporation, and any individual customarily performing similar functions with respect to any organization whether incorporated or unincorporated, but shall not include the chairman of the board of directors.

(7) The term "indenture" means any mortgage, deed of trust, trust or other indenture, or similar instrument or agreement (including any supplement or amendment to any of the foregoing), under which securities are outstanding or are to be issued, whether or not any property, real or personal, is, or is to be, pledged, mortgaged, assigned, or conveyed thereunder.

(8) The term "application" or "application for qualification" means the application provided for in section 305 or section 307, and includes any amendment thereto and any report, document, or memorandum accompanying such application or incorporated therein by reference.

(9) The term "indenture to be qualified" means (A) the indenture under which there has been or is to be issued a security in respect of which a particular registration statement has been filed, or (B) the indenture in respect of which a particular application has been filed.

(10) The term "indenture trustee" means each trustee under the indenture to be qualified, and each successor trustee.

(11) The term "indenture security" means any security issued or issuable under the indenture to be qualified.

(12) The term "obligor", when used with respect to any such indenture security, means every person (including a guarantor) who is liable thereon, and, if such security is a certificate of interest or participation, such term means also every person (including a guarantor) who is liable upon the security

or securities in which such certificate evidences an interest or participation; but such term shall not include the trustee under an indenture under which certificates of interest or participation, equipment trust certificates, or like securities are outstanding.

(13) The term "paying agent", when used with respect to any such indenture security, means any person authorized by an obligor thereon (A) to pay the principal of or interest on such security on behalf of such obligor, or (B) if such security is a certificate of interest or participation, equipment trust certificate, or like security, to make such payment on behalf of the trustee.

(14) The term "State" means any State of the United States.

(15) The term "Commission" means the Securities and Exchange Commission.

(16) The term "voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a person, or any security issued under or pursuant to any trust, agreement, or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of such security are presently entitled to vote in the direction or management of the affairs of a person; and a specified percentage of the voting securities of a person means such amount of the outstanding voting securities of such person as entitles the holder or holders thereof to cast such specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such person are entitled to cast in the direction or management of the affairs of such person.

(17) The terms "Securities Act of 1933" and "Securities Exchange Act of 1934" shall be deemed to refer, respectively, to such Acts, as amended, whether amended prior to or after the enactment of this title.

(18) The term "Bankruptcy Act" means the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, as amended, whether amended prior to or after the enactment of this title.

(May 27, 1933, ch. 38, title III, Sec. 303, as added Aug. 3, 1939, ch. 411, 53 Stat. 1151; amended Aug. 10, 1954, ch. 667, title III, Sec. 301, 68 Stat. 686; Pub. L. 95-598, title III, Sec. 307, Nov. 6, 1978, 92 Stat. 2674; Pub. L. 100-181, title V, Sec. 501, 502, Dec. 4, 1987, 101 Stat. 1260; Pub. L. 101-550, title IV, Sec. 402, Nov. 15, 1990, 104 Stat. 2722; Pub. L. 105-353, title III, Sec. 301(e)(1), Nov. 3, 1998, 112 Stat. 3237; Pub. L. 111-203, title IX, Sec. 986(b)(1), July 21, 2010, 124 Stat. 1935.)

EXEMPTED SECURITIES AND TRANSACTIONS

SEC. 304. (a) The provisions of this title shall not apply to any of the following securities:

(1) any security other than (A) a note, bond, debenture, or evidence of indebtedness, whether or not secured, or (B) a cer-

tificate of interest or participation in any such note, bond, debenture or evidence of indebtedness, or (C) a temporary certificate for, or guarantee of, any such note, bond, debenture, evidence of indebtedness, or certificate;

(2) any certificate of interest or participation in two or more securities having substantially different rights and privileges, or a temporary certificate for any such certificate;

(3) [Repealed.]

(4) (A) any security exempted from the provisions of the Securities Act of 1933 by paragraph (2), (3), (4), (5), (6), (7), (8), (11), or (13) of section 3(a) thereof;

(B) any security exempted from the provisions of the Securities Act of 1933, as amended, by paragraph (2) of subsection 3(a) thereof, as amended by section 401 of the Employment Security Amendments of 1970.

(5) any security issued under a mortgage indenture as to which a contract of insurance under the National Housing Act is in effect; and any such security shall be deemed to be exempt from the provisions of the Securities Act of 1933 to the same extent as though such security were specifically enumerated in section 3(a)(2) of such Act;

(6) any note, bond, debenture, or evidence of indebtedness issued or guaranteed by a foreign government or by a subdivision, department, municipality, agency, or instrumentality thereof;

(7) any guarantee of any security which is exempted by this subsection;

(8) any security which has been or is to be issued otherwise than under an indenture, but this exemption shall not be applied within a period of twelve consecutive months to an aggregate principal amount of securities of the same issuer greater than the figure stated in section 3(b) of the Securities Act of 1933 limiting exemptions thereunder, or such lesser amount as the Commission may establish by its rules and regulations;

(9) any security which has been or is to be issued under an indenture which limits the aggregate principal amount of securities at any time outstanding thereunder to $10,000,000, or such lesser amount as the Commission may establish by its rules and regulations, but this exemption shall not be applied within a period of thirty-six consecutive months to more than $10,000,000 aggregate principal amount of securities of the same issuer, or such lesser amount as the Commission may establish by its rules and regulations; or

(10) any security issued under a mortgage or trust deed indenture as to which a contract of insurance under title XI of the National Housing Act is in effect; and any such security shall be deemed to be exempt from the provisions of the Securities Act of 1933 to the same extent as though such security were specifically enumerated in section 3(a)(2), as amended, of the Securities Act of 1933 (15 U.S.C. 77c(a)(2)).

In computing the aggregate principal amount of securities to which the exemptions provided by paragraphs (8) and (9) may be applied, securities to which the provisions of sections 305 and 306 would

not have applied, irrespective of the provisions of those paragraphs, shall be disregarded.

(b) The provisions of sections 305 and 306 shall not apply (1) to any of the transactions exempted from the provisions of section 5 of the Securities Act of 1933 by section 4 thereof, or (2) to any transaction which would be so exempted but for the last sentence of paragraph (11) of section 2(a) of such Act.

(c) The Commission shall, on application by the issuer and after opportunity for hearing thereon, by order exempt from any one or more provisions of this title any security issued or proposed to be issued under any indenture under which, at the time such application is filed, securities referred to in paragraph (3) of subsection (a) of this section are outstanding or on January 1, 1959, such securities were outstanding, if and to the extent that the Commission finds that compliance with such provision or provisions, through the execution of a supplemental indenture or otherwise—

(1) would require, by reason of the provisions of such indenture, or the provisions of any other indenture or agreement made prior to the enactment of this title, or the provisions of any applicable law, the consent of the holders of securities outstanding under any such indenture or agreement; or

(2) would impose an undue burden on the issuer, having due regard to the public interest and the interests of investors.

(d) The Commission may, by rules or regulations upon its own motion, or by order on application by an interested person, exempt conditionally or unconditionally any person, registration statement, indenture, security or transaction, or any class or classes of persons, registration statements, indentures, securities, or transactions, from any one or more of the provisions of this title, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by this title. The Commission shall by rules and regulations determine the procedures under which an exemption under this subsection shall be granted, and may, in its sole discretion, decline to entertain any application for an order of exemption under this subsection.

(e) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed herein, add to the securities exempted as provided in this section any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 if it finds, having regard to the purposes of that Act, that the enforcement of this Act with respect to such securities is not necessary in the public interest and for the protection of investors.

(May 27, 1933, ch. 38, title III, Sec. 304, as added Aug. 3, 1939, ch. 411, 53 Stat. 1153; amended Aug. 10, 1954, ch. 667, title III, Sec. 302, 68 Stat. 687; Pub. L. 85-699, title III, Sec. 307(b), Aug. 21, 1958, 72 Stat. 694; Pub. L. 86-760, Sept. 13, 1960, 74 Stat. 902; Pub. L. 89-754, title V, Sec. 504(b), Nov. 3, 1966, 80 Stat. 1278; Pub. L. 91-567, Sec. 6(c), Dec. 22, 1970, 84 Stat. 1499; Pub. L. 96-477, title III, Sec. 302, Oct. 21, 1980, 94 Stat. 2291; Pub. L. 101-550, title IV, Sec. 403, Nov. 15, 1990, 104 Stat. 2722; Pub. L. 104-

290, title V, Sec. 508(e), Oct. 11, 1996, 110 Stat. 3448; Pub. L. 105-353, title III, Sec. 301(e)(2), Nov. 3, 1998, 112 Stat. 3237; Pub. L. 111-203, title IX, Sec. 985(c)(1), July 21, 2010, 124 Stat. 1934.)

SECURITIES REQUIRED TO BE REGISTERED UNDER SECURITIES ACT

SEC. 305. (a) Subject to the provisions of section 304, a registration statement relating to a security shall include the following information and documents, as though such inclusion were required by the provisions of section 7 of the Securities Act of 1933—

(1) such information and documents as the Commission may by rules and regulations prescribe in order to enable the Commission to determine whether any person designated to act as trustee under the indenture under which such security has been or is to be issued is eligible to act as such under subsection (a) of section 310; and

(2) an analysis of any provisions of such indenture with respect to (A) the definition of what shall constitute a default under such indenture, and the withholding of notice to the indenture security holders of any such default, (B) the authentication and delivery of the indenture securities and the application of the proceeds thereof, (C) the release or the release and substitution of any property subject to the lien of the indenture, (D) the satisfaction and discharge of the indenture, and (E) the evidence required to be furnished by the obligor upon the indenture securities to the trustee as to compliance with the conditions and convenants provided for in such indenture.

The information and documents required by paragraph (1) of this subsection with respect to the person designated to act as indenture trustee shall be contained in a separate part of such registration statement, which part shall be signed by such person. Such part of the registration statement shall be deemed to be a document filed pursuant to this title, and the provisions of sections 11, 12, 17, and 24 of the Securities Act of 1933 shall not apply to statements therein or omissions therefrom.

(b)(1) Except as may be permitted by paragraph (2) of this subsection, the Commission shall issue an order prior to the effective date of registration refusing to permit such a registration statement to become effective, if it finds that—

(A) the security to which such registration statement relates has not been or is not to be issued under an indenture; or

(B) any person designated as trustee under such indenture is not eligible to act as such under subsection (a) of section 310;

but no such order shall be issued except after notice and opportunity for hearing within the periods and in the manner required with respect to refusal orders pursuant to section 8(b) of the Securities Act of 1933. If and when the Commission deems that the objections on which such order was based have been met, the Commission shall enter an order rescinding such refusal order, and the registration shall become effective at the time provided in section

8(a) of the Securities Act of 1933, or upon the date of such rescission, whichever shall be the later.

(2) In the case of securities registered under the Securities Act of 1933, which securities are eligible to be issued, offered, or sold on a delayed basis by or on behalf of the registrant, the Commission shall not be required to issue an order pursuant to paragraph (1) of subsection (b) of section 305 for failure to designate a trustee eligible to act under subsection (a) of section 310 if, in accordance with such rules and regulations as may be prescribed by the Commission, the issuer of such securities files an application for the purpose of determining such trustee's eligibility under subsection (a) of section 310. The Commission shall issue an order prior to the effective date of such application refusing to permit the application to become effective, if it finds that any person designated as trustee under such indenture is not eligible to act as such under subsection (a) of section 310, but no order shall be issued except after notice and opportunity for hearing within the periods and in the manner required with respect to refusal orders pursuant to section 8(b) of the Securities Act of 1933. If after notice and opportunity for hearing the Commission issues an order under this provision, the obligor shall within 5 calendar days appoint a trustee meeting the requirements of subsection (a) of section 310. No such appointment shall be effective and such refusal order shall not be rescinded by the Commission until a person eligible to act as trustee under subsection (a) of section 310 has been appointed. If no order is issued, an application filed pursuant to this paragraph shall be effective the tenth day after filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of information provided therein, the public interest, and the protection of investors.

(c) A prospectus relating to any such security shall include to the extent the Commission may prescribe by rules and regulations as necessary and appropriate in the public interest or for the protection of investors, as though such inclusion were required by section 10 of the Securities Act of 1933, a written statement containing the analysis set forth in the registration statement, of any indenture provisions with respect to the matters specified in paragraph (2) of subsection (a) of this section, together with a supplementary analysis, prepared by the Commission, of such provisions and of the effect thereof, if, in the opinion of the Commission, the inclusion of such supplementary analysis is necessary or appropriate in the public interest or for the protection of investors, and the Commission so declares by order after notice and, if demanded by the issuer, opportunity for hearing thereon. Such order shall be entered prior to the effective date of registration, except that if opportunity for hearing thereon is demanded by the issuer such order shall be entered within a reasonable time after such opportunity for hearing.

(d) The provisions of sections 11, 12, 17, and 24 of the Securities Act of 1933, and the provisions of sections 323 and 325 of this title, shall not apply to statements in or omissions from any analysis required under the provisions of this section or section 306 or 307.

(May 27, 1933, ch. 38, title III, Sec. 305, as added Aug. 3, 1939, ch. 411, 53 Stat. 1154; amended Aug. 10, 1954, ch. 667, title III, Sec. 303, 68 Stat. 687; Pub. L. 101-550, title IV, Sec. 404, Nov. 15, 1990, 104 Stat. 2722.)

SECURITIES NOT REGISTERED UNDER SECURITIES ACT

SEC. 306. (a) In the case of any security which is not registered under the Securities Act of 1933 and to which this subsection is applicable notwithstanding the provisions of section 304, unless such security has been or is to be issued under an indenture and an application for qualification is effective as to such indenture, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) In the case of any security which is not registered under the Securities Act of 1933, but which has been or is to be issued under an indenture as to which an application for qualification is effective, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any such security, unless such prospectus, to the extent the Commission may prescribe by rules and regulations as necessary and appropriate in the public interest or for the protection of investors, includes or is accompanied by a written statement that contains the information specified in subsection (c) of section 305; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless, to the extent the Commission may prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors, accompanied or preceded by a written statement that contains the information specified in subsection (c) of section 305.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell through the use or medium of any prospectus or otherwise any security which is not registered under the Securities Act of 1933 and to which this subsection is applicable notwithstanding the provisions of section 304, unless such security has been or is to be issued under an indenture and an application for qualification has been filed as to such indenture, or while the application is the subject of a refusal order or stop order or (prior to qualification) any public proceeding or examination under section 307(c).

(May 27, 1933, ch. 38, title III, Sec. 306, as added Aug. 3, 1939, ch. 411, 53 Stat. 1155; amended Aug. 10, 1954, ch. 667, title III, Sec. 304, 68 Stat. 687.)

QUALIFICATION OF INDENTURES COVERING SECURITIES NOT REQUIRED TO BE REGISTERED

SEC. 307. (a) In the case of any security which is not required to be registered under the Securities Act of 1933 and to which subsection (a) of section 306 is applicable notwithstanding the provisions of section 304, an application for qualification of the indenture under which such security has been or is to be issued shall be filed with the Commission by the issuer of such security. Each such application shall be in such form, and shall be signed in such manner, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. Each such application shall include the information and documents required by subsection (a) of section 305. The information and documents required by paragraph (1) of such subsection with respect to the person designated to act as indenture trustee shall be contained in a separate part of such application, which part shall be signed by such person. Each such application shall also include such of the other information and documents which would be required to be filed in order to register such indenture security under the Securities Act of 1933 as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. An application may be withdrawn by the applicant at any time prior to the effective date thereof. Subject to the provisions of section 321, the information and documents contained in or filed with any application shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant therefor at such reasonable charge as the Commission may prescribe.

(b) The filing with the Commission of an application, or of an amendment to an application, shall be deemed to have taken place upon the receipt thereof by the Commission.

(c) The provisions of section 8 of the Securities Act of 1933 and the provisions of subsection (b) of section 305 of this title shall apply with respect to every such application, as though such application were a registration statement filed pursuant to the provisions of such Act.

(May 27, 1933, ch. 38, title III, Sec. 307, as added Aug. 3, 1939, ch. 411, 53 Stat. 1156; amended Pub. L. 107-123, Sec. 7, Jan. 16, 2002, 115 Stat. 2397.)

INTEGRATION OF PROCEDURE WITH SECURITIES ACT AND OTHER ACTS

SEC. 308. (a) The Commission, by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, shall authorize the filing of any information or documents required to be filed with the Com-

mission under this title, or under the Securities Act of 1933 or the Securities Exchange Act of 1934, by incorporating by reference any information or documents on file with the Commission under this title or under any such Act.

(b) The Commission, by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, shall provide for the consolidation of applications, reports, and proceedings under this title with registration statements, applications, reports, and proceedings under the Securities Act of 1933 or the Securities Exchange Act of 1934.

(May 27, 1933, ch. 38, title III, Sec. 308, as added Aug. 3, 1939, ch. 411, 53 Stat. 1156; amended Pub. L. 111-203, title IX, Sec. 986(b)(2), July 21, 2010, 124 Stat. 1936.)

WHEN QUALIFICATION BECOMES EFFECTIVE; EFFECT OF QUALIFICATION

SEC. 309. (a) The indenture under which a security has been or is to be issued shall be deemed to have been qualified under this title—

(1) when registration becomes effective as to such security;

(2) when an application for the qualification of such indenture becomes effective, pursuant to section 307.

(b) After qualification has become effective as to the indenture under which a security has been or is to be issued, no stop order shall be issued pursuant to section 8(d) of the Securities Act of or 1933, suspending the effectiveness of the registration statement relating to such security or of the application for qualification of such indenture, except on one or more of the grounds specified in section 8 of such Act, or the failure of the issuer to file an application as provided for by section 305(b)(2).

(c) The making, amendment, or rescission of a rule, regulation, or order under the provisions of this title (except to the extent authorized by subsection (a) of section 314 with respect to rules and regulations prescribed pursuant to such subsection) shall not affect the qualification, form, or interpretation of any indenture as to which qualification became effective prior to the making, amendment, or rescission of such rule, regulation, or order.

(d) No trustee under an indenture which has been qualified under this title shall be subject to any liability because of any failure of such indenture to comply with any of the provisions of this title, or any rule, regulation, or order thereunder.

(e) Nothing in this title shall be construed as empowering the Commission to conduct an investigation or other proceeding for the purpose of determining whether the provisions of an indenture which has been qualified under this title are being complied with, or to enforce such provisions.

(May 27, 1933, ch. 38, title III, Sec. 309, as added Aug. 3, 1939, ch. 411, 53 Stat. 1157; amended Pub. L. 101-550, title IV, Sec. 405, Nov. 15, 1990, 104 Stat. 2723.)

ELIGIBILITY AND DISQUALIFICATION OF TRUSTEE

SEC. 310. Persons Eligible for Appointment as Trustee

(a)(1) There shall at all times be one or more trustees under every indenture qualified or to be qualified pursuant to this title, at least one of whom shall at all times be a corporation organized and doing business under the laws of the United States or of any State or Territory or of the District of Columbia or a corporation or other person permitted to act as trustee by the Commission (referred to in this title as the institutional trustee), which (A) is authorized under such laws to exercise corporate trust powers, and (B) is subject to supervision or examination by Federal, State, Territorial, or District of Columbia authority. The Commission may, pursuant to such rules and regulations as it may prescribe, or by order on application, permit a corporation or other person organized and doing business under the laws of a foreign government to act as sole trustee under an indenture qualified or to be qualified pursuant to this title, if such corporation or other person (i) is authorized under such laws to exercise corporate trust powers, and (ii) is subject to supervision or examination by authority of such foreign government or a political subdivision thereof substantially equivalent to supervision or examination applicable to United States institutional trustees. In prescribing such rules and regulations or making such order, the Commission shall consider whether under such laws, a United States institutional trustee is eligible to act as sole trustee under an indenture relating to securities sold within the jurisdiction of such foreign government.

(2) Such institution[1] trustee shall have at all times a combined capital and surplus of a specified minimum amount, which shall not be less than $150,000. If such institutional trustee publishes reports of condition at least annually, pursuant to law or to the requirements of said supervising or examining authority, the indenture may provide that, for the purposes of this paragraph, the combined capital and surplus of such trustee shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published.

(3) If the indenture to be qualified requires or permits the appointment of one or more co-trustees in addition to such institutional trustee, the rights, powers, duties, and obligations conferred or imposed upon the trustees or any of them shall be conferred or imposed upon and exercised or performed by such institutional trustee, or such institutional trustee and such co- trustees jointly, except to the extent that under any law of any jurisdiction in which any particular act or acts are to be performed, such institutional trustee shall be incompetent or unqualified to perform such act or acts, in which event such rights, powers, duties, and obligations shall be exercised and performed by such co-trustees.

(4) In the case of certificates of interest or participation, the indenture trustee or trustees shall have the legal power to exercise all of the rights, powers, and privileges of a holder of the security or securities in which such certificates evidence an interest or participation.

[1]So in law. Probably should be "institutional".

(5) No obligor upon the indenture securities or person directly or indirectly controlling, controlled by, or under common control with such obligor shall serve as trustee upon such indenture securities.

(b) If any indenture trustee has or shall acquire any conflicting interest as hereinafter defined—

(i) then, within 90 days after ascertaining that it has such conflicting interest, and if the default (as defined in the next sentence) to which such conflicting interest relates has not been cured or duly waived or otherwise eliminated before the end of such 90-day period, such trustee shall either eliminate such conflicting interest or, except as otherwise provided below in this subsection, resign, and the obligor upon the indenture securities shall take prompt steps to have a successor appointed in the manner provided in the indenture;

(ii) in the event that such trustee shall fail to comply with the provisions of clause (i) of this subsection, such trustee shall, within 10 days after the expiration of such 90-day period, transmit notice of such failure to the indenture security holders in the manner and to the extent provided in subsection (c) of section 313; and

(iii) subject to the provisions of subsection (e) of section 315, unless such trustee's duty to resign is stayed as provided below in this subsection, any security holder who has been a bona fide holder of indenture securities for at least six months may, on behalf of himself and all others similarly situated, petition any court of competent jurisdiction for the removal of such trustee, and the appointment of a successor, if such trustee fails, after written request thereof by such holder to comply with the provisions of clause (i) of this subsection.

For the purposes of this subsection, an indenture trustee shall be deemed to have a conflicting interest if the indenture securities are in default (as such term is defined in such indenture, but exclusive of any period of grace or requirement of notice) and—

(1) such trustee is trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of an obligor upon the indenture securities are outstanding or is trustee for more than one outstanding series of securities, as hereafter defined, under a single indenture of an obligor, unless—

(A) the indenture securities are collateral trust notes under which the only collateral consists of securities issued under such other indenture,

(B) such other indenture is a collateral trust indenture under which the only collateral consists of indenture securities, or

(C) such obligor has no substantial unmortgaged assets and is engaged primarily in the business of owning, or of owning and developing and/or operating, real estate, and the indenture to be qualified and such other indenture are secured by wholly separate and distinct parcels of real estate:

Provided, That the indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that

such provision is excluded) to contain a provision excluding from the operation of this paragraph other series under such indenture, and any other indenture or indentures under which other securities, or certificates of interest or participation in other securities, of such an obligor are outstanding, if—

(i) the indenture to be qualified and any such other indenture or indentures (and all series of securities issuable thereunder) are wholly unsecured and rank equally, and such other indenture or indentures (and such series) are specifically described in the indenture to be qualified or are thereafter qualified under this title, unless the Commission shall have found and declared by order pursuant to subsection (b) of section 305 or subsection (c) of section 307 that differences exist between the provisions of the indenture (or such series) to be qualified and the provisions of such other indenture or indentures (or such series) which are so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as such under one of such indentures, or

(ii) the issuer shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that trusteeship under the indenture to be qualified and such other indenture or under more than one outstanding series under a single indenture is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify such trustee from acting as such under one of such indentures or with respect to such series;

(2) such trustee or any of its directors or executive officers is an underwriter for an obligor upon the indenture securities;

(3) such trustee directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with an underwriter for an obligor upon the indenture securities;

(4) such trustee or any of its directors or executive officers is a director, officer, partner, employee, appointee, or representative of an obligor upon the indenture securities, or of an underwriter (other than the trustee itself) for such an obligor who is currently engaged in the business of underwriting, except that—

(A) one individual may be a director and/or an executive officer of the trustee and a director and/or an executive officer of such obligor, but may not be at the same time an executive officer of both the trustee and of such obligor,

(B) if and so long as the number of directors of the trustee in office is more than nine, one additional individual may be a director and/or an executive officer of the trustee and a director of such obligor, and

(C) such trustee may be designated by any such obligor or by any underwriter for any such obligor, to act in the capacity of transfer agent, registrar, custodian, paying

agent, fiscal agent, escrow agent, or depositary, or in any other similar capacity, or, subject to the provisions of paragraph (1) of this subsection, to act as trustee, whether under an indenture or otherwise;

(5) 10 per centum or more of the voting securities of such trustee is beneficially owned either by an obligor upon the indenture securities or by any director, partner or executive officer thereof, or 20 per centum or more of such voting securities is beneficially owned, collectively by any two or more of such persons; or 10 per centum or more of the voting securities of such trustee is beneficially owned either by an underwriter for any such obligor or by any director, partner, or executive officer thereof, or is beneficially owned, collectively, by any two or more such persons;

(6) such trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default as hereinafter defined—

(A) 5 per centum or more of the voting securities, or 10 per centum or more of any other class of security, of an obligor upon the indenture securities, not including indentures[2] securities and securities issued under any other indenture under which such trustee is also trustee, or

(B) 10 per centum or more of any class of security of an underwriter for any such obligor;

(7) such trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default as hereinafter defined, 5 per centum or more of the voting securities of any person who, to the knowledge of the trustee, owns 10 per centum or more of the voting securities of, or controls directly or indirectly or is under direct or indirect common control with, an obligor upon the indenture securities;

(8) such trustee is the beneficial owner of, or holds as collateral security for an obligation which is in default as hereinafter defined, 10 per centum or more of any class of security of any person who, to the knowledge of the trustee, owns 50 per centum or more of the voting securities of an obligor upon the indenture securities;

(9) such trustee owns, on the date of default upon the indenture securities (as such term is defined in such indenture but exclusive of any period of grace or requirement of notice) or any anniversary of such default while such default upon the indenture securities remains outstanding, in the capacity of executor, administrator, testamentary or inter vivos trustee, guardian, committee or conservator, or in any other similar capacity, an aggregate of 25 per centum or more of the voting securities, or of any class of security, of any person, the beneficial ownership of a specified percentage of which would have constituted a conflicting interest under paragraph (6), (7), or (8) of this subsection. As to any such securities of which the indenture trustee acquired ownership through becoming executor, administrator or testamentary trustee of an estate which include them, the provisions of the preceding sentence shall not

[2]So in law. Probably should be "indenture".

apply for a period of not more than 2 years from the date of such acquisition, to the extent that such securities included in such estate do not exceed 25 per centum of such voting securities or 25 per centum of any such class of security. Promptly after the dates of any such default upon the indenture securities and annually in each succeeding year that the indenture securities remain in default the trustee shall make a check of its holding of such securities in any of the above- mentioned capacities as of such dates. If the obligor upon the indenture securities fails to make payment in full of principal or interest under such indenture when and as the same becomes due and payable, and such failure continues for 30 days thereafter, the trustee shall make a prompt check of its holdings of such securities in any of the above-mentioned capacities as of the date of the expiration of such 30-day period, and after such date, notwithstanding the foregoing provisions of this paragraph, all such securities so held by the trustee, with sole or joint control over such securities vested in it, shall be considered as though beneficially owned by such trustee, for the purposes of paragraphs (6), (7), and (8) of this subsection; or

(10) except under the circumstances described in paragraphs[3] (1), (3), (4), (5) or (6) of section 311(b) of this title, the trustee shall be or shall become a creditor of the obligor.

For purposes of paragraph (1) of this subsection, and of section 316(a) of this title, the term "series of securities" or "series" means a series, class or group of securities issuable under an indenture pursuant to whose terms holders of one such series may vote to direct the indenture trustee, or otherwise take action pursuant to a vote of such holders, separately from holders of another such series: Provided, That "series of securities" or "series" shall not include any series of securities issuable under an indenture if all such series rank equally and are wholly unsecured.

The specification of percentages in paragraphs (5) to (9), inclusive, of this subsection shall not be construed as indicating that the ownership of such percentages of the securities of a person is or is not necessary or sufficient to constitute direct or indirect control for the purposes of paragraph (3) or (7) of this subsection.

For the purposes of paragraphs (6), (7), (8), and (9) of this subsection—

(A) the terms "security" and "securities" shall include only such securities as are generally known as corporate securities, but shall not include any note or other evidence of indebtedness issued to evidence an obligation to repay moneys lent to a person by one or more banks, trust companies, or banking firms, or any certificate of interest or participation in any such note or evidence of indebtedness;

(B) an obligation shall be deemed to be in default when a default in payment of principal shall have continued for thirty days or more, and shall not have been cured; and

(C) the indenture trustee shall not be deemed the owner or holder of (i) any security which it holds as collateral security (as trustee or otherwise) for any obligation which is not in de-

[3]So in law. Probably should be "paragraph".

fault as above defined, or (ii) any security which it holds as collateral security under the indenture to be qualified, irrespective of any default thereunder, or (iii) any security which it holds as agent for collection, or as custodian, escrow agent or depositary, or in any similar representative capacity.

For the purposes of this subsection, the term "underwriter" when used with reference to an obligor upon the indenture securities means every person who, within one year prior to the time as of which the determination is made, was an underwriter of any security of such obligor outstanding at the time of the determination.

Except in the case of a default in the payment of the principal of or interest on any indenture security, or in the payment of any sinking or purchase fund installment, the indenture trustee shall not be required to resign as provided by this subsection if such trustee shall have sustained the burden of proving, on application to the Commission and after opportunity for hearing thereon, that—

(i) the default under the indenture may be cured or waived during a reasonable period and under the procedures described in such application, and

(ii) a stay of the trustee's duty to resign will not be inconsistent with the interests of holders of the indenture securities. The filing of such an application shall automatically stay the performance of the duty to resign until the Commission orders otherwise.

Any resignation of an indenture trustee shall become effective only upon the appointment of a successor trustee and such successor's acceptance of such an appointment.

(May 27, 1933, ch. 38, title III, Sec. 310, as added Aug. 3, 1939, ch. 411, 53 Stat. 1157; amended Pub. L. 101-550, title IV, Sec. 406-408, Nov. 15, 1990, 104 Stat. 2723, 2724; Pub. L. 111-203, title IX, Sec. 986(b)(3), July 21, 2010, 124 Stat. 1936.)

PREFERENTIAL COLLECTION OF CLAIMS AGAINST OBLIGOR

SEC. 311. (a) Subject to the provisions of subsection (b) of this section, if the indenture trustee shall be, or shall become, a creditor, directly or indirectly, secured or unsecured, of an obligor upon the indenture securities, within three months prior to a default as defined in the last paragraph of this subsection, or subsequent to such a default, then, unless and until such default shall be cured, such trustee shall set apart and hold in a special account for the benefit of the trustee individually and the indenture security holders—

(1) an amount equal to any and all reductions in the amount due and owing upon any claim as such creditor in respect of principal or interest, effected after the beginning of such three months' period and valid as against such obligor and its other creditors, except any such reduction resulting from the receipt or disposition of any property described in paragraph (2) of this subsection, or from the exercise of any right of set-off which the trustee could have exercised if a peti-

tion in bankruptcy had been filed by or against such obligor upon the date of such default; and

(2) all property received in respect of any claim as such creditor, either as security therefor, or in satisfaction or composition thereof, or otherwise, after the beginning of such three months' period, or an amount equal to the proceeds of any such property, if disposed of, subject, however, to the rights, if any, of such obligor and its other creditors in such property or such proceeds.

Nothing herein contained shall affect the right of the indenture trustee—

(A) to retain for its own account (i) payments made on account of any such claim by any person (other than such obligor) who is liable thereon, and (ii) the proceeds of the bona fide sale of any such claim by the trustee to a third person, and (iii) distributions made in cash, securities, or other property in respect of claims filed against such obligor in bankruptcy or receivership or in proceedings for reorganization pursuant to the Bankruptcy Act or applicable State law;

(B) to realize, for its own account, upon any property held by it as security for any such claim, if such property was so held prior to the beginning of such three months' period;

(C) to realize, for its own account, but only to the extent of the claim hereinafter mentioned, upon any property held by it as security for any such claim, if such claim was created after the beginning of such three months' period and such property was received as security therefor simultaneously with the creation thereof, and if the trustee shall sustain the burden of proving that at the time such property was so received the trustee had no reasonable cause to believe that a default as defined in the last paragraph of this subsection would occur within three months; or

(D) to receive payment on any claim referred to in paragraph (B) or (C), against the release of any property held as security for such claim as provided in paragraph (B) or (C), as the case may be, to the extent of the fair value of such property.

For the purposes of paragraphs (B), (C), and (D), property substituted after the beginning of such three months' period for property held as security at the time of such substitution shall, to the extent of the fair value of the property released, have the same status as the property released, and, to the extent that any claim referred to in any of such paragraphs is created in renewal of or in substitution for or for the purpose of repaying or refunding any preexisting claim of the indenture trustee as such creditor, such claim shall have the same status as such preexisting claim.

If the trustee shall be required to account, the funds and property held in such special account and the proceeds thereof shall be apportioned between the trustee and the indenture security holders in such manner that the trustee and indenture security holders realize, as a result of payments from such special account and payments of dividends on claims filed against such obligor in bankruptcy or receivership or in the proceedings for reorganization pursuant to the Bankruptcy Act or applicable State law, the same per-

centage of their respective claims, figured before crediting to the claim of the trustee anything on account of the receipt by it from such obligor of the funds and property in such special account and before crediting to the respective claims of the trustee and the indenture security holders dividends on claims filed against such obligor in bankruptcy or receivership or in proceedings for reorganization pursuant to the Bankruptcy Act or applicable State law, but after crediting thereon receipts on account of the indebtedness represented by their respective claims from all sources other than from such dividends and from the funds and property so held in such special account. As used in this paragraph, with respect to any claim, the term "dividends" shall include any distribution with respect to such claim, in bankruptcy or receivership or in proceedings for reorganization pursuant to the Bankruptcy Act or applicable State law, whether such distribution is made in cash, securities, or other property, but shall not include any such distribution with respect to the secured portion, if any, of such claim. The court in which such bankruptcy, receivership, or proceeding for reorganization is pending shall have jurisdiction (i) to apportion between the indenture trustee and the indenture security holders, in accordance with the provisions of this paragraph, the funds and property held in such special account and the proceeds thereof, or (ii) in lieu of such apportionment, in whole or in part, to give to the provisions of this paragraph due consideration in determining the fairness of the distributions to be made to the indenture trustee and the indenture security holders with respect to their respective claims, in which event it shall not be necessary to liquidate or to appraise the value of any securities or other property held in such special account or as security for any such claim, or to make a specific allocation of such distributions as between the secured and unsecured portions of such claims, or otherwise to apply the provisions of this paragraph as a mathematical formula.

Any indenture trustee who has resigned or been removed after the beginning of such three months' period shall be subject to the provisions of this subsection as though such resignation or removal had not occurred. Any indenture trustee who has resigned or been removed prior to the beginning of such three months' period shall be subject to the provisions of this subsection if and only if the following conditions exist—

(i) the receipt of property or reduction of claim which would have given rise to the obligation to account, if such indenture trustee had continued as trustee, occurred after the beginning of such three months' period; and

(ii) such receipt of property or reduction of claim occurred within three months after such resignation or removal.

As used in this subsection, the term "default" means any failure to make payment in full of principal or interest, when and as the same becomes due and payable, under any indenture which has been qualified under this title, and under which the indenture trustee is trustee and the person of whom the indenture trustee is directly or indirectly a creditor is an obligor; and the term "indenture security holder" means all holders of securities outstanding under any such indenture under which any such default exists. In any case commenced under the Bankruptcy Act of July 1, 1898, or

any amendment thereto enacted prior to November 6, 1978, all references to periods of three months shall be deemed to be references to periods of four months.

(b) The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions excluding from the operation of subsection (a) of this section a creditor relationship arising from—

(1) the ownership or acquisition of securities issued under any indenture, or any security or securities having a maturity of one year or more at the time of acquisition by the indenture trustee;

(2) advances authorized by a receivership or bankruptcy court of competent jurisdiction, or by the indenture, for the purpose of preserving the property subject to the lien of the indenture or of discharging tax liens or other prior liens or encumbrances on the trust estate, if notice of such advance and of the circumstances surrounding the making thereof is given to the indenture security holders, at the time and in the manner provided in the indenture;

(3) disbursements made in the ordinary course of business in the capacity of trustee under an indenture, transfer agent, registrar, custodian, paying agent, fiscal agent or depositary, or other similar capacity;

(4) an indebtedness created as a result of services rendered or premises rented; or an indebtedness created as a result of goods or securities sold in a cash transaction as defined in the indenture;

(5) the ownership of stock or of other securities of a corporation organized under the provisions of section 25(a)[1] of the Federal Reserve Act, as amended, which is directly or indirectly a creditor of an obligor upon the indenture securities; or

(6) the acquisition, ownership, acceptance, or negotiation of any drafts, bills of exchange, acceptances, or obligations which fall within the classification of self-liquidating paper as defined in the indenture.

(May 27, 1933, ch. 38, title III, Sec. 311, as added Aug. 3, 1939, ch. 411, 53 Stat. 1161; amended Pub. L. 101-550, title IV, Sec. 409, Nov. 15, 1990, 104 Stat. 2728; Pub. L. 111-203, title IX, Sec. 986(B)(4), July 21, 2010, 124 Stat. 1936.)

BONDHOLDERS LISTS

SEC. 312. (a) Each obligor upon the indenture securities shall furnish or cause to be furnished to the institutional trustee thereunder at stated intervals of not more than six months, and at such other times as such trustee may request in writing, all information in the possession or control of such obligor, or of any of its paying agents, as to the names and addresses of the indenture security holders, and requiring such trustee to preserve, in as current a

[1]Section 25(a) of the Federal Reserve Act was renumbered section 25A of that act by Pub. L. 102-242, title I, Sec. 142(e)(2), Dec. 19, 1991, 105 Stat. 2281.

form as is reasonably practicable, all such information so furnished to it or received by it in the capacity of paying agent.

(b) Within five business days after the receipt by the institutional trustee of a written application by any three or more indenture security holders stating that the applicants desire to communicate with other indenture security holders with respect to their rights under such indenture or under the indenture securities, and accompanied by a copy of the form of proxy or other communication which such applicants propose to transmit, and by reasonable proof that each such applicant has owned an indenture security for a period of at least six months preceding the date of such application, such institutional trustee shall, at its election, either—

(1) afford to such applicants access to all information so furnished to or received by such trustee; or

(2) inform such applicants as to the approximate number of indenture security holders according to the most recent information so furnished to or received by such trustee, and as to the approximate cost of mailing to such indenture security holders the form of proxy or other communication, if any, specified in such application.

If such trustee shall elect not to afford to such applicants access to such information, such trustee shall, upon the written request of such applicants, mail to all such indenture security holders copies of the form of proxy or other communication which is specified in such request, with reasonable promptness after a tender to such trustee of the material to be mailed and of payment, or provision for the payment, of the reasonable expenses of such mailing, unless within five days after such tender, such trustee shall mail to such applicants, and file with the Commission together with a copy of the material to be mailed, a written statement to the effect that, in the opinion of such trustee, such mailing would be contrary to the best interests of the indenture security holders or would be in violation of applicable law. Such written statement shall specify the basis of such opinion. After opportunity for hearing upon the objections specified in the written statement so filed, the Commission may, and if demanded by such trustee or by such applicants shall, enter an order either sustaining one or more of such objections or refusing to sustain any of them. If the Commission shall enter an order refusing to sustain any of such objections, or if, after the entry of an order sustaining one or more of such objections, the Commission shall find, after notice and opportunity for hearing, that all objections so sustained have been met, and shall enter an order so declaring, such trustee shall mail copies of such material to all such indenture security holders with reasonable promptness after the entry of such order and the renewal of such tender.

(c) The disclosure of any such information as to the names and addresses of the indenture security holders in accordance with the provisions of this section, regardless of the source from which such information was derived, shall not be deemed to be a violation of any existing law, or of any law hereafter enacted which does not specifically refer to this section, nor shall such trustee be held accountable by reason of mailing any material pursuant to a request made under subsection (b) of this section.

(May 27, 1933, ch. 38, title III, Sec. 312, as added Aug. 3, 1939, ch. 411, 53 Stat. 1164; amended Nov. 15, 1990, Pub. L. 101-550, title IV, Sec. 410, 104 Stat. 2728.)

REPORTS BY INDENTURE TRUSTEE

SEC. 313. (a) The indenture trustee shall transmit to the indenture security holders as hereinafter provided, at stated intervals of not more than 12 months, a brief report with respect to any of the following events which may have occurred within the previous 12 months (but if no such event has occurred within such period no report need be transmitted):—

(1) any change to its eligibility and its qualifications under section 310;

(2) the creation of or any material change to a relationship specified in paragraph (1)[1] through (10) of section 310(b);

(3) the character and amount of any advances made by it, as indenture trustee, which remain unpaid on the date of such report, and for the reimbursement of which it claims or may claim a lien or charge, prior to that of the indenture securities, on the trust estate or on property or funds held or collected by it as such trustee, if such advances so remaining unpaid aggregate more than one-half of 1 per centum of the principal amount of the indenture securities outstanding on such date;

(4) any change to the amount, interest rate, and maturity date of all other indebtedness owing to it in its individual capacity, on the date of such report, by the obligor upon the indenture securities, with a brief description of any property held as collateral security therefor, except an indebtedness based upon a creditor relationship arising in any manner described in paragraphs (2), (3), (4), or (6) of subsection 311[2];

(5) any change to the property and funds physically in its possession as indenture trustee on the date of such report;

(6) any release, or release and substitution, of property subject to the lien of the indenture (and the consideration therefor, if any) which it has not previously reported;

(7) any additional issue of indenture securities which it has not previously reported; and

(8) any action taken by it in the performance of its duties under the indenture which it has not previously reported and which in its opinion materially affects the indenture securities or the trust estate, except action in respect of a default, notice of which has been or is to be withheld by it in accordance with an indenture provision authorized by subsection (b) of section 315.

(b) The indenture trustee shall transmit to the indenture security holders as hereinafter provided, within the times hereinafter specified, a brief report with respect to—

(1) the release, or release and substitution, of property subject to the lien of the indenture (and the consideration therefor, if any) unless the fair value of such property, as set

[1]So in law. Probably should be "paragraphs".
[2]So in law. Probably should read "subsection (b) of section 311".

forth in the certificate or opinion required by paragraph (1) of subsection (d) of section 314, is less than 10 per centum of the principal amount of indenture securities outstanding at the time of such release, or such release and substitution, such report to be so transmitted within 90 days after such time; and

(2) the character and amount of any advances made by it as such since the date of the last report transmitted pursuant to the provisions of subsection (a) (or if no such report has yet been so transmitted, since the date of execution of the indenture), for the reimbursement of which it claims or may claim a lien or charge, prior to that of the indenture securities, on the trust estate or on property or funds held or collected by it as such trustee, and which it has not previously reported pursuant to this paragraph, if such advances remaining unpaid at any time aggregate more than 10 per centum of the principal amount of indenture securities outstanding at such time, such report to be so transmitted within 90 days after such time.

(c) Reports pursuant to this section shall be transmitted by mail—

(1) to all registered holders of indenture securities, as the names and addresses of such holders appear upon the registration books of the obligor upon the indenture securities;

(2) to such holders of indenture securities as have, within the two years preceding such transmission, filed their names and addresses with the indenture trustee for that purpose; and

(3) except in the case of reports pursuant to subsection (b) of this section, to all holders of indenture securities whose names and addresses have been furnished to or received by the indenture trustee pursuant to section 312.

(d) A copy of each such report shall, at the time of such transmission to indenture security holders, be filed with each stock exchange upon which the indenture securities are listed, and also with the Commission.

(May 27, 1933, ch. 38, title III, Sec. 313, as added Aug. 3, 1939, ch. 411, 53 Stat. 1165; amended Pub. L. 101-550, title IV, Sec. 411, 412, Nov. 15, 1990, 104 Stat. 2729; Pub. L. 105-353, title III, Sec. 301(e)(3), Nov. 3, 1998, 112 Stat. 3237.)

REPORTS BY OBLIGOR; EVIDENCE OF COMPLIANCE WITH INDENTURE PROVISIONS

SEC. 314. Periodic Reports

(a) Each person who, as set forth in the registration statement or application, is or is to be an obligor upon the indenture securities covered thereby shall—

(1) file with the indenture trustee copies of the annual reports and of the information, documents, and other reports (or copies of such portions of any of the foregoing as the Commission may by rules and regulations prescribe) which such obligor is required to file with the Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934; or, if the obligor is not required to file information, documents, or reports pursuant to either of such sections, then to file with

the indenture trustee and the Commission, in accordance with rules and regulations prescribed by the Commission, such of the supplementary and periodic information, documents, and reports which may be required pursuant to section 13 of the Securities Exchange Act of 1934, in respect of a security listed and registered on a national securities exchange as may be prescribed in such rules and regulations;

(2) file with the indenture trustee and the Commission, in accordance with rules and regulations prescribed by the Commission, such additional information, documents, and reports with respect to compliance by such obligor with the conditions and covenants provided for in the indenture, as may be required by such rules and regulations, including, in the case of annual reports, if required by such rules and regulations, certificates or opinions of independent public accountants, conforming to the requirements of subsection (e) of this section, as to compliance with conditions or covenants, compliance with which is subject to verification by accountants, but no such certificate or opinion shall be required as to any matter specified in clauses (A), (B), or (C) of paragraph (3) of subsection (c);

(3) transmit to the holders of the indenture securities upon which such person is an obligor, in the manner and to the extent provided in subsection (c) of section 313, such summaries of any information, documents, and reports required to be filed by such obligor pursuant to the provisions of paragraph (1) or (2) of this subsection as may be required by rules and regulations prescribed by the Commission; and

(4) furnish to the indenture trustee, not less often than annually, a brief certificate from the principal executive officer, principal financial officer or principal accounting officer as to his or her knowledge of such obligor's compliance with all conditions and covenants under the indenture. For purposes of this paragraph, such compliance shall be determined without regard to any period of grace or requirement of notice provided under the indenture.

The rules and regulations prescribed under this subsection shall be such as are necessary or appropriate in the public interest or for the protection of investors, having due regard to the types of indentures, and the nature of the business of the class of obligors affected thereby, and the amount of indenture securities outstanding under such indentures, and, in the case of any such rules and regulations prescribed after the indentures to which they apply have been qualified under this title, the additional expense, if any, of complying with such rules and regulations. Such rules and regulations may be prescribed either before or after qualification becomes effective as to any such indenture.

Evidence of Recording of Indenture

(b) If the indenture to be qualified is or is to be secured by the mortgage or pledge of property, the obligor upon the indenture securities shall furnish to the indenture trustee—

(1) promptly after the execution and delivery of the indenture, an opinion of counsel (who may be of counsel for such obligor) either stating that in the opinion of such counsel the indenture has been properly recorded and filed so as to make ef-

fective the lien intended to be created thereby, and reciting the details of such action, or stating that in the opinion of such counsel no such action is necessary to make such lien effective; and

(2) at least annually after the execution and delivery of the indenture, an opinion of counsel (who may be of counsel for such obligor) either stating that in the opinion of such counsel such action has been taken with respect to the recording, filing, rerecording, and refiling of the indenture as is necessary to maintain the lien of such indenture, and reciting the details of such action, or stating that in the opinion of such counsel no such action is necessary to maintain such lien.

Evidence of Compliance With Conditions Precedent

(c) The obligor upon the indenture securities shall furnish to the indenture trustee evidence of compliance with the conditions precedent, if any, provided for in the indenture (including any covenants compliance with which constitutes a condition precedent) which relate to the authentication and delivery of the indenture securities, to the release or the release and substitution of property subject to the lien of the indenture, to the satisfaction and discharge of the indenture, or to any other action to be taken by the indenture trustee at the request or upon the application of such obligor. Such evidence shall consist of the following:

(1) certificates or opinions made by officers of such obligor who are specified in the indenture, stating that such conditions precedent have been complied with;

(2) an opinion of counsel (who may be of counsel for such obligor) stating that in his opinion such conditions precedent have been complied with; and

(3) in the case of conditions precedent compliance with which is subject to verification by accountants (such as conditions with respect to the preservation of specified ratios, the amount of net quick assets, negative-pledge clauses, and other similar specific conditions), a certificate or opinion of an accountant, who, in the case of any such conditions precedent to the authentication and delivery of indenture securities, and not otherwise, shall be an independent public accountant selected or approved by the indenture trustee in the exercise of reasonable care, if the aggregate principal amount of such indenture securities and of other indenture securities authenticated and delivered since the commencement of the then current calendar year (other than those with respect to which a certificate or opinion of an accountant is not required, or with respect to which a certificate or opinion of an independent public accountant has previously been furnished) is 10 per centum or more of the aggregate amount of the indenture securities at the time outstanding; but no certificate or opinion need be made by any person other than an officer or employee of such obligor who is specified in the indenture, as to (A) dates or periods not covered by annual reports required to be filed by the obligor, in the case of conditions precedent which depend upon a state of facts as of a date or dates or for a period or periods different from that required to be covered by such annual reports, or (B) the amount and value of property additions, except as provided

in paragraph (3) of subsection (d), or (C) the adequacy of depreciation, maintenance, or repairs.

Certificates of Fair Value

(d) If the indenture to be qualified is or is to be secured by the mortgage or pledge of property or securities, the obligor upon the indenture securities shall furnish to the indenture trustee a certificate or opinion of an engineer, appraiser, or other expert as to the fair value—

(1) of any property or securities to be released from the lien of the indenture, which certificate or opinion shall state that in the opinion of the person making the same the proposed release will not impair the security under such indenture in contravention of the provisions thereof, and requiring further that such certificate or opinion shall be made by an independent engineer, appraiser, or other expert, if the fair value of such property or securities and of all other property or securities released since the commencement of the then current calendar year, as set forth in the certificates or opinions required by this paragraph, is 10 per centum or more of the aggregate principal amount of the indenture securities at the time outstanding; but such a certificate or opinion of an independent engineer, appraiser, or other expert shall not be required in the case of any release of property or securities, if the fair value thereof as set forth in the certificate or opinion required by this paragraph is less than $25,000 or less than 1 per centum of the aggregate principal amount of the indenture securities at the time outstanding;

(2) to such obligor of any securities (other than indenture securities and securities secured by a lien prior to the lien of the indenture upon property subject to the lien of the indenture), the deposit of which with the trustee is to be made the basis for the authentication and delivery of indenture securities, the withdrawal of cash constituting a part of the trust estate or the release of property or securities subject to the lien of the indenture, and requiring further that if the fair value to such obligor of such securities and of all other such securities made the basis of any such authentication and delivery, withdrawal, or release since the commencement of the then current calendar year, as set forth in the certificates or opinions required by this paragraph, is 10 per centum or more of the aggregate principal amount of the indenture securities at the time outstanding, such certificate or opinion shall be made by an independent engineer, appraiser, or other expert and, in the case of the authentication and delivery of indenture securities, shall cover the fair value to such obligor of all other such securities so deposited since the commencement of the current calendar year as to which a certificate or opinion of an independent engineer, appraiser, or other expert has not previously been furnished; but such a certificate of an independent engineer, appraiser, or other expert shall not be required with respect to any securities so deposited, if the fair value thereof to such obligor as set forth in the certificate or opinion required by this paragraph is less than $25,000 or less than 1 per cen-

tum of the aggregate principal amount of the indenture securities at the time outstanding; and

(3) to such obligor of any property the subjection of which to the lien of the indenture is to be made the basis for the authentication and delivery of indenture securities, the withdrawal of cash constituting a part of the trust estate, or the release of property or securities subject to the lien of the indenture, and requiring further that if—

(A) within six months prior to the date of acquisition thereof by such obligor, such property has been used or operated, by a person or persons other than such obligor, in a business similar to that in which it has been or is to be used or operated by such obligor, and

(B) the fair value to such obligor of such property as set forth in such certificate or opinion is not less than $25,000 and not less than 1 per centum of the aggregate principal amount of the indenture securities at the time outstanding,

such certificate or opinion shall be made by an independent engineer, appraiser, or other expert and, in the case of the authentication and delivery of indenture securities, shall cover the fair value to the obligor of any property so used or operated which has been so subjected to the lien of the indenture since the commencement of the then current calendar year, and as to which a certificate or opinion of an independent engineer, appraiser, or other expert has not previously been furnished. The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that such provision is excluded) to provide that any such certificate or opinion may be made by an officer or employee of the obligor upon the indenture securities who is duly authorized to make such certificate or opinion by the obligor from time to time, except in cases in which this subsection requires that such certificate or opinion be made by an independent person. In such cases, such certificate or opinion shall be made by an independent engineer, appraiser, or other expert selected or approved by the indenture trustee in the exercise of reasonable care.

Recitals as to Basis of Certificate or Opinion

(e) Each certificate or opinion with respect to compliance with a condition or covenant provided for in the indenture (other than certificates provided pursuant to subsection (a)(4) of this section) shall include (1) a statement that the person making such certificate or opinion has read such covenant or condition; (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based; (3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and (4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.

Parties May Provide for Additional Evidence

(f) Nothing in this section shall be construed either as requiring the inclusion in the indenture to be qualified of provisions that the obligor upon the indenture securities shall furnish to the inden-

ture trustee any other evidence of compliance with the conditions and covenants provided for in the indenture than the evidence specified in this section, or as preventing the inclusion of such provisions in such indenture, if the parties so agree.

(May 27, 1933, ch. 38, title III, Sec. 314, as added Aug. 3, 1939, ch. 411, 53 Stat. 1167; amended Pub. L. 101-550, title IV, Sec. 413, Nov. 15, 1990, 104 Stat. 2729.)

DUTIES AND RESPONSIBILITY OF THE TRUSTEE

SEC. 315. Duties Prior to Default

(a) The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to provide that, prior to default (as such term is defined in such indenture)—

(1) the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture; and

(2) the indenture trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, in the absence of bad faith on the part of such trustee, upon certificates or opinions conforming to the requirements of the indenture;

but the indenture trustee shall examine the evidence furnished to it pursuant to section 314 to determine whether or not such evidence conforms to the requirements of the indenture.

Notice of Defaults

(b) The indenture trustee shall give to the indenture security holders, in the manner and to the extent provided in subsection (c) of section 313, notice of all defaults known to the trustee, within ninety days after the occurrence thereof: Provided, That such indenture shall automatically be deemed (unless it is expressly provided therein that such provision is excluded) to provide that, except in the case of default in the payment of the principal of or interest on any indenture security, or in the payment of any sinking or purchase fund installment, the trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee, or a trust committee of directors and/or responsible officers, of the trustee in good faith determine that the withholding of such notice is in the interests of the indenture security holders.

Duties of the Trustee in Case of Default

(c) The indenture trustee shall exercise in case of default (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

Responsibility of the Trustee

(d) The indenture to be qualified shall not contain any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that—

(1) such indenture shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain the provisions authorized by paragraphs (1) and (2) of subsection (a) of this section;

(2) such indenture shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions protecting the indenture trustee from liability for any error of judgment made in good faith by a responsible officer or officers of such trustee, unless it shall be proved that such trustee was negligent in ascertaining the pertinent facts; and

(3) such indenture shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions protecting the indenture trustee with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of not less than a majority in principal amount of the indenture securities at the time outstanding (determined as provided in subsection (a) of section 316) relating to the time, method, and place of conducting any proceeding for any remedy available to such trustee, or exercising any trust or power conferred upon such trustee, under such indenture.

Undertaking for Costs

(e) The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant: Provided, That the provisions of this subsection shall not apply to any suit instituted by such trustee, to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per centum in principal amount of the indenture securities outstanding, or to any suit instituted by any indenture security holder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

(May 27, 1933, ch. 38, title III, Sec. 315, as added Aug. 3, 1939, ch. 411, 53 Stat. 1171; amended Pub. L. 101-550, title IV, Sec. 414, Nov. 15, 1990, 104 Stat. 2730.)

DIRECTIONS AND WAIVERS BY BONDHOLDERS; PROHIBITION OF IMPAIRMENT OF HOLDER'S RIGHT TO PAYMENT

SEC. 316. (a) The indenture to be qualified—

(1) shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions authorizing the holders of not less than a majority in principal amount of the indenture securities or if expressly specified in such indenture, of any series of securities at the time outstanding (A) to direct the time, method, and place of conducting any proceeding for any remedy available to such trustee, or exercising any trust or power conferred upon such trustee, under such indenture, or (B) on behalf of the holders of all such indenture securities, to consent to the waiver of any past default and its consequences; or

(2) may contain provisions authorizing the holders of not less than 75 per centum in principal amount of the indenture securities or if expressly specified in such indenture, of any series of securities at the time outstanding to consent on behalf of the holders of all such indenture securities to the postponement of any interest payment for a period not exceeding three years from its due date.

For the purposes of this subsection and paragraph (3) of subsection (d) of section 315, in determining whether the holders of the required principal amount of indenture securities have concurred in any such direction or consent, indenture securities owned by any obligor upon the indenture securities, or by any person directly or indirectly controlling or controlled by or under direct or indirect common control with any such obligor, shall be disregarded, except that for the purposes of determining whether the indenture trustee shall be protected in relying on any such direction or consent, only indenture securities which such trustee knows are so owned shall be so disregarded.

(b) Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a), and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.

(c) The obligor upon any indenture qualified under this title may set a record date for purposes of determining the identity of indenture security holders entitled to vote or consent to any action by vote or consent authorized or permitted by subsection (a) of this section. Unless the indenture provides otherwise, such record date shall be the later of 30 days prior to the first solicitation of such consent or the date of the most recent list of holders furnished to the trustee pursuant to section 312 of this title prior to such solicitation.

(May 27, 1933, ch. 38, title III, Sec. 316, as added Aug. 3, 1939, ch. 411, 53 Stat. 1172; amended Pub. L. 101-550, title IV, Sec. 415, Nov. 15, 1990, 104 Stat. 2731.)

SPECIAL POWERS OF TRUSTEE; DUTIES OF PAYING AGENTS

SEC. 317. (a) The indenture trustee shall be authorized—

(1) in the case of a default in payment of the principal of any indenture security, when and as the same shall become due and payable, or in the case of a default in payment of the interest on any such security, when and as the same shall become due and payable and the continuance of such default for such period as may be prescribed in such indenture, to recover judgment, in its own name and as trustee of an express trust, against the obligor upon the indenture securities for the whole amount of such principal and interest remaining unpaid; and

(2) to file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of such trustee and of the indenture security holders allowed in any judicial proceedings relative to the obligor upon the indenture securities, its creditors, or its property.

(b) Each paying agent shall hold in trust for the benefit of the indenture security holders or the indenture trustee all sums held by such paying agent for the payment of the principal of or interest on the indenture securities, and shall give to such trustee notice of any default by any obligor upon the indenture securities in the making of any such payment.

(May 27, 1933, ch. 38, title III, Sec. 317, as added Aug. 3, 1939, ch. 411, 53 Stat. 1173; amended Pub. L. 101-550, title IV, Sec. 416, Nov. 15, 1990, 104 Stat. 2731; Pub. L. 111-203, title IX, Sec. 985(c)(2), July 21, 2010, 124 Stat. 1934.)

EFFECT OF PRESCRIBED INDENTURE PROVISIONS

SEC. 318. (a) If any provision of the indenture to be qualified limits, qualifies, or conflicts with the duties imposed by operation of subsection (c) of this section, the imposed duties shall control.

(b) The indenture to be qualified may contain, in addition to provisions specifically authorized under this title to be included therein, any other provisions the inclusion of which is not in contravention of any provision of this title.

(c) The provisions of sections 310 to and including 317 that impose duties on any person (including provisions automatically deemed included in an indenture unless the indenture provides that such provisions are excluded) are a part of and govern every qualified indenture, whether or not physically contained therein, shall be deemed retroactively to govern each indenture heretofore qualified, and prospectively to govern each indenture hereafter qualified under this title and shall be deemed retroactively to amend and supersede inconsistent provisions in each such indenture heretofore qualified. The foregoing provisions of this subsection shall not be deemed to effect the inclusion (by retroactive

amendment or otherwise) in the text of any indenture heretofore qualified of any of the optional provisions contemplated by section 310(b)(1), 311(b), 314(d), 315(a), 315(b), 315(d), 315(e), or 316(a)(1).

(May 27, 1933, ch. 38, title III, Sec. 318, as added Aug. 3, 1939, ch. 411, 53 Stat. 1173; amended Pub. L. 101-550, title IV, Sec. 417, Nov. 15, 1990, 104 Stat. 2731.)

RULES, REGULATIONS, AND ORDERS

SEC. 319. (a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as it may deem necessary or appropriate in the public interest or for the protection of investors to carry out the provisions of this title, including rules and regulations defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, (1) by rules and regulations, to prescribe for the purposes of section 310(b) the method (to be fixed in indentures to be qualified under this title) of calculating percentages of voting securities and other securities; (2) by rules and regulations, to prescribe the definitions of the terms "cash transaction" and "self- liquidating paper" which shall be included in indentures to be qualified under this title, which definitions shall include such of the creditor relationships referred to in paragraphs (4) and (6) of subsection (b) of section 311 as to which the Commission determines that the application of subsection (a) of such section is not necessary in the public interest or for the protection of investors, having due regard for the purposes of such subsection; and (3) for the purposes of this title, to prescribe the form or forms in which information required in any statement, application, report, or other document filed with the Commission shall be set forth. For the purpose of its rules or regulations the Commission may classify persons, securities, indentures, and other matters within its jurisdiction and prescribe different requirements for different classes of persons, securities, indentures, or matters.

(b) Subject to the provisions of chapter 15 of title 44, United States Code, and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this title shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided in such rules and regulations.

(c) No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(May 27, 1933, ch. 38, title III, Sec. 319, as added Aug. 3, 1939, ch. 411, 53 Stat. 1173; Pub. L. 105-353, title III, Sec. 301(e)(4), Nov. 3, 1998, 112 Stat. 3237.)

HEARINGS BY COMMISSION

SEC. 320. Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

(May 27, 1933, ch. 38, title III, Sec. 320, as added Aug. 3, 1939, ch. 411, 53 Stat. 1174.)

SPECIAL POWERS OF THE COMMISSION

SEC. 321. (a) For the purpose of any investigation or any other proceeding which, in the opinion of the Commission, is necessary and proper for the enforcement of this title, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such books, papers, correspondence, memoranda, contracts, agreements, or other records may be required from any place in the United States or in any Territory at any designated place of investigation or hearing. In addition, the Commission shall have the powers with respect to investigations and hearings, and with respect to the enforcement of, and offenses and violations under, this title and rules and regulations and orders prescribed under the authority thereof, provided in sections 20, 22(b), and 22(c) of the Securities Act of 1933.

(b) The Treasury Department, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Reserve Banks, and the Federal Deposit Insurance Corporation are hereby authorized, under such conditions as they may prescribe, to make available to the Commission such reports, records, or other information as they may have available with respect to trustees or prospective trustees under indentures qualified or to be qualified under this title, and to make through their examiners or other employees for the use of the Commission, examinations of such trustees or prospective trustees. Every such trustee or prospective trustee shall, as a condition precedent to qualification of such indenture, consent that reports of examinations by Federal, State, Territorial, or District authorities may be furnished by such authorities to the Commission upon request therefor.

Notwithstanding any provision of this title, no report, record, or other information made available to the Commission under this subsection, no report of an examination made under this subsection for the use of the Commission, no report of an examination made of any trustee or prospective trustee by any Federal, State, Territorial, or District authority having jurisdiction to examine or supervise such trustee, no report made by any such trustee or prospective trustee to any such authority, and no correspondence between any such authority and any such trustee or prospective trustee, shall be divulged or made known or available by the Commission

or any member, officer, agent, or employee thereof, to any person other than a member, officer, agent, or employee of the Commission: Provided, That the Commission may make available to the Attorney General of the United States, in confidence, any information obtained from such records, reports of examination, other reports, or correspondence, and deemed necessary by the Commission, or requested by him, for the purpose of enabling him to perform his duties under this title.

(c) Any investigation of a prospective trustee, or any proceeding or requirement for the purpose of obtaining information regarding a prospective trustee, under any provision of this title, shall be limited—

(1) to determining whether such prospective trustee is qualified to act as trustee under the provisions of subsection (b) of section 310;

(2) to requiring the inclusion in the registration statement or application of information with respect to the eligibility of such prospective trustee under paragraph (1) of subsection (a) of such section 310; and

(3) to requiring the inclusion in the registration statement or application of the most recent published report of condition of such prospective trustee, as described in paragraph (2) of such subsection (a), or, if the indenture does not contain the provision with respect to combined capital and surplus authorized by the last sentence of paragraph (2) of subsection (a) of such section 310, to determining whether such prospective trustee is eligible to act as such under such paragraph (2).

(d) The provisions section 4(b)) of the Securities Exchange Act of 1934 shall be applicable with respect to the power of the Commission—

(1) to appoint and fix the compensation of such employees as may be necessary for carrying out its functions under this title, and

(2) to lease and allocate such real property as may be necessary for carrying out its functions under this title.

(May 27, 1933, ch. 38, title III, Sec. 321, as added Aug. 3, 1939, ch. 411, 53 Stat. 1174; amended Pub. L. 101-550, title I, Sec. 104(b), Nov. 15, 1990, 104 Stat. 2714.)

COURT REVIEW OF ORDERS; JURISDICTION OF OFFENSES AND SUITS

SEC. 322. (a) Orders of the Commission under this title (including orders pursuant to the provisions of sections 305(b) and 307(c)) shall be subject to review in the same manner, upon the same conditions, and to the same extent, as provided in section 9 of the Securities Act of 1933, with respect to orders of the Commission under such Act.

(b) Jurisdiction of offenses and violations under, and jurisdiction and venue of suits and actions brought to enforce any liability or duty created by, this title, or any rules or regulations or orders prescribed under the authority thereof, shall be as provided in section 22(a) of the Securities Act of 1933.

(May 27, 1933, ch. 38, title III, Sec. 322, as added Aug. 3, 1939, ch. 411, 53 Stat. 1175; amended Pub. L. 101-550, title IV, Sec. 418, Nov. 15, 1990, 104 Stat. 2732.)

LIABILITY FOR MISLEADING STATEMENTS

SEC. 323. (a) Any person who shall make or cause to be made any statement in any application, report, or document filed with the Commission pursuant to any provisions of this title, or any rule, regulation, or order thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who shall omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall be liable to any person (not knowing that such statement was false or misleading or of such omission) who, in reliance upon such statement or omission, shall have purchased or sold a security issued under the indenture to which such application, report, or document relates, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading or of such omission. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense. No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

(b) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist under the Securities Act of 1933 or the Securities Exchange Act of 1934, or otherwise at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

(May 27, 1933, ch. 38, title III, Sec. 323, as added Aug. 3, 1939, ch. 411, 53 Stat. 1176; amended Pub. L. 111-203, title IX, Sec. 986(b)(5), July 21, 2010, 124 Stat. 1936.)

UNLAWFUL REPRESENTATIONS

SEC. 324. It shall be unlawful for any person in offering, selling, or issuing any security to represent or imply in any manner whatsoever that any action or failure to act by the Commission in the administration of this title means that the Commission has in any way passed upon the merits of, or given approval to, any trustee, indenture or security, or any transaction or transactions therein, or that any such action or failure to act with regard to any

statement or report filed with or examined by the Commission pursuant to this title or any rule, regulation, or order thereunder, has the effect of a finding by the Commission that such statement or report is true and accurate on its face or that it is not false or misleading.

(May 27, 1933, ch. 38, title III, Sec. 324, as added Aug. 3, 1939, ch. 411, 53 Stat. 1176; amended Aug. 10, 1954, ch. 667, title III, Sec. 305, 68 Stat. 688.)

PENALTIES

SEC. 325. Any person who willfully violates any provision of this title or any rule, regulation, or order thereunder, or any person who willfully, in any application, report, or document filed or required to be filed under the provisions of this title or any rule, regulation, or order thereunder, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.

(May 27, 1933, ch. 38, title III, Sec. 325, as added Aug. 3, 1939, ch. 411, 53 Stat. 1177; amended Pub. L. 94-29, Sec. 27(d), June 4, 1975, 89 Stat. 163.)

EFFECT ON EXISTING LAW

SEC. 326. Except as otherwise expressly provided, nothing in this title shall affect (1) the jurisdiction of the Commission under the Securities Act of 1933 or the Securities Exchange Act of 1934, over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such Acts; nor shall anything in this title affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person or security, insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation, or order thereunder.

(May 27, 1933, ch. 38, title III, Sec. 326, as added Aug. 3, 1939, ch. 411, 53 Stat. 1177; amended Pub. L. 111-203, title IX, Sec. 986(b)(6), July 21, 2010, 124 Stat. 1936.)

CONTRARY STIPULATIONS VOID

SEC. 327. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(May 27, 1933, ch. 38, title III, Sec. 327, as added Aug. 3, 1939, ch. 411, 53 Stat. 1177.)

SEPARABILITY OF PROVISIONS

SEC. 328. If any provision of this title or the application of such provision to any person or circumstance shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

(May 27, 1933, ch. 38, title III, Sec. 328, as added Aug. 3, 1939, ch. 411, 53 Stat. 1177.)

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 30 - PREFERRED STOCK

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the public offering of preferred stock is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 ~~CONDITIONS. A public offering of preferred stock may be disallowed if the issuer's adjusted net earnings for the last fiscal year or its average adjusted net earnings for the last three fiscal years prior to the public offering were insufficient to pay its fixed charges and preferred stock dividends, whether or not accrued, and to meet the redemption requirements, if applicable, of the preferred stock being offered.~~GROUNDS FOR DENIAL OF SECURITIES REGISTRATION RELATING TO PAYMENT ABILITY. The Director may deny the offer or sale of preferred stock based on the issuer's adjusted net earnings or a cash analysis. The issuer must have enough cash to pay the dividend, if any, on the preferred stock being offered, whether or not declared.

002.01 The Director may deny the offer and sale of preferred stock if either the issuer's adjusted net earnings for its last fiscal year or the issuer's average adjusted net earnings for its last three fiscal years were insufficient to pay the issuer's:

002.01A Fixed charges;

002.01B Preferred stock dividends, whether or not accrued; and

002.01C The redemption requirements, if any, of the preferred stock being offered to investors.

002.02 The Director may deny the offer or sale of preferred stock unless the issuer's statement of cash flows shows that net cash provided by operating activities was positive for the issuer's last fiscal year.

002.02A The Director may require the issuer to submit a financial statement that is presented in conformity with generally accepted accounting principles and demonstrates that the issuer had an average positive net cash provided by operating activities for the last three fiscal years.

002.03 This Section shall not apply to public offerings of:

002.03A Convertible preferred stock that ranks ahead of any convertible debt relating to payment of dividends, interest, and liquidation proceeds; or

002.03B Preferred stock that is, or may be, legally or beneficially, directly or indirectly, owned by promoters.

003 ~~CONVERTIBLE PREFERRED STOCK. The Director, in his or her discretion, may choose to not apply this Rule to public offerings of convertible preferred stock that are superior in right to payment of dividends, interest, and liquidation proceeds to any convertible debt and preferred stock that are, or may be, legally or beneficially, directly or indirectly, owned by promoters, provided:~~ GROUNDS FOR DENIAL OF SECURITIES REGISTRATION RELATING TO SHAREHOLDER APPROVAL. The Director may deny the offer or sale of equity securities if the issuer's articles of incorporation authorize the board of directors to issue preferred stock without a vote by the common shareholders.

003.01 ~~The risks of failure to declare or pay dividends and the equity characteristics of the convertible preferred stock must be disclosed in the prospectus; and~~ This Section shall not apply to public offerings if:

003.01A The offering document states that the issuer will not offer preferred stock to promoters except on the same terms as it is offered to all other existing or new shareholders; or

003.01B A majority of the issuer's independent directors that do not have an interest in the transaction:

003.01B1 Approve any offering of preferred stock; and

003.01B2 Have access, at the issuer's expense, to issuer's legal counsel or independent counsel.

~~003.02 An offering of such securities is reviewed by using the Rules for equity offerings in 48 NAC 21 through 28 and 48 NAC 31 as applicable.~~

004 ~~REDEMPTION REQUIREMENTS. If the issuer's net earnings are subject to cyclical fluctuations or if the Director deems it necessary for investor protection, the Director may require that the issuer establish redemption requirements.~~ DISCLOSURE REQUIREMENTS. The issuer's offering document relating to an offering of preferred stock must disclose:

004.01 Whether dividends on the preferred stock are cumulative;

004.02 The risks of failure to declare or pay dividends on the preferred stock; and

004.03 The equity characteristics of any convertible preferred stock being offered to investors.

~~005 EQUITY SECURITIES. A public offering of equity securities may be dissallowed by the Director if the issuer's articles of incorporation authorize its board of directors to issue preferred stock in the future without a vote of the common shareholders unless:~~

~~005.01 The issuer represents in its prospectus or offering document that it will not offer preferred stock to promoters except on the same terms as it is offered to all other existing shareholders or to new shareholders; or~~

~~005.02 The issuance of preferred stock is approved by a majority of the issuer's independent directors who do not have an interest in the transaction and who have access, at the issuer's expense, to issuer's or independent legal counsel.~~

~~006~~ 0075 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING & FINANCE

CHAPTER 32 - REAL ESTATE INVESTMENT TRUSTS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Director has determined that this Rule relating to qualification and registration of Real Estate Investment Trusts ~~(REITs)~~ is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes referenced herein shall mean those statutes as amended on or before the effective date of this Rule. A copy of the statutes referenced in this Rule is attached hereto.

002 DEFINITIONS. The following definitions, in addition to definitions contained in 48 NAC 2, shall apply to this Rule:

002.01 Real Estate Investment Trust ("REIT") means a corporation, trust, association or other legal entity, other than a real estate syndication, which is engaged primarily in investing in equity interests in real estate, including fee ownership and leasehold interests, or in loans secured by real estate, or both.

~~002.01~~ 002.02 Acquisition expenses means expenses related to selection and acquisition of properties, whether or not acquired, including, but not limited to, legal fees and expenses, travel and communications expenses, costs of appraisals, nonrefundable option payments on property not acquired, accounting fees and expenses, title insurance, and miscellaneous expenses.

~~002.02~~ 002.03 Acquisition fee means the total of all fees and commissions paid by any party to any party in connection with making or investing in mortgage loans or the purchase, development or construction of property by a REIT.

~~002.02A~~ 002.03A Acquisition fee includes any real estate commission, selection fee, development fee, construction fee, nonrecurring management fee, loan fees or points or any fee of a similar nature, however designated.

~~002.02B~~ 002.03B Acquisition fee shall not include development fees and construction fees paid to persons not affiliated with the sponsor in connection with the actual development and construction of a project.

~~002.03~~ 002.04 Adviser means the person responsible for directing or performing the day-to-day business affairs of a REIT, including a person to which an adviser subcontracts substantially all such functions.

~~002.04~~ 002.05 Average invested assets means the average of the aggregate book value of the assets of the trust invested, directly or indirectly, in equity interests in and loans secured by real estate, before reserves for depreciation or bad debts or other similar non-cash reserves, for any period, computed by taking the average of such values at the end of each month during such period.

~~002.05~~ 002.06 Competitive real estate commission means a real estate or brokerage commission paid for the purchase or sale of a property which is reasonable, customary and competitive in light of the size, type and location of such property.

~~002.06~~ 002.07 Contract price for the property means the amount actually paid or allocated to the purchase, development, construction or improvement of a property exclusive of acquisition fees and acquisition expenses.

~~002.07~~ 002.08 Construction fee means a fee or other remuneration for acting as general contractor and/or construction manager to construct improvements, supervise and coordinate projects or to provide major repairs or rehabilitation on property owned by the REIT.

~~002.08~~ 002.09 Cross Reference Sheet means a compilation of the provisions of this Rule, referenced to the page of the prospectus and declaration of trust, or other exhibits, and justification for any deviation from the Rule.

~~002.09~~ 002.10 Declaration of trust means the declaration of trust, by-laws, certificate, articles of incorporation or other governing instrument pursuant to which a REIT is organized.

~~002.10~~ 002.11 Development fee means a fee for the packaging of a REIT's property, including negotiating and approving plans, and undertaking to assist in obtaining zoning and necessary variances and necessary financing for the specific property, either initially or at a later date.

~~002.11~~ 002.12 Independent expert means a person with no material current or prior business or personal relationship with the adviser or trustee who is engaged to a substantial extent in the business of rendering opinions regarding the value of assets of the type held by the REIT.

~~002.12~~ 002.13 Independent trustee means a trustee of a REIT who is not associated and has not been associated within the last two years, directly or indirectly, with the sponsor or adviser of the REIT.

~~002.12A~~ 002.13A A trustee shall be deemed to be associated with the sponsor or adviser if he or she:

~~002.12A1~~ 002.13A1 Owns an interest in the sponsor, adviser, or any ~~of their affiliates~~ affiliate thereof;

~~002.12A2~~ 002.13A2 Is employed by the sponsor, adviser or any ~~of their affiliates~~ affiliate thereof;

~~002.12A3~~ 002.13A3 Is an officer or director of the sponsor, adviser, or any ~~of their affiliates~~ affiliate thereof;

~~002.12A4~~ 002.13A4 Performs services, other than as a trustee, for the REIT;

~~002.12A5~~ 002.13A5 Is a trustee for more than three REITs organized by the sponsor or advised by the adviser; or

~~002.12A6~~ 002.13A6 Has any material business or professional relationship with the sponsor, adviser, or any ~~of their affiliates~~ affiliate thereof.

~~002.12B~~ 002.13B For purposes of determining whether or not the business or professional relationship is material, the gross revenue derived by the prospective independent trustee from the sponsor and adviser and affiliates shall be deemed material per se if it exceeds five percent ~~(5%)~~ of the prospective independent trustee's:

~~002.12B1~~ 002.13B1 Annual gross revenue, derived from all sources, during either of the last two years; or

~~002.12B2~~ 002.13B2 Net worth, on a fair market value basis.

~~002.12C~~ 002.13C An indirect relationship shall include circumstances in which a trustee's spouse, parent, child, sibling, mother- or father-in-law, son- or daughter-in-law, or brother- or sister-in-law is, or has been associated with the sponsor, adviser, any of their affiliates, or the REIT.

~~002.13~~ 002.14 Initial investment means that portion of the initial capitalization of the REIT contributed by the sponsor or its affiliates pursuant to Section 003.01 of this Rule.

~~002.14~~ 002.15 Leverage means the aggregate amount of indebtedness of a REIT for money borrowed, including purchase money mortgage loans, outstanding at any time, both secured and unsecured.

~~002.15~~ 002.16 Net assets means the total assets, other than intangibles, at cost before deducting depreciation or other non-cash reserves less total liabilities, calculated at least quarterly on a basis consistently applied.

~~002.16~~ 002.17 Net income means total revenues applicable to such period, less the expenses applicable to ~~any~~ such period other than additions to reserves for depreciation or bad debts or other similar non-cash reserves. If the adviser receives an incentive fee, net income, for purposes of calculating total operating expenses in Section 005.04, below, shall exclude the gain from the sale of the REIT's assets.

~~002.17~~ 002.18 Organizational and offering expenses means all expenses incurred by, and to be paid from, the assets of the REIT in connection with preparing a REIT for registration and subsequently offering and distributing it to the public, including, but not limited to:

~~002.17A~~ 002.18A Total underwriting and brokerage discounts and commissions, including fees of the underwriters' attorneys;

~~002.17B~~ 002.18B Expenses for printing, engraving, and mailing;

~~002.17C~~ 002.18C Salaries of employees while engaged in sales activity;

~~002.17D~~ 002.18D Charges of transfer agents, registrars, trustees, escrow holders, depositories, and experts;

~~002.17E~~ 002.18E Expenses of qualification of the sale of the securities under federal and state laws, including taxes and fees; and

~~002.17F~~ 002.18F Accountants' and attorneys' fees.

~~002.18~~ 002.19 Prospectus shall have the meaning given to that term by Section 2(10) of the Securities Act of 1933, 15 U.S.C. § 77b(10) including a preliminary prospectus; provided, however, that such term as used herein shall also include an offering circular as described in ~~Rule 256 of the General Rules and Regulations under the Securities Act of 1933~~ 17 CFR 230.254 or, in the case of an intrastate offering, any document by whatever name known, utilized for the purpose of offering and selling securities to the public.

~~002.19 Real Estate Investment Trust ("REIT") means a corporation, trust, association or other legal entity (other than a real estate syndication) which is engaged primarily in investing in equity interests in real estate (including fee ownership and leasehold interests) or in loans secured by real estate or both.~~

002.20 Roll-up means a transaction involving the acquisition, merger, conversion, or consolidation either directly or indirectly of the REIT and the issuance of securities of a roll-up entity, but does not include:

002.20A A transaction involving securities of the REIT that have been for at least twelve months listed on a national securities exchange or traded through the ~~National Association of Securities Dealers Automated Quotation National Market System~~ NASDAQ Global Market; or

002.20B A transaction involving the conversion to corporate, trust, or association form of only the REIT if, as a consequence of the transaction there will be no significant adverse change in:

002.20B1 Shareholders' voting rights;

002.20B2 The term of existence of the REIT;

002.20B3 Sponsor or adviser compensation; or

002.20B4 The REIT's investment objectives.

002.21 Roll-up entity means a partnership, real estate investment trust, corporation, trust, or other entity that would be created or would survive after the successful completion of a proposed roll-up transaction.

002.22 Shares means shares of beneficial interest or of common stock of a REIT of the class that has the right to elect the trustees of such REIT.

002.23 Shareholders means the registered holders of a REIT's shares.

002.24 Specified asset REIT means a program where, at the time a securities registration is ordered effective, at least seventy-five percent ~~(75%)~~ of the net proceeds from the sale of shares, excluding reserves, are allocable to the purchase, construction, renovation, or improvement of individually identified assets.

002.25 Sponsor means:

002.25A Any person directly or indirectly instrumental in organizing, wholly or in part, a REIT; or

002.25B Any person who will control, manage or participate in the management of a REIT; and

002.25C Any affiliate of such person.

002.25D A person may be deemed a sponsor of the REIT by:

002.25D1 Taking the initiative, directly or indirectly, in founding or organizing the business or enterprise of the REIT, either alone or in conjunction with one or more other persons;

002.25D2 Receiving a material participation in the REIT in connection with the founding or organizing of the business of the REIT, in consideration of services, property or both;

002.25D3 Having a substantial number of relationships and contacts with the REIT;

002.25D4 Possessing significant rights to control REIT properties;

002.25D5 Receiving fees for providing services to the REIT which are paid on a basis that is not customary in the industry; or

002.25D6 Providing goods or services to the REIT on a basis which was not negotiated at arm's-length with the REIT.

002.25E Sponsor shall not include:

002.25E1 Any person whose only relationship with the REIT is that of an independent property manager of REIT assets, and whose only compensation is as such; or

002.25E2 Wholly independent third parties such as attorneys, accountants and underwriters whose only compensation is for professional services.

002.26 Total operating expenses means aggregate expenses of every character paid or incurred by the REIT as determined under ~~Generally Accepted Accounting Principles~~ generally accepted accounting principles, including advisers' fees, but excluding:

002.26A The expenses of raising capital such as organizational and offering expenses; legal, audit, accounting, underwriting, brokerage, listing, registration and other fees; printing and other such expenses; and taxes incurred in connection with the issuance, distribution, transfer, registration, and stock exchange listing of the REIT's shares;

002.26B Interest payments;

002.26C Taxes;

002.26D Non-cash expenditures such as depreciation, amortization and bad debt reserves;

002.26E Incentive fees paid in compliance with Section 005.06, below, notwithstanding Section 002.26F, below; and

002.26F Acquisition fees, acquisition expenses, real estate commissions on resale of property and other expenses connected with the acquisition, disposition, and ownership of real estate interests, mortgage loans, or other property, such as the costs of foreclosure, insurance premiums, legal services, maintenance, repair, and improvement of property.

002.27 Trustee(s) means the members of the board of trustees or directors or other body which manages the REIT.

002.28 Unimproved real property means the real property in which a REIT has an equity interest and which:

002.28A Was not acquired for the purpose of producing rental or other operating income;

002.28B Has no development or construction in process on such land; and

002.28C Has no development or construction on such land planned in good faith to commence on such land within one year.

003 REQUIREMENTS OF SPONSOR, ADVISER, TRUSTEE AND ANY AFFILIATE.

003.01 Prior to the initial public offering, the sponsor, or ~~any~~ an affiliate, shall contribute, as an initial investment to the REIT, an amount not less than the lesser of:

003.01A Ten percent ~~(10%)~~ of the total net assets upon completion of the offering; or

003.01B Two hundred thousand dollars ($200,000.00).

003.01C The sponsor or ~~any~~ the contributing affiliate may not sell this initial investment while the sponsor remains a sponsor. ~~but may transfer the~~ The shares may be transferred to other affiliates of the sponsor.

003.02 The REIT shall have a minimum of three trustees, each of whom is elected by the shareholders of the REIT and shall serve for a term of one year.

003.02A This Section shall not apply to a trustee elected to fill the unexpired term of another trustee.

003.02B Nothing in this Section shall prohibit a trustee from being ~~reelected~~ re-elected by the shareholders.

003.02C A majority of the trustees shall be independent trustees.

003.02D Independent trustees shall nominate replacements for vacancies amongst the independent trustees' positions.

003.02E The trustees may establish such committees as they deem appropriate, provided the majority of the members of each committee are independent trustees.

003.03 At or before the first meeting of the trustees, the declaration of trust shall be reviewed and ratified by a majority vote of the trustees and of the independent trustees. The prospectus shall disclose that such ratification is required.

~~003.03A The trustees shall establish written policies on investments and borrowing and shall monitor the administrative procedures, investment operations and performance of the REIT and the adviser to assure that such policies are carried out.~~

~~003.03B A majority of the independent trustees must approve matters to which this Section and Sections 003.01, 003.06, 003.07, 005, 006.07, 006.10, 006.13, 007.01, 007.02D, and 007.07, of this Rule apply.~~

~~003.03C The special obligations of the independent trustees should not be interpreted to lessen in any way the obligations of the affiliated trustees.~~

~~003.03D The prospectus shall disclose that such ratification is required.~~

003.04 The trustees shall establish written policies on investments and borrowing and shall monitor the administrative procedures, investment operations and performance of the REIT and the adviser to assure that such policies are carried out.

003.05 Matters to which Sections 003.01, 003.03, 003.08, 003.09, 005, 006.07, 006.10, 006.13, 007.01, 007.02D, and 007.07, of this Rule apply must be approved by a majority of the independent trustees.

003.05A The special obligations of the independent trustees should not be interpreted to lessen in any way the obligations of the affiliated trustees.

~~003.04~~ 003.06 ~~A trustee, including at~~ At least one ~~of the~~ independent ~~trustees,~~ trustee shall have had at least three years of relevant experience demonstrating the knowledge and experience required to successfully acquire and manage the type of assets being acquired by the REIT.

~~003.04A~~ 003.06A Relevant real estate experience means actual direct experience by the trustee in acquiring or managing the type of real estate to be acquired by the REIT for his or her own account or as an agent.

~~003.04B~~ 003.06B Relevant real estate experience does not include experience in buying and selling houses.

~~003.05~~ 003.07 The trustees and adviser of the REIT shall be deemed to be in a fiduciary relationship to the REIT and the shareholders. The trustees of the REIT shall also have a fiduciary duty to the shareholders to supervise the relationship of the REIT with the adviser.

~~003.06~~ 003.08 It shall be the duty of the trustees to evaluate the performance of the adviser before entering into or renewing an advisory contract. The criteria used in such evaluation shall be reflected in the minutes of such meeting.

~~003.06A~~ 003.08A Each contract for the services of an adviser entered into by the trustees shall have a term of no more than one year.

~~003.06B~~ 003.08B Each advisory contract shall be terminable by a majority of the independent trustees, or the adviser on sixty ~~60~~ days written notice without cause or penalty. In the event of the termination of such contract, the adviser will cooperate with the REIT and take all reasonable steps requested to assist the trustees in making an orderly transition of the advisory function.

~~003.06C~~ 003.08C The qualifications of the adviser shall be set forth in the prospectus relating to the initial public offering of the shares of the REIT and the trustees shall determine that any successor adviser possesses sufficient qualifications to:

~~003.06C1~~ 003.08C1 Perform the advisory function for the REIT; and

~~003.06C2~~ 003.08C2 Justify the compensation provided for in its contract with the REIT.

~~003.07~~ 003.09 The REIT shall not indemnify the trustees, advisers or affiliates for any liability or loss suffered by the trustees, advisers or affiliates, nor shall it provide that the trustees, advisers or affiliates be held harmless for any loss or liability suffered by the REIT, unless all of the following conditions are met:

~~003.07A~~ 003.09A The trustees, advisers or affiliates have determined, in good faith, that the course of conduct which caused the loss or liability was in the best interests of the REIT.

~~003.07B~~ 003.09B The trustees, advisers or affiliates were acting on behalf of or performing services for the REIT.

~~003.07C~~ 003.09C Such liability or loss was not the result of:

~~003.07C1~~ 003.09C1 Negligence or misconduct by the trustees, excluding the independent trustees, advisers or affiliates; or

~~003.07C2~~ 003.09C2 Gross negligence or willful misconduct by the independent trustees.

~~003.07D~~ 003.09D Such indemnification or agreement to hold harmless is recoverable only out of REIT net assets and not from shareholders.

~~003.07E~~ 003.09E Notwithstanding anything to the contrary contained in this Section, the trustees, advisers or affiliates and any persons acting as a broker-dealer shall not be indemnified by the REIT for any losses, liabilities or expenses arising from or out of an alleged violation of federal or state securities laws by such party unless one or more of the following conditions are met:

~~003.07E1~~ 003.09E1 There has been a successful adjudication on the merits of each count involving alleged securities law violations as to the particular indemnitee.

~~003.07E2~~ 003.09E2 Such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the particular indemnitee.

~~003.07E3~~ 003.09E3 A court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and the related costs should be made, and the court considering the request for indemnification has been advised of the position of the Securities and Exchange Commission ("SEC") and of the published position of any state securities regulatory authority in which securities of the REIT were offered or sold as to indemnification for violations of securities laws.

~~003.07F~~ 003.09F The advancement of REIT funds to the trustees, advisers or affiliates for legal expenses and other costs incurred as a result of any legal action for which indemnification is being sought is permissible only if all of the following conditions are satisfied:

~~003.07F1~~ 003.09F1 The legal action relates to acts or omissions with respect to the performance of duties or services on behalf of the REIT.

~~003.07F2~~ 003.09F2 The legal action is initiated by a third party who is not a shareholder or by a shareholder acting in his or her capacity as such and a court of competent jurisdiction specifically approves such advancement.

~~003.07F3~~ 003.09F3 The trustees, advisers or affiliates undertake to repay the advanced funds to the REIT, together with the applicable legal rate of interest thereon, in cases in which such trustees, advisers or affiliates are found not to be entitled to indemnification.

~~003.08~~ 003.10 The declaration of trust may contain provisions relating to the use of arbitration as a means of dispute resolution, provided, it may not require arbitration for allegations involving breach of contract, negligence, violations of state or federal securities laws, breach of fiduciary duty or other misconduct by the trustees or adviser, nor shall it provide for mandatory venue.

~~003.08A~~ 003.10A A declaration of trust which contains arbitration provisions shall prominently disclose such fact on the cover page of the declaration of trust.

~~003.08B~~ 003.10B Allocation of the cost of arbitration may be made a matter for determination in the proceedings.

~~003.08C~~ 003.10C This Section shall not prohibit arbitration agreements entered into as a condition for opening or maintaining an account with a broker-dealer, who may also be a sponsor.

~~003.08D~~ 003.10D This Section shall not prohibit separate arbitration agreements between sponsors and shareholders if the agreements are not a condition of making an investment in the REIT.

004 SUITABILITY OF SHAREHOLDERS.

004.01 The sponsor shall establish minimum ~~income and net worth~~suitability standards for persons who purchase shares in a REIT for which there is not likely to be a substantial and active secondary market.

004.02 Unless the Director determines that the risks associated with the REIT would require higher standards, shareholders shall have one of the following:

004.02A A minimum annual gross income of ~~forty-five~~seventy thousand dollars ~~($45,000)~~ ($70,000.00) and a minimum net worth of ~~forty-five~~ seventy thousand dollars ~~($45,000)~~ ($70,000.00); or

004.02B A minimum net worth of ~~on~~ two hundred fifty thousand dollars ~~($150,000)~~ ($250,000.00).

004.02C Net worth shall be determined exclusive of home, home furnishings, and automobiles.

004.02D In the case of sales to fiduciary accounts, these minimum suitability standards ~~shall~~ may be met by the beneficiary, by the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the shares if the donor or grantor is the fiduciary.

004.02E The sponsor shall set forth in the final prospectus:

004.02E1 The investment objectives of the REIT;

004.02E2 A description of the type of person who might benefit from an investment in the REIT; and

004.02E3 The minimum suitability standards imposed on each shareholder in the REIT.

004.02F In evaluating the proposed suitability standards, the Director may consider the following:

004.02F1 The REIT's use of leverage;

004.02F2 The tax implications;

004.02F3 Balloon payment financing;

004.02F4 The potential variances in cash distributions;

004.02F5 The potential shareholders;

004.02F6 The relationship among potential shareholders, the sponsor and adviser;

004.02F7 The liquidity of the REIT shares;

004.02F8 The prior performance of sponsor and adviser;

004.02F9 The financial condition of the sponsor;

004.02F10 The potential transactions between the REIT and the sponsor and adviser; and

004.02F11 Any other factors that the Director deems to be relevant.

004.03 The sponsor and each person selling shares on behalf of the sponsor or REIT shall make every reasonable effort to determine that the purchase of shares is a suitable and appropriate investment for each shareholder.

004.03A In making this determination, the sponsor or each person selling shares on behalf of the sponsor or REIT shall ascertain that the prospective shareholder:

004.03A1 Meets the minimum ~~income and net worth~~ suitability standards established for the REIT;

004.03A2 Can reasonably benefit from the REIT based on the prospective shareholder's overall investment objectives and portfolio structure;

004.03A3 Is able to bear the economic risk of the investment based on the prospective shareholder's overall financial situation; and

004.03A4 Has apparent understanding of:

004.03A4a The fundamental risks of the investment;

004.03A4b The risk that the shareholder may lose the entire investment;

004.03A4c The lack of liquidity of REIT shares;

004.03A4d The restrictions on transferability of REIT shares; and

~~004.03A4e The background and qualifications of the sponsor or the adviser; and~~

~~004.03A4f~~ 004.03A4e The tax consequences of the investment.

004.03B The sponsor or each person selling shares on behalf of the sponsor or REIT will make this determination on the basis of information it has obtained from a prospective shareholder, including at least the age, investment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective shareholder, as well as any other pertinent factors.

004.03C The sponsor or each person selling shares on behalf of the sponsor or REIT shall maintain records of the information used to

determine that an investment in shares is suitable and appropriate for a shareholder for at least six years.

004.03D The sponsor shall disclose in the final prospectus the responsibility of the sponsor and each person selling shares on behalf of the sponsor or REIT to make every reasonable effort to determine that the purchase of shares is a suitable and appropriate investment for each shareholder, based on information provided by the shareholder regarding the shareholder's financial situation and investment objectives.

004.04 ~~The Director may require that each~~ Each shareholder is required to complete and sign a written subscription agreement.

004.04A The sponsor may require that each shareholder make certain factual representations in the subscription agreement, including the following:

004.04A1 The shareholder meets the minimum ~~income and net worth~~ suitability standards established for the REIT.

004.04A2 The shareholder is purchasing the shares for his or her own account.

004.04A3 The shareholder has received a copy of the prospectus.

004.04A4 The shareholder acknowledges that the shares are not liquid.

~~004.04A5 The shareholder must separately sign or initial each representation made in the subscription agreement.~~

~~004.04A6 Except in the case of fiduciary accounts, the shareholder may not grant any person a power of attorney to make such representations on his or her behalf.~~

004.04B The shareholder must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the shareholder may not grant any person a power of attorney to make such representations on his or her behalf.

~~004.04B~~ 004.04C The sponsor and/or each person selling shares on behalf of the sponsor or REIT shall not require shareholders to make representations in the subscription agreement which are subjective or unreasonable and which:

~~004.04B1~~ 004.04C1 Might cause the shareholder to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

~~004.04B2~~ 004.04C2 Would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the shareholders.

~~004.04B3~~ 004.04C3 Prohibited representations include, but are not limited to, the following:

~~004.04B3a~~ 004.04C3a The shareholder understands or comprehends the risks associated with an investment in the REIT; ~~.~~

~~004.04B3b~~ 004.04C3b The investment is a suitable one for the shareholder; ~~.~~

~~004.04B3c~~ 004.04C3c The shareholder has read the prospectus; and ~~.~~

~~004.04B3d~~ 004.04C3d In deciding to invest in the REIT, the shareholder has relied solely on the prospectus, and not on any other information or representations from other persons or sources.

~~004.04B4~~ 004.04C4 The sponsor may place the content of the prohibited representations in the subscription agreement in the form of advisory disclosures to shareholders, ~~except that the sponsor may not place~~ but the disclosures may not be contained in the shareholder representation section of the subscription agreement.

004.05 The sponsor or any person selling shares on behalf of the sponsor or REIT may not complete a sale of shares to a shareholder until at least five business days after the date the shareholder receives a final prospectus.

004.06 The sponsor or the person designated by the sponsor shall send each shareholder a confirmation of his or her purchase.

004.07 The Director may require minimum initial and subsequent cash investment amounts.

005 FEES, COMPENSATION AND EXPENSES.

005.01 The prospectus must fully disclose, in tabular form, and itemize all consideration which may be received in connection with REIT activities directly or indirectly by the sponsor, trustees, adviser and underwriters; the purpose for the consideration; and the time and method of payment.

005.01A The independent trustees will determine, at least annually, that the total fees and expenses of the REIT are reasonable in light of the investment performance of the REIT, its net assets, its net income, and the fees and expenses of other comparable unaffiliated REITs.

005.01B Each such determination shall be reflected in the minutes of the meeting of the trustees.

005.02 The organizational and offering expenses paid in connection with the REIT's formation or the syndication of its shares shall be reasonable and shall in no event exceed an amount equal to fifteen percent ~~(15%)~~ of the proceeds raised in an offering.

005.03 The total of all acquisition fees and acquisition expenses shall be reasonable, and shall not exceed an amount equal to six percent ~~(6%)~~ of the contract price of the property, or in the case of a mortgage loan, of the funds advanced, except that a majority of the trustees, including a majority of the independent trustees, not otherwise interested in the transaction may approve fees in excess of these limits if they determine the transaction to be commercially competitive, fair and reasonable to the REIT.

005.04 The total operating expenses of the REIT shall, in the absence of a satisfactory showing to the contrary, be deemed to be excessive if they exceed in any fiscal year the greater of two percent ~~(2%)~~ of its average invested assets or twenty-five percent ~~(25%)~~ of its net income for such year.

005.04A The independent trustees shall have the fiduciary responsibility of limiting such expenses to amounts that do not exceed such limitations unless such independent trustees shall have made a finding that, based on such unusual and non-recurring factors which they deem sufficient, a higher level of expenses is justified for such year. Any such finding and the reason in support thereof shall be reflected in the minutes of the meeting of the trustees.

005.04B Within sixty ~~60~~ days after the end of any fiscal quarter of the REIT for which total operating expenses, for the twelve ~~12~~ months then ended, exceed the above limitations, a written disclosure of such fact, together with an explanation of the factors the independent trustees considered in arriving at the conclusion that such higher operating expenses were justified, shall be sent to shareholders.

005.04C In the event the independent trustees determine such excess expenses are not justified, the adviser shall reimburse the REIT at the end of the twelve ~~12~~month period the amount by which the aggregate annual expenses paid or incurred by the REIT exceed the limitations herein provided.

005.05 If an adviser, trustee, sponsor or any affiliate provides a substantial amount of the services in the effort to sell the property of the REIT, that person may receive up to one-half of the brokerage commission paid but in no event to exceed an amount equal to three percent ~~(3%)~~ of the contracted for sales price. The amount paid when added to the sums paid to unaffiliated parties in such a capacity shall not exceed the lesser of the competitive real estate commission or an amount equal to six percent ~~(6%)~~ of the contracted for sales price.

005.06 An interest in the gain from the sale of assets of the REIT, for which full consideration is not paid in cash or property of equivalent value, shall be allowed provided the amount or percentage of such interest is reasonable.

005.06A An interest in gain from the sale of REIT assets shall be presumed reasonable if it does not exceed fifteen percent ~~(15%)~~ of the balance of such net proceeds remaining after payment to shareholders, in the aggregate, of an amount equal to one hundred percent ~~(100%)~~ of the original issue price of REIT shares, plus an amount equal to six percent ~~(6%)~~ of the original issue price of the REIT shares per annum cumulative.

005.06B The original issue price of the REIT shares may be reduced by prior cash distributions to shareholders of net proceeds from the sale of REIT assets.

005.06C In the case of multiple advisers, advisers and any affiliates shall be allowed incentive fees provided such fees are distributed by a proportional method reasonably designed to reflect the value added to REIT assets by each respective adviser or any affiliate.

005.07 The independent trustees shall determine, at least annually, ~~that~~ whether the compensation which the REIT contracts to pay to the adviser is reasonable in relation to the nature and quality of services performed and ~~that~~ whether such compensation is within the limits prescribed by this Rule.

005.07A The independent trustees shall supervise the performance of the adviser and the compensation paid to it by the REIT to determine that the provisions of such contract are being carried out.

005.07B Each such determination shall be based on the following factors:

005.07B1 The size of the advisory fee in relation to the size, composition and profitability of the portfolio of the REIT;

005.07B2 The success of the adviser in generating opportunities that meet the investment objectives of the REIT;

005.07B3 The rates charged to other REITs and to investors other than REITs by advisers performing similar services;

005.07B4 Additional revenues realized by the adviser and any affiliate through their relationship with the REIT, including loan administration, underwriting or broker commissions, or servicing, engineering, inspection and other fees, whether paid by the REIT or by others with whom the REIT does business;

005.07B5 The quality and extent of service and advice furnished by the adviser;

005.07B6 The performance of the investment portfolio of the REIT, including income, conservation or appreciation of capital,

frequency of problem investments, and competence in dealing with distress situations;

005.07B7 The quality of the portfolio of the REIT in relationship to the investments generated by the adviser for its own account; and

005.07B8 All other factors such independent trustees may deem relevant.

005.07C The findings of the independent trustees on each factor shall be recorded in the minutes of the trustees.

006 CONFLICTS OF INTEREST AND INVESTMENT RESTRICTIONS.

006.01 The REIT shall not purchase property from the sponsor, adviser, trustee, or any affiliate thereof, unless a majority of trustees, including a majority of independent trustees, not otherwise interested in such transaction approve the transaction as being fair and reasonable to the REIT and at a price to the REIT no greater than the cost of the asset to such sponsor, adviser, trustee or any affiliate thereof, or if the price to the REIT is in excess of such cost, that substantial justification for such excess exists and such excess is reasonable. In no event shall the cost of such asset to the REIT exceed its current appraised value.

006.02 A sponsor, adviser, trustee or any affiliate thereof shall not acquire assets from the REIT unless approved by a majority of trustees, including a majority of independent trustees, not otherwise interested in such transaction, as being fair and reasonable to the REIT, except that a REIT may lease assets to a sponsor, adviser, trustee or any affiliate thereof only if approved by a majority of trustees, including a majority of independent trustees, not otherwise interested in such transaction as being fair and reasonable to the REIT.

006.03 No loans may be made by the REIT to the sponsor, adviser, trustee or any affiliate thereof except as provided under Section 006.13C, below, or to wholly owned subsidiaries of the REIT.

006.04 The REIT may not borrow money from the sponsor, adviser, trustee, or any affiliate thereof, unless a majority of trustees, including a majority of independent trustees, not otherwise interested in such transaction approve the transaction as being fair, competitive, and commercially reasonable and no less favorable to the REIT than loans between unaffiliated parties under the same circumstances.

006.05 The REIT shall not invest in joint ventures with the sponsor, adviser, trustee, or any affiliate thereof, unless a majority of trustees, including a majority of independent trustees, not otherwise interested in such transactions, approve the transaction as being fair and reasonable to the REIT and on substantially the same terms and conditions as those received by the other joint venturers.

006.06 The REIT shall not invest in equity securities unless a majority of trustees, including a majority of independent trustees, not otherwise interested in such

transaction approve the transaction as being fair, competitive, and commercially reasonable.

006.07 The prospectus must state the specific investment objectives of the REIT and should indicate whether the primary objective is to obtain current income, tax benefits, or capital appreciation for its shareholders.

006.07A The independent trustees shall review the investment policies of the REIT at least annually to determine that the policies being followed by the REIT at any time are in the best interests of its shareholders.

006.07B Each such determination and the basis therefore shall be set forth in the minutes of the trustees.

006.08 The method for the allocation of the acquisition of properties by two or more programs of the same sponsor or adviser seeking to acquire similar types of assets shall be reasonable.

006.08A The method shall be described in the prospectus.

006.08B It shall be the duty of the trustees, including the independent trustees, to insure such method is applied fairly to the REIT.

006.09 All other transactions between the REIT and the sponsor, adviser, trustee or any affiliate thereof, shall require approval by a majority of the trustees, including a majority of independent trustees, not otherwise interested in such transactions as being fair and reasonable to the REIT and on terms and conditions not less favorable to the REIT than those available from unaffiliated third parties.

006.10 The consideration paid for real property acquired by the REIT shall be based on the fair market value of the property as determined by a majority of the trustees, except that, in cases in which a majority of the independent trustees so determine, and in all cases in which assets are acquired from the advisers, trustees, sponsors or affiliates thereof, such fair market value shall be as determined by an independent expert selected by the independent trustees.

006.11 In connection with a proposed roll-up, an appraisal of all REIT assets shall be obtained from a competent, independent expert.

006.11A If the appraisal will be included in a prospectus used to offer the securities of a roll-up entity, the appraisal shall be filed with the Director as an exhibit to the ~~Registration Statement~~registration statement for the offering.

006.11A1 REIT assets shall be appraised based on an evaluation of all relevant information and shall indicate the value of the REIT's assets as of a date immediately prior to the announcement of the proposed roll-up transaction.

006.11A2 The appraisal shall assume an orderly liquidation of REIT assets over a twelve ~~12~~month period.

006.11A3 The terms of the engagement of the independent expert shall clearly state that the engagement is for the benefit of the REIT and its investors.

006.11A4 A summary of the independent appraisal, indicating all material assumptions underlying the appraisal, shall be included in a report to the investors in connection with a proposed roll-up.

006.11A5 The issuer shall be subject to liability under the Act for any material omission or misrepresentation contained in the appraisal.

006.11B In connection with a proposed roll-up, the person sponsoring the roll-up shall offer to shareholders who vote "no" on the proposal the choice of:

006.11B1 Accepting the securities of the roll-up entity offered in the proposed roll-up; or

006.11B2 One of the following:

006.11B2a Remaining as shareholders of the REIT and preserving their interests therein on the same terms and conditions as existed previously; or

006.11B2b Receiving cash in an amount equal to the shareholders' pro-rata share of the appraised value of the net assets of the REIT.

006.11C The REIT shall not participate in any proposed roll-up which would result in shareholders having democracy rights in the roll-up entity that are less than those provided for under Sections 007.01, 007.02, 007.03, 007.04, and 007.05, below.

006.11D The REIT shall not participate in any proposed roll-up which includes provisions which would operate to materially impede or frustrate the accumulation of shares by any purchaser of the securities of the roll-up entity, except to the minimum extent necessary to preserve the tax status of the roll-up entity.

006.11E The REIT shall not participate in any proposed roll-up which would limit the ability of an investor to exercise the voting rights of ~~its~~ his/her securities of the roll-up entity on the basis of the number of REIT shares held by that investor.

006.11F The REIT shall not participate in any proposed roll-up in which investors' rights of access to the records of the roll-up entity will be less than those provided for under Section 007.05, below.

006.11G The REIT shall not participate in any proposed roll-up in which any of the costs of the transaction would be borne by the REIT if the roll-up is not approved by the shareholders.

006.12 The prospectus shall include an explanation of the borrowing policies of the REIT.

006.12A The aggregate borrowings of the REIT, secured and unsecured, shall be reasonable in relation to the net assets of the REIT and shall be reviewed by the trustees at least quarterly.

006.12B The maximum amount of such borrowings in relation to the net assets shall, in the absence of a satisfactory showing that higher level of borrowing is appropriate, not exceed three hundred percent ~~(300%)~~. Any excess in borrowing over such level shall be approved by a majority of the independent trustees and disclosed to shareholders in the next quarterly report of the REIT, along with justification for such excess.

006.13 The REIT may not:

006.13A Invest more than ten percent ~~(10%)~~ of its total assets in unimproved real property or mortgage loans on unimproved real property;

006.13B Invest in commodities or commodity future contracts, except that this limitation is not intended to apply to future contracts used solely for hedging purposes in connection with the REIT's ordinary business of investing in real estate assets and mortgages;

006.13C Invest in or make mortgage loans unless an appraisal is obtained concerning the underlying property except for those loans insured or guaranteed by a government or government agency;

006.13C1 In cases in which a majority of the independent trustees so determine, and in all cases in which the transaction is with the adviser, trustees, sponsor or affiliates thereof, such an appraisal must be obtained from an independent expert concerning the underlying property. A copy of the appraisal shall be maintained in the REIT's records for at least five years, and shall be available for inspection and duplication by any shareholder.

006.13C2 A mortgagee's or owner's title insurance policy or commitment as to the priority of the mortgage or the condition of the title must be obtained.

006.13C3 The adviser and trustees shall observe the following policies in connection with investing in or making mortgage loans:

006.13C3a The REIT shall not invest in real estate contracts of sale, unless such contracts of sale are

in recordable form and appropriately recorded in the chain of title.

006.13C3b The REIT shall not make or invest in mortgage loans, including construction loans, on any one property if the aggregate amount of all mortgage loans outstanding on the property, including the loans of the REIT, would exceed an amount equal to eighty-five percent ~~(85%)~~ of the appraised value of the property as determined by appraisal unless substantial justification exists because of the presence of other underwriting criteria. For purposes of this subsection, the "aggregate amount of all mortgage loans outstanding on the property, including the loans of the REIT," shall include all interest, excluding contingent participation in income and/or appreciation in value of the mortgaged property, the current payment of which may be deferred pursuant to the terms of such loans, to the extent that deferred interest on each loan exceeds five percent ~~(5%)~~ per annum of the principal balance of the loan.

006.13C3c The standards provided in Section 006.13C3b, above, may be exceeded for a particular registration if:

006.13C3c(1) The mortgage loans are supported by sound underwriting criteria, such as the net worth of the borrower, the credit rating of the borrower based on historical financial performance, or collateral adequate to justify waiver from application of this Section; or

006.13C3c(2) The program mortgage loans are or will be insured or guaranteed by a government or a government agency where the loan is secured by the pledge or assignment of other real estate or another real estate mortgage, where rents are assigned under a lease where a tenant or tenants have demonstrated through historical net worth and cash flow the ability to satisfy the terms of the lease, or where similar criteria is presented satisfactory to the Director.

006.13C3d The REIT shall not make or invest in any mortgage loans that are subordinate to any mortgage or equity interest of the adviser, trustees, sponsors or any affiliate of the REIT.

006.13D Issue redeemable equity securities;

006.13E Issue debt securities unless the debt service coverage in the most recently completed fiscal year as adjusted for known changes is sufficient to properly service that higher level of debt;

006.13F Issue options or warrants to purchase its shares to the adviser, trustees, sponsors or any affiliate thereof except on the same terms as such options or warrants are sold to the general public; or

006.13F1 The REIT may issue options or warrants to persons not so connected with the REIT but not at exercise prices less than the fair market value of such securities on the date of grant and for consideration, which may include services, that in the judgment of the independent trustees, has a market value less than the value of such option on the date of grant.

006.13F2 Options or warrants issuable to the adviser, trustees, sponsors or any affiliate thereof shall not exceed an amount equal to ten percent ~~(10%)~~ of the outstanding shares of the REIT on the date of grant of any options or warrants.

006.13G Issue its shares on a deferred payment basis or other similar arrangement.

007 RIGHTS AND OBLIGATIONS OF SHAREHOLDERS.

007.01 There shall be an annual meeting of the shareholders of the REIT upon reasonable notice and within a reasonable period, not less than thirty ~~30~~ days, following delivery of the annual report.

007.01A The trustees, including the independent trustees, shall be responsible for complying with the meeting requirement.

007.01B Special meetings of the shareholders may be called by the chief executive officer, by a majority of the trustees or by a majority of the independent trustees, and shall be called by an officer of the REIT upon written request of shareholders holding in the aggregate not less than ten percent ~~(10%)~~ of the outstanding shares of the REIT entitled to vote at such meeting. Upon receipt of a written request stating the purpose(s) of the meeting, the sponsor shall, within ten ~~10~~ days after receipt of said request, provide all shareholders with written notice of the meeting, including the purpose thereof, to be held on a date not less than fifteen ~~15~~ nor more than sixty ~~60~~ days after the distribution of such notice, at a time and place specified in the request, or if none is specified, at a time and place convenient to shareholders.

007.02 Voting Rights of Shareholders.

007.02A A public offering of equity securities of a REIT other than voting shares will be looked upon with disfavor.

007.02B The voting rights per share of equity securities of the REIT, other than the publicly held equity securities of the REIT, sold in a private offering shall not exceed voting rights which bear the same relationship to the voting rights of the publicly held shares of the REIT as the consideration paid to the REIT for each privately offered REIT share bears to the book value of each outstanding publicly held share.

007.02C The declaration of trust must provide that a majority of the then outstanding shares may, without the necessity for concurrence by the trustees, vote to:

007.02C1 Amend the declaration of trust;

007.02C2 Terminate the REIT; or

007.02C3 Remove the trustees.

007.02D The declaration of trust must provide that a majority of shareholders present in person or by proxy at an annual meeting at which a quorum, being fifty percent ~~(50%)~~ of the then outstanding shares, is present, may, without the necessity for concurrence by the trustees, vote to elect the trustees.

007.02E Without concurrence of a majority of the outstanding shares, the trustees may not:

007.02E1 Amend the declaration of trust, except for amendments which do not adversely affect the rights, preferences and privileges of shareholders including amendments to provisions relating to trustee qualifications, fiduciary duty, liability and indemnification, conflicts of interest, investment policies or investment restrictions;

007.02E2 Sell two-thirds or more of the REIT's assets, based on the total number of properties and mortgages or on the current fair market value of the assets, other than in the ordinary course of the REIT's business or in connection with liquidation and dissolution;

007.02E3 Cause the merger or other reorganization of the REIT; or

007.02E4 Dissolve or liquidate the REIT, other than before the initial investment in property.

007.02F With respect to shares owned by the adviser, the trustees, or any affiliate, neither the adviser, nor the trustees, nor any affiliate may vote or consent on matters submitted to the shareholders regarding the removal of the adviser, trustees or any affiliate or any transaction between the REIT and any of them.

007.02G In determining the requisite percentage-in-interest of shares necessary to approve a matter on which the adviser, trustees and any affiliate may not vote or consent, any shares owned by any of them shall not be included.

007.03 The declaration of trust shall provide that:

007.03A The shares of the REIT shall be non-assessable by the REIT whether trust, corporation or other entity.

007.03B The shareholders of ~~the~~ a REIT that is not a corporation shall not be personally liable on account of any of the contractual obligations undertaken by the REIT.

007.03C All written contracts to which a REIT that is not a corporation is a party shall include a provision that the shareholders shall not be personally liable thereon.

007.04 The declaration of trust shall provide that the REIT shall cause to be prepared and mailed or delivered to each shareholder as of a record date after the end of the fiscal year and each holder of other publicly held securities of the REIT within one hundred twenty ~~120~~ days after the end of the fiscal year to which it relates, an annual report for each fiscal year ending after the initial public offering of its securities which shall include:

007.04A Financial statements prepared in accordance with generally accepted accounting principles which are audited and reported on by independent certified public accountants;

007.04B The ratio of the costs of raising capital during the period to the capital raised;

007.04C The aggregate amount of advisory fees and the aggregate amount of other fees paid to the adviser and any affiliate of the adviser by REIT and including fees or charges paid to the adviser and any affiliate of the adviser by third parties doing business with the REIT;

007.04D The total operating expenses of the REIT, stated as a percentage of average invested assets and as a percentage of its net income;

007.04E A report from the independent trustees that the policies being followed by the REIT are in the best interests of its shareholders and the basis for such determination; and

007.04F Full disclosure, separately stated, of all material terms, factors, and circumstances surrounding any and all transactions involving the REIT, trustees, advisers, sponsors and any affiliate thereof occurring in the year for which the annual report is made. Independent trustees shall examine and comment in the report on the fairness of such transactions.

007.04G The trustees, including the independent trustees, shall be required to take reasonable steps to insure that the above requirements are met.

007.04H This Section is not intended to be exhaustive of the type and extent of information presented to shareholders in an annual report.

007.05 Any shareholder and any designated representative thereof shall be permitted access to all records of the REIT at all reasonable times, and may inspect and copy any of them.

007.05A Inspection of the REIT's books and records by the Director shall be provided upon reasonable notice and during normal business hours.

007.05B The declaration of trust shall include the following provisions regarding access to the list of shareholders:

007.05B1 An alphabetical list of the names, addresses, and telephone numbers of the shareholders of the REIT along with the number of shares held by each of them (the "shareholder list") shall be maintained as part of the books and records of the REIT and shall be available for inspection by any shareholder or the shareholder's designated agent at the home office of the REIT upon the request of the shareholder.

007.05B2 The shareholder list shall be updated at least quarterly to reflect changes in the information contained therein.

007.05B3 A copy of the shareholder list shall be mailed to any shareholder requesting it within ten days of the request.

007.05B3a The copy of the shareholder list shall be printed in alphabetical order, on white paper, and in a readily readable type size, in no event smaller than 10-point type.

007.05B3b A reasonable charge for copy work may be charged by the REIT.

007.05B4 The purposes for which a shareholder may request a copy of the shareholder list include, without limitation, matters relating to shareholders' voting rights under the REIT agreement and the exercise of shareholders' rights under federal proxy laws.

007.05B5 The REIT may require the shareholder requesting the shareholder list to represent that the list is not requested for a commercial purpose unrelated to the shareholder's interest in the REIT.

007.05B6 If the advisor or trustees of the REIT neglects or refuses to exhibit~~;~~, produce, or mail a copy of the shareholder list as requested, the advisor~~,~~ and the trustees shall be liable to any shareholder requesting the list for the costs, including attorneys' fees, incurred by that shareholder for compelling the production of the shareholder list, and for actual damages suffered by any shareholder by reason of such refusal or neglect.

~~007.05B6(i)~~ 007.05B6a It shall be a defense that the actual purpose and reason for the requests for inspection or for a copy of the shareholder list is to secure such list of shareholders or other information for the purpose of selling such list or copies thereof, or of using the same for a commercial purpose other than in the interest of the applicant as a shareholder relative to the affairs of the REIT.

~~007.05B6(ii)~~ 007.05B6b The remedies provided hereunder are in addition to, and shall not in any way limit, other remedies available to shareholders under federal law, or the laws of any state.

007.06 The REIT is neither obligated to repurchase any of the shares nor precluded from voluntarily repurchasing the shares if such repurchase does not impair the capital or operations of the REIT.

007.06A The REIT may have excess share provisions that provide for mandatory redemption.

007.06B The sponsor, adviser, trustees or affiliates are prohibited from receiving a fee on the repurchase of the shares by ~~the~~ a REIT.

007.07 All distribution reinvestment plans shall, at a minimum, provide:

007.07A All material information regarding the distribution to the shareholder and the effect of reinvesting such distribution, including the tax consequences thereof, shall be provided to the shareholder at least annually.

007.07B Each shareholder participating in the plan shall have a reasonable opportunity to withdraw from the plan at least annually after receipt of the information required above.

007.08 The declaration of trust shall state the manner in which distributions to shareholders are to be determined.

007.09 Distributions in kind shall not be permitted, except for:

007.09A Distributions of readily marketable securities;

007.09B Distributions of beneficial interests in a liquidating trust established for the dissolution of the REIT and the liquidation of its assets in accordance with the terms of the declaration of trust; or

007.09C Distributions of in-kind property which meet all of the following conditions:

007.09C1 The trustees advise each shareholder of the risks associated with direct ownership of the property;

007.09C2 The trustees offer each shareholder the election of receiving in-kind property distributions; and

007.09C3 The trustees distribute in-kind property only to those shareholders who accept the trustee's offer.

008 DISCLOSURE AND MARKETING.

008.01 Statements made in sales material communicated, directly or indirectly, to the public may not conflict with, or modify risk factors or other statements made in the prospectus.

008.02 A prospectus which is not part of a ~~Registration Statement~~ registration statement declared effective by the ~~Securities and Exchange Commission~~SEC pursuant to the Securities Act of 1933 shall generally conform to the disclosure requirements which would apply if the offering were so registered. The format and information requirements of applicable guide(s) promulgated by the ~~Securities and Exchange Commission~~SEC shall be followed, with appropriate adjustments made for the different business of the REIT.

008.03 In connection with the offering and sale of shares in a REIT, neither the sponsor(s) nor the underwriter(s) may, in writing or otherwise, directly or indirectly, represent or imply that the Director has approved the merits of the investment or any aspects thereof. Any reference to the REIT's compliance with this Rule or any provisions herein which connotes or implies compliance is prohibited.

008.04 Forecasts and Projections.

008.04A Neither the prospectus nor any sales material communicated, directly or indirectly, to the public shall contain a quantitative estimate of a REIT's anticipated economic performance or anticipated return to participants, in the form of investment objectives, cash distributions, tax benefits or otherwise, except as permitted by this Section.

008.04B The presentation of predicted future results of operations of programs shall be permitted but not required for a specified asset REIT if they comply with all of the following requirements:

008.04B1 The cover of the prospectus for a specified asset REIT with forecasts must contain in bold face the following language: "Forecasts are contained in this prospectus. Any representation to the contrary and any predictions, written or oral, which do not conform to that contained in the prospectus shall not be permitted."

008.04B2 Forecasts shall be realistic in their predictions and shall clearly identify the assumptions made with respect to all material features of presentation.

008.04B3 Forecasts should be examined by an independent certified public accountant in accordance with the Guide for Prospective Financial Statements and the Statement on Standards for Accountant's Services on Prospective Financial Information as promulgated by the American Institute of Certified Public Accountants, and a copy of the report of the independent certified public accountant must be included in the prospectus.

008.04B4 If any part of the forecast appears in the sales material, the entire forecast must be presented.

008.04B5 Forecasts shall generally be for a period equivalent to the anticipated holding period for REIT assets.

008.04B5a Forecasts which do not extend through the expected term of the REIT's life must show the effects of a hypothetical liquidation of program assets under good and bad conditions.

008.04B5b Yield information may not be presented for forecasts which do not extend through the expected term of the REIT's life.

008.04B6 Forecasts shall disclose possible undesirable tax consequences of an early sale of program assets.

008.04B7 In computing any rate of return or yield to investors, no unrealized gains or value shall be included.

008.04C For all other REITs, the presentation of predicted future results of operations of programs shall be prohibited. The cover of the prospectus for such a REIT must contain in bold face the following language: "The use of forecasts in this offering is prohibited. Any representations to the contrary and any predictions, written or oral, as to the amount or certainty of any present or future cash benefit or tax consequence which may flow from an investment in this program is not permitted."

008.05 The Director may require that the declaration of trust be given to prospective shareholders.

009 MISCELLANEOUS.

009.01 The requirements and/or provisions of appropriate portions of the following Sections shall be included in the declaration of trust: Sections 002; 003; 004.02; 004.03; 004.06; 005.01A; 005.01B; 005.03; 005.04; 005.05; 005.06; 005.07; 006.01; 006.02; 006.03; 006.04; 006.05; 006.06; 006.07A; 006.07B; 006.09; 006.10; 006.11; 006.12; 006.13; and 007.

009.02 A marked copy of all amendments and supplements to an application shall be filed with the Director as soon as the amendment or supplement is available.

009.03 The ~~cross reference sheet~~ Cross Reference Sheet shall be included with the application for registration.

009.03A Sections which are not applicable should be noted as such.

009.03B Provisions of the REIT which vary from the Rule must be explained by endnote. Endnotes should be numbered sequentially in the column designated "Endnotes" and should be presented on a rider identified as "Endnotes" with each endnote on the rider numerically corresponding to the endnote identified on the Cross Reference Sheet.

010 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

15 U.S.C.
United States Code, 2014 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES
Sec. 77b - Definitions; promotion of efficiency, competition, and capital formation
From the U.S. Government Publishing Office, www.gpo.gov

§77b. Definitions; promotion of efficiency, competition, and capital formation

(a) Definitions

When used in this subchapter, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 77e of this title shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security. Any offer or sale of a security futures product by or on behalf of the issuer of the securities underlying the security futures product, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities. Any offer or sale of a security-based swap by or on behalf of the issuer of the securities upon which such security-based swap is based or is referenced, an affiliate of the issuer, or an underwriter, shall constitute a contract for

sale of, sale of, offer for sale, or offer to sell such securities. The publication or distribution by a broker or dealer of a research report about an emerging growth company that is the subject of a proposed public offering of the common equity securities of such emerging growth company pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective shall be deemed for purposes of paragraph (10) of this subsection and section 77e(c) of this title not to constitute an offer for sale or offer to sell a security, even if the broker or dealer is participating or will participate in the registered offering of the securities of the issuer. As used in this paragraph, the term "research report" means a written, electronic, or oral communication that includes information, opinions, or recommendations with respect to securities of an issuer or an analysis of a security or an issuer, whether or not it provides information reasonably sufficient upon which to base an investment decision.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 77f of this title, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 77j of this title at the time of [1] such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed

necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

(13) The term "insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.

(14) The term "separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(15) The term "accredited investor" shall mean—

(i) a bank as defined in section 77c(a)(2) of this title whether acting in its individual or fiduciary capacity; an insurance company as defined in paragraph (13) of this subsection; an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.] or a business development company as defined in section 2(a)(48) of that Act [15 U.S.C. 80a–2(a)(48)]; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 et seq.], if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act [29 U.S.C. 1002(21)], which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

(16) The terms "security future", "narrow-based security index", and "security futures product" have the same meanings as provided in section 78c(a)(55) of this title.

(17) The terms "swap" and "security-based swap" have the same meanings as in section 1a of title 7.

(18) The terms "purchase" or "sale" of a security-based swap shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(19) The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the

Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this subchapter;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

(b) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(May 27, 1933, ch. 38, title I, §2, 48 Stat. 74; June 6, 1934, ch. 404, title II, §201, 48 Stat. 905; Aug. 10, 1954, ch. 667, title I, §§1–4, 68 Stat. 683, 684; Pub. L. 86–70, §12(a), June 25, 1959, 73 Stat. 143; Pub. L. 86–624, §7(a), July 12, 1960, 74 Stat. 412; Pub. L. 91–547, §27(a), Dec. 14, 1970, 84 Stat. 1433; Pub. L. 96–477, title VI, §603, Oct. 21, 1980, 94 Stat. 2294; Pub. L. 97–303, §1, Oct. 13, 1982, 96 Stat. 1409; Pub. L. 100–181, title II, §§201, 202, Dec. 4, 1987, 101 Stat. 1252; Pub. L. 104–290, title I, §106(a), Oct. 11, 1996, 110 Stat. 3424; Pub. L. 105–353, title III, §301(a)(1), Nov. 3, 1998, 112 Stat. 3235; Pub. L. 106–554, §1(a)(5) [title II, §208(a)(1)], Dec. 21, 2000, 114 Stat. 2763, 2763A–434; Pub. L. 111–203, title VII, §768(a), July 21, 2010, 124 Stat. 1800; Pub. L. 112–106, title I, §§101(a), 105(a), Apr. 5, 2012, 126 Stat. 307, 310.)

AMENDMENT OF SECTION

Unless otherwise provided, amendment by subtitle B (§§761–774) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see 2010 Amendment notes and Effective Date of 2010 Amendment note below.

REFERENCES IN TEXT

The Investment Company Act of 1940, referred to in subsec. (a)(15)(i), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

The Employee Retirement Income Security Act of 1974, referred to in subsec. (a)(15)(i), is Pub. L. 93–406, Sept. 2, 1974, 88 Stat. 829, as amended, which is classified principally to chapter 18 (§1001 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 29 and Tables.

CODIFICATION

Words "Philippine Islands" deleted from definition of term "Territory" under authority of Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352, which granted independence to the Philippine Islands. Proc. No. 2695 was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, and is set out as a note under that section.

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of December 1, 2015

Title 17 → Chapter II → Part 230 → §230.254

Title 17: Commodity and Securities Exchanges
PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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§230.254 Preliminary offering circular.

After the filing of an offering statement, but before its qualification, written offers of securities may be made if they meet the following requirements:

(a) *Outside front cover page.* The outside front cover page of the material bears the caption *Preliminary Offering Circular,* the date of issuance, and the following legend, which must be highlighted by prominent type or in another manner:

An offering statement pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted before the offering statement filed with the Commission is qualified. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor may there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful before registration or qualification under the laws of any such state. We may elect to satisfy our obligation to deliver a Final Offering Circular by sending you a notice within two business days after the completion of our sale to you that contains the URL where the Final Offering Circular or the offering statement in which such Final Offering Circular was filed may be obtained.

(b) *Other contents.* The Preliminary Offering Circular contains substantially the information required to be in an offering circular by Form 1-A (§239.90 of this chapter), except that certain information may be omitted under Rule 253(b) (§230.253(b)) subject to the conditions set forth in such rule.

(c) *Filing.* The Preliminary Offering Circular is filed as a part of the offering statement.

[80 FR 21895, Apr. 20, 2015]

Need assistance?

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 33 - LIMITED PARTNERSHIPS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to limited partnerships is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

002 REQUIREMENTS. Certificates of interest or participation in limited partnerships shall conform to the provisions of this Rule and any other policies and requirements that may be adopted or approved by the Director with respect to a specific security or transaction or types of plans or programs.

002.01 Limited partnerships must comply with the applicable North American Securities Administrators Association ("NASAA") Guidelines or Statements of Policy specified below, as adopted on the effective date of this Rule. A copy of each Guideline or Statement of Policy is available appendix to this rule at http://www.ndbf.ne.gov/legal/title48.shtml.

002.01A The offer or sale of interests in a limited partnership or other business combination which will engage in real estate syndications may be deemed inconsistent with investor protection and not in the public interest if the offering does not comply with the provisions of NASAA's Statement of Policy Regarding Real Estate Programs.

002.01B The offer or sale of interests in a limited partnership or other business combination which will engage in oil or gas well drilling and exploration activities or the purchase of production from oil and gas wells may be deemed inconsistent with investor protection and not in the public interest if the offering does not comply with the provisions of NASAA's Statement of Policy for the Registration of Oil and Gas Programs.

002.01C The offer or sale of interests in a limited partnership or similar organizational form which will engage in cattle feeding operations may be deemed inconsistent with investor protection and not in the public interest if the offering does not comply with the provisions of NASAA's Statement of Policy for the Registration of Publicly Offered Cattle Feeding Programs.

002.01D The offer or sale of interests in a limited partnership or other business combination which will engage in the buying and selling of, and trading in, commodity futures contracts, options thereon, commodity forward contracts or similar instruments, may be deemed inconsistent with investor protection and not in the public interest if the offering does not comply with the provisions of NASAA's Statement of Policy on Registration of Commodity Pool Programs.

002.01E The offer or sale of interests in a limited partnership or other business combination which will engage in the acquisition and ownership of equipment for lease or operation may be deemed inconsistent with investor protection and not in the public interest if the offering does not comply with the provisions of NASAA's Statement of Policy for Equipment Programs.

002.01F The offer or sale of interests in any other limited partnership or other business combination may be deemed inconsistent with investor protection and not in the public interest if the offering does not comply with the provisions of NASAA's Statement of Policy for Omnibus Guidelines.

~~002.01F~~ 002.01G Copies of the above NASAA Statements of Policy are ~~available from the Department~~attached hereo and are also contained in NASAA REPORTS published by Commerce Clearing House.

002.02 The limited partnership agreement or other organizational instrument shall conform to the provisions and requirements of this Rule, which shall also be fully disclosed in the prospectus of the offering.

002.03 An offer or sale of securities may be disallowed if the standards described in this Rule are not met, or if the offering is deemed inconsistent with investor protection.

002.04 The total amount of consideration of all kinds which may be paid directly or indirectly to the sponsor or its affiliates shall be reasonable, considering all of the aspects of the program and the investors.

002.05 The limited partnership shall specify an offering minimum which shall be an amount sufficient for the limited partnership to reasonably begin its program.

003 MINIMUM INVESTMENTS. Limited partnerships shall require the following:

003.01 The minimum investment of initial and subsequent investors in limited partnerships shall be~~:~~ five thousand dollars ($5,000.00), except for an investment through an IRA/Keogh plan which shall be one thousand dollars ($1,000.00).

~~003.01A The minimum provided for in the specific applicable Guideline or Statement of Policy; or~~

~~003.01B Five thousand dollars ($5,000.00).~~

~~003.01C The minimum investment of an IRA/Keogh plan shall be one thousand dollars ($1,000.00).~~

003.02 The minimum amounts for additional investments or reinvestments shall be:

003.02A One thousand dollars ($1,000.00) for investments in subsequent partnerships of the same series in the same program year; and

003.02B Fifty dollars ($50.00) for reinvestments of dividends from income revenues in the same program year.

003.03 Reinvestments in continuous offerings in subsequent program years will be permitted where all offers are made by prospectus and where the investor annually signs a new agreement to reinvest.

004 SUITABILITY.

004.01 ~~Limited~~ Unless the Director determines that the risks associated with the limited partnership would require higher standards, limited partnerships shall require purchasers of limited partnership interests ~~to satisfy the following suitability standards:~~ to have one of the following:

004.01A ~~Annual~~ A minimum annual gross income ~~from whatever source~~ of at least ~~forty-five~~ seventy thousand dollars ~~($45,000)~~ ($70,000.00) and a minimum net worth of at least ~~forty-five~~ seventy thousand dollars ~~($45,000)~~ ($70,000.00); ~~exclusive of home, furnishings and automobiles;~~ or

004.01B A minimum net worth of at least ~~one~~ two hundred fifty thousand dollars ($250,000.00). ~~($150,000), exclusive of home, furnishings and automobiles.~~

004.01C Net worth shall be determined exclusive of home, home furnishings, and automobiles.

004.01D In the case of sales to fiduciary accounts, these minimum suitability standards may be met by the beneficiary, by the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the shares if the donor or grantor is the fiduciary.

~~004.02 A purchaser of limited partnership interests may not invest more than ten percent (10%) of his or her net worth, exclusive of home, furnishings and automobiles, in any one limited partnership.~~

~~004.03~~ 004.02 A purchaser of limited partnership interests shall be required to sign a subscription agreement. Such subscription agreement shall contain a statement attesting that the purchaser meets the suitability standards required.

005 LIMITED LIFE. The limited partnership shall exist for a specified length of time.

005.01 The length of the existence of the partnership shall be reasonable.

005.02 The length of the existence of the partnership shall be disclosed in the prospectus and partnership agreement.

006 OFFERING PERIOD.

006.01 The duration of the offering period shall be specified in the prospectus and partnership agreement.

006.02 The proceeds of the sales shall be escrowed during the offering period.

006.03 If the specified offering minimum is not received during the offering period, the proceeds of the sales shall be returned to the investors with pro rata interest from the escrowed funds.

007 TAXES. The limited partnership shall obtain a favorable tax ruling concerning the tax status of the partnership before commencing operations.

007.01 An opinion of independent tax counsel may be accepted by the Director in lieu of a tax ruling.

007.02 Any projection of earnings, tax write-offs and returns shall be reasonable and fully disclosed ~~with~~ in the prospectus.

008 RIGHTS OF LIMITED PARTNERS.

008.01 Limited partners owning ten percent ~~(10%)~~ of the limited partnership capital shall have the right to propose for vote any amendment to the limited partnership agreement, any dismissal of the general partner, and/or the termination of the life of the partnership. A majority of the limited partnership interests shall be required for approval of any such proposal.

008.02 Any limited partner shall have the right to secure, by written request to the general partner, ~~a~~ an alphabetical list of the names, addresses and telephone numbers of all other limited partners ("limited partner list") along with the number of interests held by each of them. ~~and related interest holdings of all other limited partners.~~

008.02A A copy of the limited partner list shall be mailed to the requesting limited partner within ten days of the request.

008.02A1 The copy of the limited partner list shall be printed in alphabetical order, on white paper, and in a readily readable type size, in no event smaller than 10-point type.

008.02A2 A reasonable fee for copy work may be charged by the limited partnership.

008.03 Any contract between the partnership and the general partner or an affiliate of the general partner shall be subject to termination by majority vote or consent of the limited partners following sixty ~~(60)~~ days' prior written notice thereof to the limited partners.

008.04 The general partner shall not withdraw from the partnership without sixty ~~(60)~~ days' prior written notice thereof to the limited partners.

008.05 A majority of the limited partnership interests shall approve any transfer of the general partner's interest.

009 SERIES OFFERINGS. A ~~partnership~~ filing to register a limited partnership ~~which~~ that is ~~part~~ the continuation of a series previously registered in Nebraska shall include the following additions to such filing:

009.01 An ~~an~~ affidavit ~~stating~~:

009.01A Setting forth the substantive changes from the prior partnership, and ~~that~~

009.01B Attesting that any changes required by the Department following review of previous filings are included in the offering; ~~,~~ ~~and~~

009.02 A ~~a~~ marked copy of the prospectus showing the changes from the previous filing. ~~, and appropriate fees.~~

010 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

Title 48 - DEPARTMENT OF BANKING & FINANCE

CHAPTER 34 - REGISTRATION OF ASSET-BACKED SECURITIES

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the registration of asset-backed securities is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case by case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 Federal statutes and rules of the Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), or the Financial Accounting Standards Board ("FASB") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the statutes or rules referenced in this Rule is available as an appendix to this rule at http://www.ndbf.ne.gov/legal/title48.shtml.

002 DEFINITIONS. The following definitions, in addition to definitions contained in 48 NAC 2, shall apply to this Rule:

002.01 Acquisition cost means the cost of an eligible asset as reflected on the issuer's balance sheet, net of applicable acquisition expenses and origination fees.

002.02 Acquisition criteria means the specified characteristics an eligible asset is required to possess in order for it to be sufficiently similar to other eligible assets to make possible a reliable prediction of the cash flows associated with the eligible assets when pooled in large numbers.

002.03 Acquisition expenses mean all direct and indirect expenses incurred by the issuer in connection with the selection and acquisition of eligible assets, whether or not acquired, other than origination fees.

002.04 Allowed expenses means trustee fees, ongoing fees paid to rating agencies, servicing fees, origination fees, acquisition expenses, liquidation expenses, bank service charges, taxes, attorneys' fees, audit fees, and other direct charges incurred by the issuer in the ordinary course of the issuer's business, exclusive of organizational and offering expenses, conversion expenses and extraordinary expenses.

002.05 Asset-backed securities mean securities that provide a stated rate of return to security holders and that are primarily serviced as to both return of investment and return on investment by the cash flow from designated eligible assets, excluding:

002.05A The securities of an investment company subject to the Investment Company Act of 1940; and

002.05B Equity interests in limited partnerships or other direct investment vehicles subject to other applicable registration Rules.

002.06 Cash flow means the amount of cash generated from operations, calculated in compliance with Financial Accounting Standard 95, plus receipts from the disposition or liquidation of eligible assets.

002.07 Collections account means the account in a financial institution created to receive cash flow generated by the eligible assets and to maintain the segregation of such cash from other assets of the ~~servicing agent~~ servicer.

002.08 Conversion expenses means the expenses associated with changing from one ~~servicing agent~~ servicer to another ~~servicing agent~~ servicer or one trustee to another trustee.

002.09 Credit enhancement means insurance, letters of credit, lines of credit, over-collateralization, seller recourse, reserve accounts, senior claim guarantees, and other arrangements intended to decrease the likelihood of default on the asset-backed securities.

002.10 Eligible assets means financial or commercial assets, either fixed or revolving, which are:

002.10A Generally homogenous in nature;

002.10B Subject to reasonably objective valuation; and

002.10C For other than asset-backed securities with an investment grade rating:

002.10C1 Self-liquidating or easily liquidated; and

002.10C2 Capable of generating a predictable cash flow.

002.11 Investment grade means a rating that is in one of the four highest rating categories as determined by a rating agency.

002.12 Issuer means the person formed to issue the asset-backed securities and to hold ownership of, or a security interest in, the eligible assets.

002.13 Liquidation expenses means the expenditures necessary to convert residual or non-performing eligible assets, or any underlying collateral, into cash,

including expenditures necessary to collect on insurance or other credit enhancements.

002.14 Net worth means the excess of total assets over total liabilities as determined by generally accepted accounting principles.

002.15 Obligor means a person obligated to make the payments on or under an eligible asset.

002.16 Operating account means the account in a financial institution created to receive offering proceeds and revenues from the collections account which are not required to be transferred to the trust account, and from which payments are made for additional eligible assets and allowed expenses.

002.17 Origination fees means all fees, commissions, or other consideration, other than the purchase price of the eligible assets, paid by any party to any party in connection with the origination and sale of eligible assets to the issuer, but not including initial fees paid to rating agencies and professional fees paid to attorneys, accountants, appraisers, and similar professionals for providing routine professional services, which fees shall be deemed acquisition expenses.

002.18 Originator means a person, which may or may not be the sponsor, that creates or originates, directly or indirectly, eligible assets to be sold or pledged, to the issuer.

002.19 Organizational and offering expenses means all expenses incurred in connection with and in preparing the asset-backed securities for registration and subsequently offering and distributing the asset-backed securities to the public. Organizational and offering expenses include, but are not limited to, total underwriting and brokerage discounts and commissions, including fees of the underwriters' attorneys; initial fees paid to rating agencies; expenses for printing, engraving, and mailing; salaries of employees while engaged in sales activity; charges of transfer agents, registrars, trustees, escrow holders, ~~depositaries,~~ depositories, and experts; expenses of qualification of the sale of the securities under federal and state laws, including taxes and fees; and accountants' and attorneys' fees.

002.20 Paying agent means the trustee or other person responsible for disbursing funds from the trust account to the security holders in satisfaction of the issuer's obligation for payments on the asset-backed securities.

002.21 Prospectus means the primary disclosure document(s), by whatever name known, utilized for the purpose of offering and selling asset-backed securities to the public.

002.22 Rating agency means Standard and Poor's Ratings Group, a division of McGraw Hill Company; Moody's Investors Service, Inc.; Fitch Investors Service, Inc.; or Duff & Phelps Credit Rating Co.; or a successor to any of the foregoing.

002.23 Security holders means the persons in whose names the issuer's asset-backed securities are held and to whom payments pursuant to the terms of the trust agreement are entitled to be made.

002.24 ~~Servicing agent~~Servicer means the person responsible for the management of the issuer's assets and the conversion of such assets into the cash flow necessary to make stated payments on the asset-backed securities.

002.25 Servicing agreement means the contract that establishes the responsibilities and compensation of the ~~servicing agent~~ servicer.

002.26 Servicing fees means compensation paid to the ~~servicing agent~~ servicer pursuant to the terms of the servicing agreement.

002.27 Special purpose entity means a trust, corporation, partnership, limited liability company, or other legal entity formed for the purpose of making one or more offerings of asset-backed securities, holding an ownership interest or a security interest in the eligible assets, and forwarding the cash flows from the eligible assets to the security holders.

002.28 Sponsor means any person directly or indirectly instrumental in organizing, wholly or in part, an issuer or any person, other than the trustee, who will control, manage, or participate in the management of an issuer or its assets, but shall not include:

002.28A Any person whose only relationship with the issuer is that of an independent ~~servicing agent~~ servicer of the issuer's eligible assets and whose only compensation is as such; or

002.28B Wholly independent third parties such as attorneys, accountants, rating agencies, and underwriters whose only compensation is for professional services rendered in connection with the offering of asset-backed securities.

002.29 Stated rate of return means a return where the security holder is entitled to receive either:

002.29A A stated principal amount;

002.29B Interest on the principal amount, which may be a notional principal amount, calculated by reference to:

002.29B1 A fixed rate, or

002.29B2 A standard or formula which does not reference any change in the market value or fair value of eligible assets.

002.29C Interest on a principal amount, which may be a notional principal amount, calculated by reference to:

002.29C1 Auctions among security holders and prospective security holders;~~, or~~

002.29C2 A periodic remarketing of the asset-backed security;

002.29D An amount representing specified fixed or variable portions of the interest generated by the underlying eligible assets; or

002.29E Any combination of the above.

002.30 Trust account means the account in a financial institution created to receive funds from the collections account and the operating account and from which payments are made on the asset-backed securities of the issuer.

002.31 Trust agreement means the governing document(s), by whatever name, which defines the pooling arrangements and which establishes the rights, privileges, duties, and responsibilities of the trustee, the issuer, the security holders, and, when relevant, the~~ servicing agent~~ servicer in connection with the issuance of the asset-backed securities.

002.31A The trust established by the trust agreement may or may not be a taxable entity and it may or may not serve as the issuer of the asset-backed securities.

002.31B The trust agreement may include the servicing agreement.

002.32 Trustee means the financial institution meeting the requirements under Section 006, below, which is party to the trust agreement and which has the primary responsibility of representing the interests of the security holders by assuring the terms of the trust agreement are enforced.

002.33 Trustee fees means the fees and other consideration paid to the trustee for performing services under the trust agreement.

003 REQUIREMENTS OF SPONSOR.

003.01 For other than asset-backed securities with an investment grade rating, the sponsor or its management shall demonstrate the knowledge and expertise necessary to supervise the origination, pooling and servicing of the type of eligible assets being securitized.

003.02 Financial Condition.

003.02A The sponsor shall demonstrate that it is solvent and will, with reasonable certainty, be able to meet any financial obligations to the issuer.

003.02B If the Director deems it relevant, the sponsor shall provide complete audited financial statements for its most recent fiscal year and, if necessary, unaudited financial statements prepared within one hundred

thirty-five ~~135~~ days of the date that the application for registration of the asset-backed securities is made effective by the Director.

003.03 Credit Enhancements.

003.03A The sponsor shall make or cause to be made an equity contribution to the issuer or shall provide or cause to be provided other substantial credit enhancements to help establish a reasonable likelihood that the stated rate of return will be realized, unless:

003.03A1 The asset-backed securities have an investment grade rating, or

003.03A2 The Director waives this requirement.

003.03B The sponsor shall describe the credit enhancement in the prospectus, including summary information regarding any third party which is providing the credit enhancement.

003.04 Portfolio Characteristics.

003.04A For other than asset-backed securities with an investment grade rating, the sponsor shall demonstrate, based on designated acquisition criteria or specifically identified eligible assets, that the eligible assets being pooled will generate sufficient cash flow to make all scheduled payments on the asset-backed securities after taking allowed expenses into consideration.

003.04B For other than asset-backed securities with an investment grade rating, if a significant portion of the cash flow is anticipated to come from the liquidation of tangible assets underlying the eligible assets, additional evidence should be provided establishing the issuer's or ~~servicing agent~~ servicer's ability to reliably predict the value of such tangible assets.

003.04C For other than asset-backed securities with an investment grade rating, if the cash flow is primarily based upon the credit quality of the obligors, the sponsor shall demonstrate that adequate measures will be taken to qualify obligors.

003.04D The sponsor shall disclose, in the prospectus, the following information regarding the identified eligible assets:

003.04D1 The outstanding principal balance of the eligible assets;~~,~~

003.04D2 The outstanding principal balance of the eligible assets as a percentage of the total amount of asset-backed securities being offered;~~,~~

003.04D3 The cash flow currently being generated by the eligible assets as a percentage of the total amount of asset-backed securities being offered;~~,~~

003.04D4 A description of what constitutes a default;~~,~~

003.04D5 The amount of eligible assets in default;~~,~~

003.04D6 The amount of eligible assets in default as a percentage of the total amount of asset-backed securities being offered;~~,~~ and

003.04D7 The amount of eligible assets in default as a percentage of the credit enhancement.

003.05 Asset-backed securities must have a stated rate of return.

003.06 Asset Selection.

003.06A Acquisition criteria for the eligible assets or the relevant characteristics of any specified pool of eligible assets shall be set forth in the prospectus and the trust agreement.

003.06B If eligible assets are selected from a larger pool of eligible assets owned or controlled by the sponsor, the selection process must be random, unless a reasonable basis exists for selecting eligible assets on a non-random basis.

003.06C Any selection method used must be fair and must be fully disclosed in the prospectus.

003.07 Asset Repurchase and Substitution.

003.07A The sponsor may repurchase an eligible asset or may substitute one or more eligible assets which are part of the collateral underlying the asset-backed securities with new eligible assets if:

003.07A1 The eligible assets which are to be repurchased or replaced are found not to meet the acquisition criteria or are otherwise found not to comply with the requirements set forth in the trust agreement;~~,~~ and

003.07A2 The repurchase or substitution is not made for the purpose of recognizing gains or decreasing losses resulting from market value changes in the issuer's portfolio of eligible assets.

003.07B The sponsor or another person may repurchase the eligible assets when the pool of eligible assets has been reduced to fifteen percent ~~(15%)~~ or less of the original eligible assets.

003.07C A repurchase must be made at a price determined by a fair and reasonable formula set forth in the original prospectus.

003.07D If a substitution takes place, the new eligible asset must have equal or greater scheduled cash flow, approximately the same term; and, if appropriate, equal or greater liquidation value than the eligible asset to be replaced. Compliance with this requirement must be verified by a certified public accountant, or if the eligible asset is readily marketable, by documentation of the current market value of the eligible asset.

003.07E If any repurchases or substitutions take place and the asset-backed securities are rated at the time of the initial offering, then the initial rating must be maintained.

003.07F The sponsor shall provide a report representing compliance with these requirements to the trustee simultaneously with consummating the repurchase or substitution.

003.07G The sponsor shall disclose, in the prospectus, any obligation it has to repurchase eligible assets.

003.08 Cash flow not needed for stated payments on the asset-backed securities, reserve deposits, or other designated purposes, may be reinvested in additional eligible assets which meet acquisition criteria.

003.09 Distributions of excess cash flow or eligible assets to the sponsor, or other residual owners of the issuer, while the asset-backed securities are outstanding will be allowed, provided that:

003.09A The specific circumstances permitting such distributions are fully disclosed in the prospectus; and

003.09B The ability of the issuer to make all subsequent stated payments on the asset-backed securities, as determined on the date of such distributions, is not materially diminished as a result of such distributions.

003.09C For other than asset-backed securities with an investment grade rating, the issuer must provide reasonable evidence that such distribution rights will not impact the credit quality of the asset-backed securities at the time the asset-backed securities are registered.

004 REQUIREMENTS OF ISSUER.

004.01 The issuer must be a special purpose entity.

004.01A The issuer will generally not be permitted to:

004.01A1 Have employees, other than non-compensated officers; or

004.01A2 Incur obligations other than allowed expenses, conversion expenses, organizational and offering expenses and other extraordinary expenses arising from a change of ~~servicing agents~~ servicer or similar extraordinary event.

004.01B The issuer may make more than one offering, if the asset-backed securities have an investment grade rating or if each offering is secured by a distinct pool of assets, with cross-defaults and cross-collateralization prohibited by contract or otherwise.

004.01C If the issuer is not a trust, there must be a supplemental trust agreement administered by a trustee.

004.02 For other than asset-backed securities with an investment grade rating, the issuer's interest in the eligible assets must be an ownership interest or a security interest. The eligible assets may be held by a special purpose entity other than the issuer if the issuer's ownership interest or security interest in the eligible assets is supported by an opinion of counsel as required by Section 004.03B, below.

004.03 For offerings where the issuer acquires ownership of the eligible assets, the Director may require the issuer to provide an opinion of qualified counsel to the effect that, in the event of a bankruptcy by the sponsor or an originator or other seller of eligible assets to the issuer, the transfer of eligible assets would be treated as a true sale.

004.03A For offerings where the issuer acquires a security interest in the eligible assets, an opinion may be required indicating:

004.03A1 That the security interest will be perfected based on procedures set forth in the trust agreement~~;~~, and

004.03A2 Whether financial statements under the Uniform Commercial Code are necessary to perfect security interests in the eligible assets.

004.03B If a special purpose entity, other than the issuer, is established to hold the eligible assets that are pledged to the issuer, an opinion may be required indicating that, in the event of a bankruptcy by the sponsor or an originator or other seller of eligible assets to the special purpose entity, the transfer of eligible assets would be treated as a true sale.

004.04 For other than asset-backed securities with an investment grade rating, the minimum amount of proceeds required to close the offering shall be sufficient to allow the issuer to acquire all specified eligible assets or a sufficient amount of unspecified eligible assets to diversify the pool of eligible assets to the extent necessary to achieve a high level of confidence with respect to the statistical characteristics of the portfolio.

004.05 All funds received prior to achieving the minimum offering shall be deposited in an interest-bearing account with an independent escrow agent whose name and address shall be disclosed in the prospectus.

004.05A In the event that the established minimum is not reached, all paid subscriptions shall be returned to the investors, plus interest earned, on a pro rata basis.

004.05B The Director may require the available proceeds from offerings that do not have an investment grade rating to be fully invested in eligible assets within two months from the date such proceeds are released from escrow.

004.06 The offering period may not exceed one year from the date of effectiveness unless permitted by the Director.

004.07 For other than asset-backed securities with an investment grade rating, cash held in collections accounts, operating accounts, trust accounts or reserve accounts, cash held pending investment in eligible assets, cash held pending distribution to security holders, and other temporary cash balances may be invested, either directly or through money market funds, in securities that are direct obligations of, or fully guaranteed by, the U.S. Government or a U.S. Governmental agency or instrumentality, certificates of deposit, demand or time deposits, and bankers acceptances from any state or federally chartered depository institution having an investment grade rating.

004.08 If the asset-backed securities are rated at the time of the initial offering, the issuer must agree to pay to have that rating monitored at least annually.

004.09 The trust agreement shall provide that the issuer or trustee shall cause to be prepared and distributed to the security holders the following reports:

004.09A A report containing relevant information regarding the performance of the issuer's portfolio of eligible assets, including cash flows, delinquency rates, gross and net loss rates, substitution, and changes in the outstanding principal balance of eligible assets, if applicable, which report shall be prepared concurrently with distributions to security holders;

004.09B A table comparing any forecasts previously provided with the actual results during the period covered by the report, which shall be prepared at least annually; and

004.09C An annual audited financial statement of the issuer.

005 REQUIREMENTS OF ~~SERVICING AGENT~~ SERVICER.

005.01 For other than asset-backed securities with an investment grade rating, the ~~servicing agent~~ servicer or its management must have at least three years' experience servicing eligible assets similar to the assets to be acquired by the issuer.

005.01A A greater amount of experience may be required if the portfolios of eligible assets require intensive levels of servicing.

005.01B The~~servicing agent~~ servicer may be required to provide supplemental summary information regarding the performance of prior pools of similar eligible assets which it has serviced.

005.02 For other than asset-backed securities with an investment grade rating, the ~~servicing agent~~ servicer must demonstrate that it is solvent and possesses the financial resources necessary to perform under the servicing agreement and/or trust agreement.

005.02A For other than asset-backed securities with an investment grade rating, a ~~servicing agent~~ servicer which is to provide any financial guarantees or advances in connection with the issuance of the asset-backed securities must demonstrate its ability to perform on such guarantees or advances under a default.

005.02B For other than asset-backed securities with an investment grade rating, if the Director deems it relevant, the ~~servicing agent~~ servicer shall provide complete audited financial statements for its most recent fiscal year end and, if necessary, unaudited financial statements prepared within one hundred thirty-five ~~135~~ days of the date that the application for registration of the asset-backed securities is made effective by the Director.

005.03 The~~servicing agent~~ servicer may not be affiliated with the trustee.

005.03A For other than asset-backed securities with an investment grade rating, the ~~servicing agent~~ servicer may not be affiliated with any obligor under any eligible asset.

005.03B The trustee may serve as successor ~~servicing agent~~ servicer if it is otherwise qualified to perform the servicing function.

005.04 The servicing agreement shall require that the ~~servicing agent~~ servicer prepare and deliver to the trustee the following reports, if applicable:

005.04A On a monthly basis or similar time interval that coincides with the timing of cash flows from the eligible assets:

005.04A1 For other than asset-backed securities with an investment grade rating, a report containing relevant information regarding the performance of the portfolio of eligible assets, including cash flows, delinquency rates, gross and net loss rates, substitutions, and changes in the outstanding principal balance of eligible assets;

005.04A2 Information regarding the status of credit enhancements, including the extent to which any such credit enhancements have been utilized by the ~~servicing agent~~ servicer to supplement the cash flow associated with the eligible assets; and

005.04A3 For other than asset-backed securities with an investment grade rating, notification of any default in the payment of principal and interest on any other asset-backed securities issued by a special purpose entity with the same sponsor, ~~servicing agent~~ servicer, and business plan.

005.04B On a quarterly basis:

005.04B1 Information regarding the identity of each originator or seller of eligible assets to the issuer, and if the originator or seller has guaranteed any aspect of performance of any eligible assets, complete financial statements of the originator or seller as of the most recent date available together with specific information regarding the historical performance of the originator's or seller's portfolio of eligible assets;

005.04B2 Information regarding the percentage of eligible assets acquired from each originator or seller; and

005.04B3 Information regarding the diversification of each originator's or seller's portfolio of eligible assets with respect to underlying obligors, if applicable.

005.05 The~~servicing agent~~ servicer may not voluntarily withdraw as ~~servicing agent~~ servicer, except as may be required by law, or upon at least thirty ~~30~~ days prior notice to the trustee, provided that a qualified successor ~~servicing agent~~ servicer has been retained, effective as of the resignation date of its predecessor.

005.05A In the event that the trustee, sponsor, or security holders terminates the ~~servicing agent~~ servicer, the servicing agreement shall designate a qualified successor ~~servicing agent~~ servicer or shall specify the criteria for selecting a qualified successor ~~servicing agent~~ servicer.

005.05B The successor ~~servicing agent~~ servicer must be approved by the trustee and must be capable of commencing the servicing of the eligible assets within a commercially reasonable period of time.

006 REQUIREMENTS OF TRUSTEE.

006.01 There shall at all times be one or more trustees under the trust agreement, with at least one trustee at all times being a corporation organized and doing business under the laws of the United States or of any state or territory thereof or of the District of Columbia which:

006.01A Is authorized under such laws to exercise corporate trust powers;

006.01B Is subject to supervision or examination by federal, state, territorial, or District of Columbia authority; and

006.01C Has a rating, or is a subsidiary of an institution having a rating, issued by a nationally recognized bank or financial institution rating organization, in one of the four highest categories.

006.02 The trustee or one or more of its corporate trust officers must have at least three years' relevant experience. The trustee in its commercial capacity must have origination or servicing experience with respect to similar eligible assets.

006.03 The trustee may not be affiliated with the ~~servicing agent~~ servicer, the sponsor, or the issuer.

006.03A The trustee may serve as successor ~~servicing agent~~ servicer if it is otherwise qualified to perform the servicing function.

006.03B The trustee may not have received within the last five years and may not receive during the term of the trust agreement more than five percent ~~(5%)~~ of its total revenue from all sources, including trustee's fees, from the sponsor and the ~~servicing agent~~ servicer on a combined basis.

006.03C The trust agreement shall provide that no more than five percent ~~(5%)~~ of the loan portfolio of the trustee or its affiliates may be loans to either the issuer, the sponsor, or the ~~servicing agent~~ servicer.

006.04 If the trustee voluntarily withdraws as trustee, the issuer or sponsor shall designate a successor trustee or the withdrawing trustee may petition a court to appoint a successor trustee.

006.04A The withdrawing or resigning trustee must continue to perform under the trust agreement until the successor trustee is designated by the issuer, the sponsor, or the court.

006.04B If the trust agreement allows the trustee to be terminated by the security holders or by the issuer, there must be a reasonable procedure set forth in the trust agreement for replacing the trustee.

006.05 The trust agreement shall provide that it shall be the responsibility of the trustee to:

006.05A Maintain the custody of the documentation delivered to it evidencing title or perfected security interest in the issuer's eligible assets.

006.05B Verify all funds deposited in the trust account for the benefit of the security holders and use its best efforts to verify all payments called for under the terms of the trust agreement.

006.05C Verify the delivery of all reports and other instruments required pursuant to the terms of the trust agreement and the Securities Exchange Act of 1934.

006.05D Examine all reports or other instruments furnished to the trustee pursuant to the terms of the trust agreement and determine, based on the

information provided, whether there is a violation of any of the terms and conditions set forth in the trust agreement.

006.05E In the event that the trustee determines there has been a default under the terms of the trust agreement, the trustee shall be responsible for the timely notification of security holders and the implementation of appropriate remedial actions and may not first seek additional indemnification other than that provided in the trust agreement from the security holders before taking such actions.

006.05E1 The trustee shall be entitled to reimbursement for all costs relating to a default.

006.05E2 The trustee shall not be indemnified for its breach of contract, misconduct or gross negligence.

006.05F Upon notification of a default, under Section 005.04A3, above, the trustee may, if it deems appropriate, replace the ~~servicing agent~~ servicer and take any other steps necessary for the protection of security holders.

006.06 The trustee shall provide an annual report to the security holders which indicates whether the trustee has fulfilled its obligations under the trust agreement and whether there have been any known uncured defaults under the trust agreement.

007 SUITABILITY OF SECURITY HOLDERS.

007.01 The sponsor shall establish minimum income and net worth standards which are reasonable given the risks associated with the purchase of the asset-backed securities. Offerings with greater investor risk shall have minimum suitability standards with a greater income and net worth requirements.

007.01A The provisions of this Section shall not apply to asset-backed securities:

007.01A1 Which have an investment grade rating;

007.01A2 Which are firmly underwritten; or

007.01A3 For which the sponsor is able to demonstrate that there will be a substantial and active secondary market.

007.01B The Director shall evaluate the standards proposed by the sponsor when the issuer's application for registration is reviewed, which evaluation may involve the following:

007.01B1 Potential for variances in cash flows;

007.01B2 Intensity of the servicing function;

007.01B3 Potential security holders;

007.01B4 Relationships among potential security holders and the sponsor;

007.01B5 Liquidity of the asset-backed securities;

007.01B6 Prior performance of similar pools formed by the sponsor;

007.01B7 Financial condition of the sponsor;

007.01B8 Credit enhancements;

007.01B9 Transactions between the issuer and the sponsor; and

007.01B10 Any other relevant factors.

007.02 Unless the Director determines that the risks associated with particular asset-backed securities would require greater suitability standards, security holders shall have:

007.02A A minimum annual gross income of ~~forty-five~~ seventy thousand dollars ~~($45,000)~~ ($70,000.00) and a minimum net worth of ~~forty-five~~ seventy thousand dollars ~~($45,000)~~ ($70,000.00); or

007.02B A minimum net worth of ~~one~~ two hundred fifty thousand dollars ~~($150,000)~~ ($250,000.00).

007.02C Net worth shall be determined exclusive of home, home furnishings, and automobiles.

007.02D In the case of sales to fiduciary accounts, the minimum suitability standards may be met by the beneficiary, by the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the asset-backed securities if the donor or grantor is the fiduciary.

007.02E The sponsor shall set forth in the final prospectus:

007.02E1 A description of the type of ~~person~~ prospective security holder who might benefit from an investment in the asset-backed securities; and

007.02E2 The minimum suitability standards imposed on security holders.

007.03 The sponsor and each person selling asset-backed securities on behalf of the sponsor or issuer shall make every reasonable effort to determine that the

purchase of asset-backed securities is a suitable and appropriate investment for each security holder.

007.03A In making this determination, the sponsor and/or each person selling shares on behalf of the sponsor shall ascertain that the prospective security holder:

007.03A1 Meets the minimum ~~income and net worth~~suitability standards established by the issuer;

007.03A2 Can reasonably benefit from the asset-backed securities based on the prospective security holder's overall investment objectives and portfolio structure;

007.03A3 Is able to bear the economic risk of the investment based on the prospective security holder's overall financial situation; and

007.03A4 Has apparent understanding of:

007.03A4a The fundamental risks of the investment; and

007.03A4b The lack of liquidity of the asset-backed securities. ~~; and~~

~~007.03A4c The background and qualifications of the sponsor.~~

007.03B Each person selling asset-backed securities on behalf of the sponsor or issuer shall make the suitability determination on the basis of information it has obtained from a prospective security holder, including the age, investment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective security holder, as well as any other pertinent factors.

007.03C Each person selling asset-backed securities on behalf of the sponsor or issuer shall maintain records of the information used to determine that an investment in asset-backed securities is suitable and appropriate for a security holder for at least six years.

007.03D The issuer shall disclose in the final prospectus the responsibility of each person selling asset-backed securities on behalf of the sponsor or issuer to make every reasonable effort to determine that the purchase of asset backed securities is a suitable and appropriate investment for each security holder, based on information provided by the security holder regarding the security holder's financial situation and investment objectives.

007.04 ~~The Director may require that security~~ Security holders shall be required to complete and sign a written subscription agreement.

007.04A The sponsor may require that security holders make certain factual representations in the subscription agreement, including the following:

007.04A1 The security holder meets the minimum ~~income and net worth~~ suitability standards established for the issuer;

007.04A2 The security holder is purchasing the asset-backed securities for his or her own account;

007.04A3 The security holder has received a copy of the prospectus; and

007.04A4 The security holder acknowledges that the asset-backed securities will not be readily marketable.

007.04B The security holders must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the security holders may not grant any person a power of attorney to make such representations on their behalf.

007.04C The sponsor and/or each person selling asset-backed securities on behalf of the sponsor or issuer shall not require security holders to make representations in the subscription agreement which are subjective or unreasonable and which:

007.04C1 Might cause the security holder to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

007.04C2 Would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the security holders.

~~007.04D~~ 007.04C3 Prohibited representations include, but are not limited to the following:

~~007.04D1~~ 007.04C3a The security holder understands or comprehends the risk factors associated with an investment in the asset-backed securities;

~~007.04D2~~ 007.04C3b The investment is a suitable one for the security holder;

~~007.04D3~~ 007.04C3c The security holder has read the prospectus; and

~~007.04D4~~ 007.04C3d In deciding to invest in the asset-backed securities, the security holder has relied solely on the prospectus, and not on any

other information or representations from other persons or sources.

~~007.04D5~~ 007.04C4 The sponsor may place the content of the prohibited representations in the subscription agreement in the form of advisory disclosures to security holders, but the disclosures may not be contained in the security holder representation section of the subscription agreement.

007.05 The sponsor or persons selling the asset-backed securities shall send all security holders a confirmation of their purchase.

008 FEES, COMPENSATION AND EXPENSES.

008.01 For other than asset-backed securities with an investment grade rating, the sponsor shall demonstrate that the total amount of consideration of all kinds which may be paid, directly or indirectly, to all parties is fair, competitive, commercially reasonable, and not less favorable to the issuer than fees or expenses between unrelated third parties.

008.01A The sponsor shall subordinate its interest in the cash flow and liquidation value of eligible assets and the underlying collateral, if any, to the interest of the security holders.

008.01B The prospectus must fully disclose, in tabular form, an itemization of:

008.01B1 The consideration which may be received in connection with the issuer's activities directly or indirectly by the sponsor, the ~~servicing agent~~ servicer, and the selling agents;

008.01B2 The reason for which the consideration is paid; and

008.01B3 The method for paying the consideration, including the time when payment will be made.

008.02 All items of compensation to underwriters or selling agents, including, but not limited to, selling commissions, expenses, rights of first refusal, consulting fees, finders' fees and all other items of compensation of any kind or description paid by the issuer, directly or indirectly, shall be taken into consideration in computing the amount of allowable organizational and offering expenses. Generally, organizational and offering expenses will not be permitted to exceed fifteen percent ~~(15%)~~ of gross proceeds.

008.03 For other than asset-backed securities with an investment grade rating, origination fees and acquisition expenses paid or to be paid by the issuer, sponsor, or their affiliates must be fully justified based on actual services provided and expenses incurred in connection with acquiring the eligible assets.

008.04 Other than allowed expenses, organizational and offering expenses, and conversion expenses, the issuer may only be charged for the actual cost of goods

and services used or incurred for or by the issuer and obtained from persons other than the sponsor, ~~servicing agent~~ servicer, or their affiliates.

008.04A No reimbursement shall be permitted for goods or services for which the sponsor or ~~servicing agent~~ servicer are entitled to compensation by way of separate fees. Items excluded from permitted expenses include, but are not limited to, the following:

008.04A1 Rent or depreciation, utilities, capital equipment, and other administrative items of the sponsor or ~~servicing agent~~ servicer; and

008.04A2 Salaries, fringe benefits, travel expenses, and other administrative items incurred or allocated to any controlling person of the sponsor or ~~servicing agent~~ servicer.

008.04B For other than asset-backed securities with an investment grade rating, the prospectus shall contain a table showing an itemized listing of the fees and expenses expected to be incurred by the issuer annually, with the amounts expressed in dollars and as a percentage of the gross proceeds of the offering.

008.05 For other than asset-backed securities with an investment grade rating, servicing fees must be demonstrated to be fair and reasonable based on the actual services performed.

009 CONFLICTS OF INTEREST.

009.01 For other than asset-backed securities with an investment grade rating, the issuer will not be permitted to acquire an interest in eligible assets in which the sponsor or ~~servicing agent~~ servicer has an interest unless the following conditions are met:

009.01A The transaction occurs at the closing of the offering and is fully disclosed in the prospectus or, in the case of revolving and substituted eligible assets, the terms and conditions of all transfers are fully disclosed in the prospectus; and

009.01B The eligible assets are acquired upon terms fair to the issuer and at a price not to exceed fair market value, inclusive of origination fees and acquisition expenses.

~~009.01C~~ 009.02 Notwithstanding the requirements of Section 009.01, above, the sponsor or ~~servicing agent~~ servicer may purchase or generate eligible assets in its own name or the name of a nominee and temporarily hold title thereto, for the purpose of facilitating the acquisition of the eligible assets by the issuer. If the offering does not have an investment grade rating, the following additional conditions must be met:

~~009.01C1~~ 009.02A The eligible assets must be purchased by the issuer for a price no greater than the cost of the eligible assets to the sponsor or

~~servicing agent~~ servicer, adjusted for intervening cash flow and expenses; and

~~009.01C2~~ 009.02B There may be no other benefits arising out of such transaction to the sponsor or ~~servicing agent~~ servicer apart from compensation otherwise permitted by this Rule and disclosed in the prospectus.

~~009.02~~ 009.03 For other than asset-backed securities with an investment grade rating, a sponsor or ~~servicing agent~~ servicer shall not be permitted to acquire eligible assets from the issuer, except for:

~~009.02A~~ 009.03A Repurchases or substitutions permitted under Section 003.07, above;

~~009.02B~~ 009.03B Repurchases where there has been a breach of a representation or warranty pursuant to the trust agreement with respect to eligible assets; and

~~009.02C~~ 009.03C Circumstances where the proceeds are used to redeem one hundred percent ~~(100%)~~ of the outstanding principal amount of asset-backed securities, together with interest accrued to the date of redemption, without any penalty to the issuer.

~~009.03~~ 009.04 Except as provided below, the assets of the issuer shall not be commingled with the assets of any other person.

~~009.03A~~ 009.04A For other than asset-backed securities with an investment grade rating, all cash flows generated by the eligible assets shall be deposited, daily, into a segregated collections account.

~~009.03B~~ 009.04B For other than asset-backed securities with an investment grade rating, in no event shall the ~~servicing agent~~ servicer hold cash flow in its own account for more than ~~48 hours,~~ two business days, unless such amounts are guaranteed by a letter of credit, a segregated reserve account, or other arrangement acceptable to the Director. Amounts in the collections account may be transferred to an operating account for reinvestment and the payment of allowed expenses or directly to a trust account for distribution to security holders.

~~009.04~~ 009.05 For other than asset-backed securities with an investment grade rating, if the Director deems appropriate, the Director may delay the registration of asset-backed securities of another special purpose entity formed by the sponsor to purchase similar eligible assets until:

~~009.04A~~ 009.05A The offering of the asset-backed securities is completed; and

~~009.04B~~ 009.05B Seventy-five percent ~~(75%)~~ of the proceeds of the offering have been invested, or committed to investment, in eligible assets.

~~009.05~~ 009.06 For other than asset-backed securities with an investment grade rating, the trust agreement shall provide that all transactions between the issuer and the sponsor or the ~~servicing agent~~ servicer or their affiliates will be on terms no less favorable to the issuer than could be obtained from a nonaffiliated entity in an arm's-length transaction.

010 DISCLOSURE AND MARKETING.

010.01 Sales material, including, but not limited to, books, pamphlets, movies, slides, article reprints, television and radio commercials, materials prepared for broker-dealer use only, sales presentations, including prepared presentations to prospective security holders at group meetings, materials to be made available through the Internet, and all other advertising used in the offer or sale of asset-backed securities, shall conform to filing, disclosure, and adequacy requirements under the Act and any applicable rules and regulations. Statements made in sales material communicated directly or indirectly to the public may not conflict with or modify risk factors or other statements made in the prospectus.

010.02 Prospectus and its Contents.

010.02A In connection with the offering and sale of asset-backed securities, neither the sponsor(s) nor the underwriter(s) may, in writing or otherwise, directly or indirectly, represent or imply that the Director has approved the merits of the investment or any aspects thereof.

010.02A1 Any reference to compliance with this Rule or any provisions herein which connotes or implies compliance shall not be allowed.

010.02A2 The title of the issuer may not include the words "mutual fund" or "fund."

010.02B A forecast of the issuer's economic performance may be included in the prospectus and in the sales material for the offering if it complies with all of the following requirements:

010.02B1 The forecast is realistic in its predictions and clearly identifies the assumptions made with respect to all material features of the presentation.

010.02B2 The forecast is examined by an independent certified public accountant in accordance with the Guide for Prospective Financial Statements and the Statement on Standards for Accountant's Services on Prospective Financial Information as promulgated by the American Institute of Certified Public Accountants.

010.02B3 The report of the independent certified public accountant is included in the prospectus.

010.02B4 If any part of the forecast appears in the sales material, the entire forecast, including notes, must be presented.

010.02B5 The forecast is for a period equal to the term of the asset-backed securities.

010.02B6 If supplemental projections are included in the prospectus or the sales material, they must be accompanied by the complete forecast.

010.02C For other than asset-backed securities with an investment grade rating, the prospectus shall disclose relevant facts and performance information for ~~each~~ previous offerings by the sponsor made within the prior ten ~~10~~ years of the date the registration application is filed with the Director.

010.02C1 Information regarding offerings made within six months of the date the registration application is filed with the Director need not be included in the disclosure.

010.02C2 The Director may allow the disclosure to be limited to offerings of asset-backed securities supported by eligible assets similar to those identified for the current offering unless it is determined that information about other offerings is also relevant.

010.02C3 The disclosure should generally include the following:

010.02C3a The acquisition criteria defining the eligible assets;

010.02C3b Information indicating whether all stated payments have been made as scheduled;

010.02C3c The structure and key features of the previous offering, if applicable;

010.02C3d The size of the portfolio;

010.02C3e Statistical data on losses, delinquencies, recoveries, turnover, and diversification; and

010.02C3f Types and amounts of credit enhancements.

010.03 A marked copy of all amendments and supplements to an application shall be filed with the Director as soon as the amendment or supplement is available.

011 WAIVER OF RULE. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown, certain provisions of this Rule may be waived by the Director.

NEBRASKA ADMINISTRATIVE CODE

TITLE 48 - DEPARTMENT OF BANKING AND FINANCE

Chapter 35 - Debt Securities Issued by a Church or Congregation

Chapter 35 is Repealed.

NEBRASKA ADMINISTRATIVE CODE

~~TITLE~~ Title - 48 - DEPARTMENT OF BANKING AND FINANCE

CHAPTER 36 - GENERAL OBLIGATION FINANCING BY RELIGIOUS DENOMINATIONS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule relating to the disclosure requirements for an offering of debt securities in the form of general obligation financing issued by a religious denomination, or a national or regional unit thereof, or other entity affiliated or associated therewith (collectively a "church extension fund"), is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 This Rule is not applicable to single project financing by individual churches or congregations. Such securities offerings must conform to the requirements of 48 NAC 35.

001.05 Federal statutes referenced herein shall mean those statues as amended on or before the effective date of this Rule. A copy of the applicable statutes or rule referenced in the Rule is attached hereto.

002 DEFINITIONS. The following definitions, in addition to definitions contained in 48 NAC 2, shall apply to this Rule:

002.01 Advertising means any ~~advertisement~~ information or promotional materials, including, but not limited to, magazine or newsletter advertisements, ~~postings on the Internet,~~ brochures, video tapes, fliers, church bulletin inserts, ~~and~~ mailers and Internet information posted by the issuer or denomination, that are used, in addition to offering circulars, to solicit investors.

002.02 Audited financial statements means financial statements prepared in accordance with generally accepted accounting principles applied on a consistent basis, and examined and reported upon by an independent certified public accountant.

002.03 Church extension fund ("CEF") means a ~~unit or division of a denomination, or another entity~~ not for profit organization affiliated or associated with a denomination, or a fund that is accounted for separately by a denomination organized as a not-for-profit organization, that offers and sells notes primarily to

provide funding for loans to various affiliated churches and related religious organizations of the denomination, for the acquisition of property, ~~any~~ construction or acquisition of buildings and other related capital ~~improvements~~ expenditures or operating needs.

~~002.03~~ 002.04 Change in net assets means the change in net assets as reported in the Statement of Activities of the CEF in conformity with ~~GAAP~~ generally accepted accounting principles which reflects the net increase or decrease in net assets of the CEF.

~~002.04~~ 002.05 Denomination means a national or regional religious organization or association that consists of, or acts on behalf of, its individual affiliated churches as well as various affiliated national or regional administrative and ~~other~~ religious organizations or units. ~~affiliated with the denomination.~~ The organizations, associations, churches or units described in this definition shall be organized as, or associated with, a not-for-profit organization.

~~002.05~~ 002.06 Denominational accounts means demand and ~~short-term~~ other obligations ~~and accounts issued by the issuer and~~ of a CEF held by national, regional or other affiliated ~~units, institutions or~~ organizations of the denomination, other than congregations. ~~exclusive of demand and short-term notes which are generally offered and sold through offering circulars pursuant to the registration, exemption or qualification process.~~

002.07 GAAP means Generally Accepted Accounting Principles in the United States as established by the Financial Accounting Standards Board (FASB), Accounting Principles Board (APB), Accounting Research Bulletins (ARB) and American Institute of Certified Public Accountants (AICPA). The AICPA Audit and Accounting Guide for Not-For-Profit Organizations provides guidance on specific GAAP for not-for-profit organizations.

~~002.06~~ 002.08 Investor(s) means the person(s) who purchase(s) notes.

002.09 Issuer means the CEF that issues or proposes to issue notes.

002.10~~002.07~~ Loan delinquency means a borrower's loan balance on which payments of principal or interest are delinquent ninety ~~90~~ days or more, whether in default or not.

002.11 Net assets mean the excess or deficiency of assets over liabilities, classified according to the existence or absence of donor-imposed restrictions.

~~002.08 Net income means all items of issuer income and revenue, including operating income, gift revenues and gains or losses from investments, less all items of expense, as reflected in the issuer's audited financial statements.~~

~~002.09 Net worth means the unrestricted equity or fund balance that represents the difference between assets and liabilities, as reflected in the issuer's audited financial statements. Internally restricted funds may be considered unrestricted for this purpose.~~

~~002.10~~ 002.12 Notes means notes, certificates, ~~or~~ similar debt instruments or other evidences of indebtedness which may be certificated or issued in book entry form by a CEF and ~~issued by an issuer which~~ represent a general unsecured obligation to repay a specific principal amount~~,~~ at a stated or variable rate of interest, when due. Notes shall not include denominational accounts.

002.13 Not-for-profit organization means an entity as described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended, that is accounted for as a not-for-profit organization under GAAP. A not-for-profit organization generally possesses the following characteristics, in varying degrees, that distinguish it from a business enterprise: (a) contributions of significant amounts of resources from resource providers who do not expect commensurate or proportionate pecuniary return, (b) operating purposes other than to provide goods or services at a profit, and (c) absence of ownership interests like those of business enterprises.

~~002.11~~ 002.14 Offering circular means the disclosure document or prospectus that provides material information about ~~prepared by~~ the issuer and the offering of notes.

~~002.12~~ 002.15 Seasoned issuer means a CEF that, alone or through a predecessor organization, has been in continuous existence for more than ten ~~(10)~~ years, has offered notes for more than ten ~~(10)~~ years, and has paid or otherwise satisfied all ~~uncontested~~ obligations to pay principal and interest on its notes in a timely manner.

~~002.13~~ 002.16 Senior secured indebtedness means any debt or debt securities incurred or issued by a CEF and secured by assets of the CEF in such a manner as to have a priority claim against any of the assets of the CEF over and above the notes. Such debt may include, but is not limited to, a mortgage loan incurred for the purchase of an advance church site or CEF headquarters building, and a secured operating line of credit.

003 REQUIREMENTS.

003.01 Any CEF intending to offer and sell notes to Nebraska residents shall comply with the disclosure provisions of the Act.

003.02 The notes shall be offered and sold without the payment of any direct or indirect underwriting, sales or similar fees, or commissions.

003.03 ~~An~~A CEF shall comply with the applicable broker-dealer, issuer-dealer, and agent licensing requirements.

004 LIMITED CLASS OF INVESTORS. The notes shall be sold to a limited class of investors~~, defined by the~~. The issuer ~~to be~~ shall specify a limited class of investors that is consistent with its operations and compatible with the mission, structure, organization and theology of its denomination.

004.01 A suggested form of limited class of investors is persons who are, prior to the receipt of the offering circular, members of, contributors to, including previous investors, or participants in the denomination, the CEF or in any program, activity or organization which constitutes a part of the denomination or the CEF, or in other

religious organizations that have a programmatic relationship with the denomination or the CEF.

005 ADVERTISING. Any advertising used by the issuer must comply with the following standards:

005.01 Advertising shall set forth that:

005.01A The advertising does not constitute an offer to sell or the solicitation of an offer to buy;

005.01B ~~There shall not be any~~The issuer will offer and sell ~~sale of~~ the securities only in ~~any state in which such offer, solicitation or sale is not~~ states where authorized; and

005.01C The offering is made solely by the offering circular.

005.02 Advertising~~may~~ shall not be directed ~~only~~ to persons who ~~fall,~~ are not, or potentially ~~will fall,~~ may not be, within the limited class of investors described in Section 004, above.

005.03 Advertising shall not ~~contain~~ set forth any statements, data or information that:

005.03A Is materially inconsistent with the statements, data or information set forth in the offering circular; ~~or~~

005.03B When read in connection with the offering circular, renders either the offering circular or advertising materially misleading; ~~or confusing.~~

005.03C Emphasizes the religious aspect or any other aspect of the offering or issuer in a manner that is materially misleading.

006 OPERATIONAL AND STRUCTURAL STANDARDS. A CEF shall be a not-for-profit organization, validly organized ~~and shall operate~~ under the laws of a state, that operates exclusively for religious, charitable or educational purposes and ~~qualify~~ qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

006.01 The notes ~~shall~~ offered and sold by the CEF should be exempt from registration pursuant to the provisions of Section 3(a)(4) of the Securities Act of 1933, as amended.

006.02 The notes shall ~~be offered under one or more programs of~~ provide general obligation financing for the CEF and shall not be specifically secured by particular loans to specific borrowing entities.

~~006.02A The notes shall not be specifically secured by particular loans to specific borrowing entities.~~

~~006.02B~~ 006.02A The proceeds from the notes ~~shall~~ may be deposited to a general fund or unrestricted account from which the CEF ~~makes and completes~~ will make or complete commitments for loans primarily to churches and religious organizations affiliated with the denomination.

~~006.02C~~ 006.02B ~~To the extent that~~ If a material amount of assets, liabilities, ~~operating~~ revenues or expenses of the CEF are unrelated to CEF operations, ~~arise out of activities other than general obligation financing programs,~~ appropriate disclosure ~~of such activities~~ shall be provided in the offering circular. ~~made.~~

~~006.02D~~ 006.02C In all cases there shall be a separate accounting for the operations of the CEF.

006.03 ~~Except as provided, notes shall be of the same rank and priority as the issuer's other debt securities and debt obligations.~~ The amount of any senior secured indebtedness to which the notes are or will be subordinated shall not exceed ten percent of the tangible assets, including total assets less intangible assets as defined by GAAP, of the CEF. To the extent that such subordination of the notes exists, appropriate disclosure shall be required.

~~006.03A The amount of any senior secured indebtedness to which the notes are or will be subordinated shall not exceed ten percent (10%) of the tangible assets of the CEF. Senior secured indebtedness, within the operation of the CEF, may be:~~

~~006.03A1 A mortgage loan incurred for the purchase of an advance church site or headquarters building; and/or~~

~~006.03A2 A secured operating line of credit with a commercial financial institution.~~

~~006.03B To the extent that such subordination of the notes exists, appropriate disclosure shall be required.~~

006.04 Limit on Securitization of CEF Loan Portfolio. A CEF may ordinarily securitize up to ten percent of its loan portfolio, if all of the following are met:

006.04A The loans are securitized and sold on a non-recourse basis predominantly to entities not affiliated with the CEF;

006.04B The proceeds from the sale of the securitized loans will be used to make additional loans to churches and other entities within the denomination; and

006.04C The securitization will not hinder the ability of the CEF to repay the principal and interest on the notes when due.

006.05 Management of the CEF. One or more executive officers or other individuals engaged in the day to day management of the CEF shall have at least

three years of relevant experience in lending and investment activities involving churches or similar organizations or otherwise must demonstrate sufficient knowledge and experience to manage loans, investments and operations of the CEF.

007 FINANCIAL STANDARDS. ~~A CEF shall comply with the following financial standards in reference to whether the issuer can reasonably expect to repay the notes, when due, in the ordinary course of its business.~~ An issuer shall not offer and sell more notes than it can reasonably expect to repay, when due, in the ordinary course of its operations.

007.01 Audited financial statements of the issuer and/or the offering circular must disclose sufficient information to evaluate the extent of compliance with the standards in this Rule. To facilitate review by investors, the offering circular should provide the financial information required by this section in a tabular or graphic presentation.

~~007.01 At the end of its most recent fiscal year, the issuer's net worth shall be positive and at least equal to three percent (3%) of its total assets.~~

007.02 At the end of its most recent fiscal year as reported on its audited financial statements, the issuer's ~~cash, cash equivalents and readily marketable~~ net assets shall ~~have a market value of at least~~ be positive and equal to five percent ~~(5%)~~ or more of ~~the principal balance of its total outstanding notes.~~ its total assets.

007.03 At the end of its most recent fiscal year as reported in its audited financial statements, the issuer's cash, cash equivalents, readily marketable securities and available lines of credit shall have a value of at least eight percent of the principal balance of its total outstanding notes, except that the value of available lines of credit for meeting this standard shall not exceed two percent of the principal balance of its total outstanding notes.

007.03A Management of the CEF shall establish and administer investment policies that provide for reasonable and prudent diversification and preservation of its cash, cash equivalents and readily marketable securities for compliance with this section.

~~007.03~~ 007.04 For each of the issuer's three most recent fiscal ~~years and~~years and, as estimated, for each of the issuer's next two fiscal years, as reported in its audited financial statements, the ~~issuer's~~ coverage ratio of available cash ~~shall equal or exceed its~~ as compared to cash redemptions, exclusive of denominational accounts, shall be at least one to one. In determining the issuer's available cash, the ~~issuer shall consider:~~ following may be considered:

~~007.03A~~ 007.04A Cash provided by its normal CEF operating activities as reported in its Statements of Cash Flows;

~~007.03B~~ 007.04B ~~The market value of its liquid~~ Liquid assets, including the total of cash, cash equivalents and readily marketable securities, at the beginning of ~~the~~ its fiscal year;

~~007.03C~~ 007.04C Loan principal repayments, less loan disbursements;

~~007.03D~~ 007.04D Cash generated from the sale of notes, exclusive of denominational accounts, except to the extent that year-end redemptions exceed deposits to, or investments in, such denominational accounts during its fiscal year; and

~~007.03E~~ 007.04E Funds from other sources.~~; and~~

~~007.03F Loan disbursements.~~

~~007.04~~ 007.05 Loan delinquencies during the issuer's most recent fiscal year as reported in its audited financial statements and disclosed in the offering circular, ~~reviewed in light of its historical operating experience,~~ shall not be excessive and shall be at such a level that the overall quality of its loan portfolio will allow the issuer:

~~007.04A~~ 007.05A To maintain ~~a positive net worth~~sufficient capital adequacy in compliance with this Rule; and

~~007.04B~~ 007.05B Receive the timely repayments of sufficient loan principal necessary to meet the liquidity and cash flow requirements as set forth in ~~Sections 007.02 and 007.03 above.~~ this Rule.

~~007.04C~~ 007.06 When the loan delinquencies become material, the extent of the loan delinquencies and the quality of the issuer's loan portfolio should be disclosed as risk factors in the offering circular.

007.07 Management of the CEF shall establish and administer lending policies that provide reasonable assurance of sufficient loan quality to prevent excessive loan delinquencies that could result in loan losses by the CEF. The provisions of lending policies, such as, but not limited to, requirements for appraisals of properties to be financed, financial statements of borrowers, and limits or criteria for loan to value ratios, debt-service ratios and geographic concentration of loans shall be disclosed in the offering circular.

007.08 A CEF's loan program shall be primarily secured. Unless a lower percentage is justified by management of the issuer, at least ninety percent of the CEF's outstanding loans shall be secured by real or personal property or guaranteed by third parties.

~~007.05~~ 007.09 The ~~issuer's net income~~ change in net assets of the issuer,, less any non-recurring or extraordinary items, for three of its last five fiscal years as reported in the audited financial statements of the issuer shall be positive.

~~007.06~~ 007.10 A seasoned issuer shall be deemed to comply with the above financial standards in any given fiscal year, if ~~it~~ the issuer can show that:

~~007.06A~~ 007.10A It has fulfilled the requirements of the financial standards for at least three out of its five most recent fiscal years;

~~007.06B~~ 007.10B The average of the relevant financial information for its five most recent fiscal years reflects compliance with the financial standards; ~~or~~and

~~007.06C~~ 007.10C ~~The information and data furnished indicates the ability of the seasoned issuer to repay its notes and other debt obligations when due in the ordinary course of its business.~~ Management of the issuer has taken appropriate action to correct or mitigate the circumstances that caused noncompliance and can demonstrate satisfactory plans or ability to meet the financial standards and repay notes in future years.

008 ISSUANCE OF NOTES. An issuer that meets the standards of this Rule shall be entitled to offer and sell its notes under the following provisions:

008.01 Trust indentures or sinking funds shall not be required in connection with the notes.

008.02 Notes, upon maturity, may be extended or rolled over under the expressed terms and conditions stated in the offering circular, if:

008.02A Each investor is provided with written notification of the maturity and the proposed extension or rollover of the notes at least thirty ~~30~~ days prior to the maturity dates of the notes; and

008.02B Each investor is or has been provided with the issuer's most current offering circular.

008.02C If the investor notifies the issuer in writing, on or prior to the maturity date, that the investor elects not to extend or roll-over the note, the issuer promptly shall repay the principal and interest accrued thereon.

008.03 ~~Notes may contain provisions pursuant to which interest payable thereon may be retained and compounded.~~ Interest payable on notes may be compounded for payment at maturity of the notes if accrued interest is included with redemption amounts for determining compliance with Section 007.04, above.

009 DISCLOSURE. ~~The~~ Investors shall receive adequate material information in order to make informed investment decisions, and the issuer must provide investors with a complete offering ~~circulars~~ circular prior to their ~~investments which shall include, in narrative or descriptive form, all relevant and material information relating to the issuer and the notes, and any other material information that affects or would affect an investor's decision to purchase the notes, including the following information:~~ purchase of notes.

009.01 The offering circular must be written in clearly understandable language and disclose all relevant and material information that affects or would affect a prospective investor's decision to purchase the notes.

009.01A The information set forth in this Rule shall be included in the offering circular unless the issuer can demonstrate that a particular type of information is not applicable or material to an understanding of the issuer of the notes.

009.01B The information set forth in this Rule is not all-inclusive. The issuer must include all information, whether or not specifically listed, that would be important for an investor's understanding of the issuer and the notes.

009.02 Any material adverse changes in the financial condition of the issuer or material changes in other information in the offering circular during the offering period shall be promptly disclosed in an appropriate supplement, or an amendment to the offering circular.

~~009.01~~ 009.03 The offering circular shall contain a cover page which includes:

~~009.01A~~ 009.03A The name of the issuer;

~~009.01B~~ 009.03B The ~~issuer's~~ principal business address and telephone number of the issuer;

~~009.01C~~ 009.03C A brief description of the notes offered, including interest rates and maturity terms available;

~~009.01D~~ 009.03D The total amount of the offering, the estimated offering expenses, and the net proceeds of the offering;

~~009.01E~~ 009.03E A statement that the offering is subject to certain risks~~, with a reference to~~ and ~~the page(s) of~~ page numbers in the offering circular ~~that disclose(s)~~ where the risk factors are disclosed;

~~009.01F~~ 009.03F A description of the limited class of investors to whom the notes will be sold;

009.03G The date of the offering circular and the proposed offering period;

~~009.01G~~ 009.03H Any legends ~~and other information~~ deemed to be appropriate by the Director;

~~009.01H~~ 009.03I Any other state-specific limitations or conditions on the sale of the notes to investors ~~in any state~~; and

009.03J An advisory disclosure for consideration by investors encouraging investors to consider the concept of investment diversification when determining the amount of notes that would be appropriate to purchase in relation to the investor's overall investment portfolio and personal financial needs.

~~009.01I The date of the offering circular.~~

009.04 A summary of narrative and financial information that highlights the key aspects and risks of the notes and the financial and operational characteristics of the issuer should be presented concisely in the offering circular following the cover page

or risk factor section. The "Summary" Section should include the disclosure of the issuer's proposed use of proceeds and a summary in tabular form of the financial data, for the issuer's most recent fiscal year.

~~009.02 The offering circular shall contain all material information on the issuer's history and operations, including:~~

~~009.02A A description of the issuer, including the name, address of principal business office, place and date of incorporation, type and nature of the corporation (not-for-profit, tax exempt, etc.);~~

~~009.02B A description of the history of the issuer and its denominational affiliation or association;~~

~~009.02C A description of the religious purposes of the issuer and the general nature and purposes of its operations;~~

~~009.02D A description of the nature and extent of the offering of the notes and the extent of the issuer's offerings on a nationwide basis; and~~

~~009.02E A description of the current operations and principal business activities of the issuer.~~

~~009.03 The offering circular must describe the risks of investing in the notes, including, if applicable:~~

~~009.03A A statement that the notes are unsecured general obligations of the issuer, and the investors will be dependent solely upon the financial condition of the issuer for repayment of principal and interest;~~

~~009.03B A statement that no sinking fund or trust indenture has been or will be established;~~

~~009.03C A description of the ranking and priority of the notes in relation to the issuer's existing and anticipated future notes and indebtedness;~~

~~009.03D A statement that no public market exists for the notes and none will develop and the transferability of the notes is limited and restricted;~~

~~009.03E A description of the financial condition of the issuer, including any relevant information concerning its income or losses from operations and any other information relevant to the issuer's ability to make payments of principal and interest on the notes when due;~~

~~009.03F A description of the issuer's policy on the maintenance of liquid funds;~~

~~009.03G A description of the investor's tax consequences with respect to investments in the notes;~~

~~009.03H A statement that the issuer's loans are made primarily to affiliated churches and related religious organizations, including local churches, whose ability to repay the loans depends primarily upon contributions that they receive from their members;~~

~~009.03I A description of the loan policies with respect to the issuer's relationship with its affiliated churches and its related religious organizations which distinguish it from commercial lenders;~~

~~009.03J A statement of the risks involved in future changes in federal or state laws that may affect the issuer's ability to continue to sell its notes; and~~

~~009.03K A statement of the risks involved in the issuer's activities other than its loan operations.~~

~~009.03L Statements to the effect that little or no risk is involved in purchasing notes are prohibited and will be regarded as material misrepresentations.~~

009.05 Risk Factors

009.05A Format and Use of Risk Factors.

009.05A1 Risk factors should immediately follow the "Cover" Section or the "Summary" Section. Consistent with investor protection, a comprehensive listing of the material risks to the potential investor in the offering should be located at the forefront of the offering circular. Potential investors often focus on the forepart of the document. When comparing potential investment opportunities, consistency in format of complex disclosure documents further assists the investor.

009.05A2 The "Risk Factor" Section is a list identifying the material risks associated with the offering. The "Risk Factor" Section should not be a comprehensive discussion of the risks and counterbalancing considerations. Like the "Summary" Section, the "Risk Factor" Section is a summary of the material disclosures that are discussed and analyzed in more detail in the appropriate, related sections of the body of the offering circular. Consistent with this purpose, most risk factors will not be comprehensive discussions of the issues. The "Risk Factor" Section itself should be limited in length. In order to emphasize the nature of the disclosures as risks, no ameliorative statements should appear in the risk factors.

009.05A3 The risk factors that identify risks the potential investor is likely to find most significant should appear at or close to the beginning of the list.

009.05A4 A caption shall precede each risk factor and shall appear in off-set or emphasized type. As a listing of the material risks of the notes, captions should stand out to the eye of the reader. Italicized, bold-face, or underlined type assists the

reader to quickly comprehend the scope and nature of the particular risk factors, and permits the reader to focus further on the risk factors of most interest to that reader. For the same reason, issuers should avoid lengthy captions.

009.05B Risk Factor Content.

009.05B1 Each caption should succinctly identify the risky element of the factor. The caption should avoid the use of general, boiler-plate language. As a topic sentence to the factor, the caption can further streamline and shorten the factor.

009.05B2 Specific cross-references point the reader to complete discussions of the issue. Risk factors should not merely repeat verbatim disclosure appearing elsewhere in the disclosure document. Where appropriate, the risk factor should be a two or three sentence summary with a cross reference to the discussion appearing elsewhere in the offering circular. In some cases, there may be no need to repeat the risk factor in the body of the offering circular. Potential investors often focus interest on disclosure that is of most interest to them, and cross-references assist the potential investor in locating this disclosure.

009.05B3 Eliminate general, boiler-plate risk factors that could apply to any type of securities offering. Include only risks that are material to the particular offering, the particular issuer, or specific to notes.

009.05C Specific Risk Factors for CEF notes. The issuer must describe to the investors the risks of investing in the notes. Particular care must be taken with respect to risks associated with the financial condition of the issuer. Statements to the effect that little or no risk is involved in buying notes are prohibited, and such statements by most issuers will be regarded as material misrepresentations. It is important that the issuer concisely describe all of the relevant and material risks. These risks could include, but are not limited to, explanations of any of the following risks, if applicable to the particular offering. The captions of those risk factors may be, but are not required to be, similar to the following:

009.05C1 Notes are unsecured general obligations of the issuer, and investors will be dependent solely upon the financial condition and operations of the issuer for repayment of principal and interest.

009.05C2 No sinking fund or trust indenture has been or will be established to ensure or secure the repayment of notes.

009.05C3 The notes are subordinate in ranking and priority in relation to the issuer's existing and anticipated future senior secured indebtedness (See Section 006.03, above).

009.05C4 No public market exists for the notes and none will develop, and therefore, the transferability of the notes is limited and restricted.

009.05C5 The recent negative changes or trends in the financial condition of the issuer and its operations may adversely affect the issuer's ability to make payments of principal and interest on the notes when due.

009.05C6 The issuer's liquid assets invested in readily marketable securities are subject to various market risks which may result in losses if market values of investments decline.

009.05C7 There are no income tax benefits with respect to investment in the notes; and interest paid or payable on notes is taxed as ordinary income, regardless of whether interest is received by the investor or retained and compounded by the issuer.

009.05C8 The issuer's loans are made primarily to affiliated churches and related religious organizations, including local churches, whose ability to repay the loans depends primarily upon contributions that they receive from their members.

009.05C9 The loan policies of the issuer for loans to its affiliated churches and its related religious organizations are less stringent than loan policies of commercial lenders.

009.05C10 Future changes in federal or state laws may adversely affect the issuer's ability to continue to sell its notes.

009.05C11 The issuer is involved in activities other than its CEF operations.

009.05C12 There are risks involved in specific transactions or arrangements, such as loan securitizations, undertaken or entered into by the CEF.

009.05C13 There are risks related to geographic concentration of loans to affiliated churches or other related organizations within a limited region, such that changes in economic conditions of that region could affect the ability of the churches or organizations, as a group, to repay the loans.

009.05C14 Risks of investment in the notes may be greater than implied by relatively low interest rates on the notes.

009.05C15 The notes are not insured by any governmental agency or private insurance company.

009.06 The offering circular shall contain all material information on the issuer's history and operations, including:

009.06A A description of the issuer, including the name, address of principal business office, place and date of incorporation, type and nature of the corporation, such as not-for-profit;

009.06B A description of the history of the issuer and its denominational affiliation or association;

009.06C A description of the religious purposes of the issuer and the general nature and purposes of its operations;

009.06D A description of the nature and extent of the offering of the notes and the extent of the issuer's offerings on a nationwide basis; and

009.06E A description of the current operations and principal business activities of the issuer.

~~009.04~~ 009.07 The offering circular shall describe ~~how the proceeds from the sale of the notes are to be used~~ the use of the proceeds and other material information related thereto.

009.07A If a material amount of proceeds are to be used for purposes other than operating a CEF program, the offering circular shall explain the uses and the need to use the funds for such purposes.

~~009.05~~ 009.08 The offering circular shall describe the financing operations and activities of the issuer, including:

~~009.05A~~009.08A A description and summary, in tabular form, of the issuer's outstanding notes and debt obligations, categorized to the extent necessary to inform an investor of the nature and type of notes and debt obligations that it has sold and incurred, including the principal amounts due at maturity, if the information is not disclosed in the audited financial statements of the issuer or the footnotes attached thereto;

~~009.05B~~009.08B A description of the receipts that the issuer received from the sale of its notes and the amount of any redemptions that it made on its notes in its prior fiscal year;

~~009.05C~~009.08C A description and summary, in tabular form, of the amount and nature of the issuer's outstanding loans receivable at the end of its last fiscal year and a summary of maturities of the various outstanding loans receivable of the issuer, if the information is not disclosed in the audited financial statements of the issuer or the footnotes attached thereto;

009.08C1 The disclosure of loans receivable shall also demonstrate that loans are primarily secured as required under Section 007.05D, above.

009.08C2 Information concerning loans guaranteed by third parties, including a summary of the financial condition of guarantors, shall be disclosed, if material

~~009.05D A description and summary of the nature and amount of any invested funds which the issuer maintains, pending utilization for its loan activities or maintaining a reasonable liquidity, and a description of the policies of the issuer with respect to the maintenance of such invested funds;~~

~~009.05E~~ 009.08D A description of the issuer's direct and indirect ~~non-related~~ revenues and expenses that are unrelated to its CEF operations, ~~if a significant percentage of the issuer's operating revenues or expenses arise out of its non-related operations;~~ material; and

~~009.05F~~ 009.08E A description of any other related material financial information of the issuer's financial activities and operations that relate to its ability to repay the principal and interest on its outstanding notes and other debt securities when due.

~~009.06~~ 009.09 The offering circular shall describe the lending activities of the issuer, including, if applicable:

~~009.06A~~ 009.09A The nature and types of its loans receivable;

~~009.06B~~ 009.09B The issuer's loan policies;

~~009.06C~~ 009.09C Material loans made to a single borrower;

~~009.06D~~ 009.09D The nature and extent of any material loan delinquencies for ~~its~~ the last three fiscal years; and

~~009.06E~~ 009.09E The nature and extent of any material loan losses that the issuer has incurred within its last three fiscal years.

009.10 The offering circular shall describe the investing activities of the issuer, including:

009.10A A description and summary of the nature and amount of any invested funds which the issuer maintains pending utilization for its loan activities or for purposes of maintaining a reasonable liquidity as required by Section 007.03, above.

009.10B A description of the policies of the issuer as required by Section 007.03A, above, with respect to making and maintaining such investments, including the types of investments the issuer is permitted to make under its investment policy and any limitations on such investments. Any investment(s) currently held by the issuer that does not comport with this policy must be disclosed and a reason provided as to why the issuer holds that investment(s).

009.10C The name(s) of the person(s) responsible for setting or altering the issuer's investment policy and the person(s) responsible for making and maintaining the issuer's investments. If the issuer has engaged a third party to make or maintain its investments, the identity of that third party must be disclosed.

009.10D A description in tabular form of the issuer's outstanding investments categorized according to the types of investments held, such as equity securities, government securities or corporate bonds, which discloses the amount invested in each category, both in monetary terms and as a percentage of the issuer's total investments. The monetary value of investments disclosed in the table should be presented in conformity with GAAP for not-for-profit organizations.

009.10E The issuer's aggregate realized and unrealized gains and losses from investments for each of its last three fiscal years.

009.10F Any other material information regarding the issuer's investments.

~~009.07~~ 009.11 Selected Financial Data. The offering circular shall:

~~009.07A The offering circular shall set forth in tabular form certain selected financial data of the issuer's last five fiscal years, including cash and liquid reserve balances, outstanding notes and debt obligations, outstanding loans receivable, fund balances, and net income or loss.~~

~~009.07B The issuer should include, to the extent relevant and material, any discussion and analysis by management of the issuer that will assist investors in understanding the nature of the operations of the issuer and the occurrence of any items of income or loss arising out of its operations.~~
009.11A Disclose the following selected financial data in tabular form for each of the issuer's last five fiscal years as reported in or derived from its audited financial statements:

009.11A1 Cash, cash equivalents and readily marketable securities, combined;

009.11A2 Total loans receivable;

009.11A3 Amount and percent of unsecured loans receivable;

009.11A4 Loan delinquencies as a percent of loans receivable;

009.11A5 Total assets;

009.11A6 Total notes payable;

009.11A7 Amount of notes redeemed during the fiscal year;

009.11A8 Other long-term debt;

009.11A9 Net assets; and

009.11A10 Change in net assets.

009.11B Include, to the extent relevant and material, any discussion and analysis by management of the issuer that will assist investors in understanding the nature of the operations of the issuer and the selected financial data.

~~009.08~~ 009.12 The offering circular shall contain all material information on the notes, including:

~~009.08A~~ 009.12A A description of the type and nature of the notes and the manner in which the interest thereon will be computed and/or accrued;

~~009.08B~~ 009.12B A description of the terms of the notes, including any right to early redemption and any penalties that will be applied thereto;

~~009.08C~~ 009.12C A description of the nature of cash or cash equivalent that will be acceptable for purchase of the notes;

~~009.08D~~ 009.12D A description of the restrictions and limitations on transferability of the notes; and

~~009.08E~~ 009.12E A description of the ranking and priority of the notes in relation to other indebtedness of the issuer.

~~009.09~~ 009.13 The offering circular shall contain all material information regarding the distribution of the securities, including:

~~009.09A~~ 009.13A A description of the method and manner in which the notes will be offered and sold to investors, including the methods of solicitation and subscription; and

~~009.09B~~ 009.13B A statement that no underwriting or selling agreements exist and that no direct or indirect commissions or other remuneration will be paid to any individuals or organizations in connection with the offer and sale of the notes.

~~009.10~~ 009.14 The offering circular shall contain a description of the federal tax aspects of ownership of the notes and ~~a statement that~~ a description of the taxability of the interest paid or accrued on the notes ~~will be taxable as ordinary income to investors.~~ under current federal tax law.

~~009.11~~ 009.15 The offering circular shall contain all material information ~~in~~ on litigation and other materials ~~and~~ transactions to which the issuer is a party, including:

~~009.11A~~ 009.15A A description of all present, pending or threatened material legal proceedings, including those that are known to be contemplated by governmental authorities, administrative bodies, or other administrative persons to which the issuer or its property is or may become a party;~~,~~

009.15B ~~including the~~The name of the court or agency in which the proceedings are pending, the date that the proceedings were instituted, the principal parties involved, and a description of the factual basis underlying the proceedings and the relief sought;~~, and the outcome of any proceeding which is no longer pending;~~ and

~~009.11B~~ 009.15C A description of any transactions that may materially affect the offering or an investor's investment decision and which are not otherwise mentioned in the offering circular.

~~009.12~~ 009.16 Management. The offering circular shall contain all material information concerning the issuer's management, including:

~~009.12A~~ 009.16A A description of the organizational structure of the issuer, including the method of choosing or replacing the members of its Board of Directors or other legal governing body;

~~009.12B~~ 009.16B A statement identifying all directors and executive officers, or persons having similar authority, of the issuer, and describing their experience and credentials, the functions they perform for the issuer and the dates that their terms of office expire;

009.16C~~009.12C~~ A statement disclosing if any director or officer of the issuer has, during the past ten ~~(10)~~ years, been convicted in any criminal proceeding~~,~~ ~~(~~other than for traffic violations or other minor misdemeanors~~)~~, is the subject of any pending criminal proceedings, or was the subject of any order, judgment or decree of any court enjoining such person from any activities associated with the offer or sale of securities~~;~~ ~~, or is or was the subject of any action by an administrative agency in connection with the offer or sale of securities;~~

~~009.12D~~ 009.16D ~~A statement disclosing all direct and indirect remuneration paid by the issuer to its executive officers or directors or persons having similar authority for the issuer's last fiscal year in the aggregate, and individually, if the remuneration, which includes, but is not limited to, salaries, pensions, retirement plans and the use of the issuer's assets for personal purposes, equals or exceeds the amount requiring disclosure as set forth in the rules and regulations of the Securities and Exchange Commission; and~~ A table disclosing all direct and indirect remuneration, which includes, but is not limited to, salaries, health and other insurance, pensions or retirement plans and the use of the issuer's assets for personal purposes, that are paid by the issuer to the following:

009.16D1 Its executive officers, directors or persons having similar authority for the issuer's last fiscal year in the aggregate, and

009.16D2 Its executive officers, directors or persons having similar authority, individually, if the remuneration equals or exceeds one hundred fifty thousand dollars ($150,000.00) during the issuer's last fiscal year; and

~~009.12E~~ 009.16E A description of all material employment contracts, perquisites of employment and conflicts of interests of the issuer's officers, directors, or persons having similar authority.

~~009.13~~ 009.17 Financial Statements. The offering circular shall contain the ~~issuer's~~ audited financial statements, ~~consisting of:~~ of the issuer, which shall include all financial statements and notes required by GAAP as follows:

~~009.13A~~ 009.17A ~~Statements of assets and liabilities (balance sheet)~~ Balance sheets for ~~its~~ the issuer's two most recent fiscal years;

~~009.13B~~ 009.17B Statements of ~~revenues and expenses (income statement or aggregation of fund balances)~~ activities, including revenues, expenses and the change in net assets, for ~~its~~ the issuer's three most recent fiscal years;

~~009.13C~~ 009.17C Statements of cash flows for ~~its~~ the issuer's three most recent fiscal years with gross rather than net reporting of financing and investing activities;

~~009.13D~~ 009.17D ~~A description of any recent changes in its current accounting policies; and~~ Notes to the financial statements to explain accounting policies and provide other disclosures required by GAAP for not-for-profit organizations or as required by this Section.

~~009.13E A copy of the report of the independent certified public accountant.~~

~~009.13F Any material adverse changes in the financial condition of the CEF during the offering period shall be promptly disclosed in an appropriate supplement, or an amendment to the offering circular.~~

~~009.13G~~ 009.18 The offering circular shall state that the ~~CEF's~~ issuer's current audited financial statements will be made available to investors upon written request, and will be mailed to investors within one hundred twenty ~~120~~ days of its last fiscal year end.

010 WAIVER OF RULE. While disclosures not conforming to the provisions of this Rule shall be looked upon with disfavor, where good cause is shown, certain provisions of the Rule may be waived by the Director.

26 U.S.C.
United States Code, 2013 Edition
Title 26 - INTERNAL REVENUE CODE
Subtitle A - Income Taxes
CHAPTER 1 - NORMAL TAXES AND SURTAXES
Subchapter F - Exempt Organizations
PART I - GENERAL RULE
Sec. 501 - Exemption from tax on corporations, certain trusts, etc.
From the U.S. Government Printing Office, www.gpo.gov

§501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation

An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) Tax on unrelated business income and certain other activities

An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II, III, and VI of this subchapter, but (notwithstanding parts II, III, and VI of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) List of exempt organizations

The following organizations are referred to in subsection (a):

(1) Any corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation—

(A) is exempt from Federal income taxes—

(i) under such Act as amended and supplemented before July 18, 1984, or

(ii) under this title without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act, or

(B) is described in subsection (l).

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section. Rules similar to the rules of subparagraph (G) of paragraph (25) shall apply for purposes of this paragraph.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

(4)(A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.

(5) Labor, agricultural, or horticultural organizations.

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(7) Clubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder.

(8) Fraternal beneficiary societies, orders, or associations—

(A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

(9) Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual. For purposes of providing for the payment of sick and accident benefits to members of such an association and their dependents, the term "dependent" shall include any individual who is a child (as defined in section 152(f)(1)) of a member who as of the end of the calendar year has not attained age 27.

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

(11) Teachers' retirement fund associations of a purely local character, if—

(A) no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and

(B) the income consists solely of amounts received from public taxation, amounts received from assessments on the teaching salaries of members, and income in respect of investments.

(12)(A) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

(B) In the case of a mutual or cooperative telephone company, subparagraph (A) shall be applied without taking into account any income received or accrued—

(i) from a nonmember telephone company for the performance of communication services which involve members of the mutual or cooperative telephone company,

(ii) from qualified pole rentals,

(iii) from the sale of display listings in a directory furnished to the members of the mutual or cooperative telephone company, or

(iv) from the prepayment of a loan under section 306A, 306B, or 311 [1] of the Rural Electrification Act of 1936 (as in effect on January 1, 1987).

(C) In the case of a mutual or cooperative electric company, subparagraph (A) shall be applied without taking into account any income received or accrued—

(i) from qualified pole rentals, or

(ii) from any provision or sale of electric energy transmission services or ancillary services if such services are provided on a nondiscriminatory open access basis under an open access transmission tariff approved or accepted by FERC or under an independent transmission provider agreement approved or accepted by FERC (other than income received or accrued directly or indirectly from a member),

(iii) from the provision or sale of electric energy distribution services or ancillary services if such services are provided on a nondiscriminatory open access basis to distribute electric energy not owned by the mutual or electric cooperative company—

(I) to end-users who are served by distribution facilities not owned by such company or any of its members (other than income received or accrued directly or indirectly from a member), or

(II) generated by a generation facility not owned or leased by such company or any of its members and which is directly connected to distribution facilities owned by such company or any of its members (other than income received or accrued directly or indirectly from a member),

(iv) from any nuclear decommissioning transaction, or

(v) from any asset exchange or conversion transaction.

(D) For purposes of this paragraph, the term "qualified pole rental" means any rental of a pole (or other structure used to support wires) if such pole (or other structure)—

(i) is used by the telephone or electric company to support one or more wires which are used by such company in providing telephone or electric services to its members, and

(ii) is used pursuant to the rental to support one or more wires (in addition to the wires described in clause (i)) for use in connection with the transmission by wire of electricity or of telephone or other communications.

For purposes of the preceding sentence, the term "rental" includes any sale of the right to use the pole (or other structure).

(E) For purposes of subparagraph (C)(ii), the term "FERC" means the Federal Energy Regulatory Commission and references to such term shall be treated as including the Public Utility Commission of Texas with respect to any ERCOT utility (as defined in section 212(k)(2)(B) of the Federal Power Act (16 U.S.C. 824k(k)(2)(B))).

(F) For purposes of subparagraph (C)(iv), the term "nuclear decommissioning transaction" means—

(i) any transfer into a trust, fund, or instrument established to pay any nuclear decommissioning costs if the transfer is in connection with the transfer of the mutual or cooperative electric company's interest in a nuclear power plant or nuclear power plant unit,

(ii) any distribution from any trust, fund, or instrument established to pay any nuclear decommissioning costs, or

(iii) any earnings from any trust, fund, or instrument established to pay any nuclear decommissioning costs.

(G) For purposes of subparagraph (C)(v), the term "asset exchange or conversion transaction" means any voluntary exchange or involuntary conversion of any property related to generating, transmitting, distributing, or selling electric energy by a mutual or cooperative electric company, the gain from which qualifies for deferred recognition under section 1031 or 1033, but only if the replacement property acquired by such company pursuant to such section constitutes property which is used, or to be used, for—

(i) generating, transmitting, distributing, or selling electric energy, or

(ii) producing, transmitting, distributing, or selling natural gas.

(H)(i) In the case of a mutual or cooperative electric company described in this paragraph or an organization described in section 1381(a)(2)(C), income received or accrued from a load loss transaction shall be treated as an amount collected from members for the sole purpose of meeting losses and expenses.

(ii) For purposes of clause (i), the term "load loss transaction" means any wholesale or retail sale of electric energy (other than to members) to the extent that the aggregate sales during the recovery period do not exceed the load loss mitigation sales limit for such period.

(iii) For purposes of clause (ii), the load loss mitigation sales limit for the recovery period is the sum of the annual load losses for each year of such period.

(iv) For purposes of clause (iii), a mutual or cooperative electric company's annual load loss for each year of the recovery period is the amount (if any) by which—

(I) the megawatt hours of electric energy sold during such year to members of such electric company are less than

(II) the megawatt hours of electric energy sold during the base year to such members.

(v) For purposes of clause (iv)(II), the term "base year" means—

(I) the calendar year preceding the start-up year, or

(II) at the election of the mutual or cooperative electric company, the second or third calendar years preceding the start-up year.

(vi) For purposes of this subparagraph, the recovery period is the 7-year period beginning with the start-up year.

(vii) For purposes of this subparagraph, the start-up year is the first year that the mutual or cooperative electric company offers nondiscriminatory open access or the calendar year which includes the date of the enactment of this subparagraph, if later, at the election of such company.

(viii) A company shall not fail to be treated as a mutual or cooperative electric company for purposes of this paragraph or as a corporation operating on a cooperative basis for purposes of section 1381(a)(2)(C) by reason of the treatment under clause (i).

(ix) For purposes of subparagraph (A), in the case of a mutual or cooperative electric company, income received, or accrued, indirectly from a member shall be treated as an amount collected from members for the sole purpose of meeting losses and expenses.

(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(14)(A) Credit unions without capital stock organized and operated for mutual purposes and without profit.

(B) Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, and insurance of shares or deposits in—

(i) domestic building and loan associations,

(ii) cooperative banks without capital stock organized and operated for mutual purposes and without profit,

(iii) mutual savings banks not having capital stock represented by shares, or

(iv) mutual savings banks described in section 591(b) [2]

(C) Corporations or associations organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for associations or banks described in clause (i), (ii), or (iii) of subparagraph (B); but only if 85 percent or more of the

income is attributable to providing such reserve funds and to investments. This subparagraph shall not apply to any corporation or association entitled to exemption under subparagraph (B).

(15)(A) Insurance companies (as defined in section 816(a)) other than life (including interinsurers and reciprocal underwriters) if—

(i)(I) the gross receipts for the taxable year do not exceed $600,000, and

(II) more than 50 percent of such gross receipts consist of premiums, or

(ii) in the case of a mutual insurance company—

(I) the gross receipts of which for the taxable year do not exceed $150,000, and

(II) more than 35 percent of such gross receipts consist of premiums.

Clause (ii) shall not apply to a company if any employee of the company, or a member of the employee's family (as defined in section 2032A(e)(2)), is an employee of another company exempt from taxation by reason of this paragraph (or would be so exempt but for this sentence).

(B) For purposes of subparagraph (A), in determining whether any company or association is described in subparagraph (A), such company or association shall be treated as receiving during the taxable year amounts described in subparagraph (A) which are received during such year by all other companies or associations which are members of the same controlled group as the insurance company or association for which the determination is being made.

(C) For purposes of subparagraph (B), the term "controlled group" has the meaning given such term by section 831(b)(2)(B)(ii), except that in applying section 831(b)(2)(B)(ii) for purposes of this subparagraph, subparagraphs (B) and (C) of section 1563(b)(2) shall be disregarded.

(16) Corporations organized by an association subject to part IV of this subchapter or members thereof, for the purpose of financing the ordinary crop operations of such members or other producers, and operated in conjunction with such association. Exemption shall not be denied any such corporation because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the corporation, on dissolution or otherwise, beyond the fixed dividends) is owned by such association, or members thereof; nor shall exemption be denied any such corporation because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

(17)(A) A trust or trusts forming part of a plan providing for the payment of supplemental unemployment compensation benefits, if—

(i) under the plan, it is impossible, at any time prior to the satisfaction of all liabilities, with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of supplemental unemployment compensation benefits,

(ii) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are highly compensated employees (within the meaning of section 414(q)), and

(iii) such benefits do not discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)). A plan shall not be considered discriminatory within the meaning of this clause merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan.

(B) In determining whether a plan meets the requirements of subparagraph (A), any benefits provided under any other plan shall not be taken into consideration, except that a plan shall not be considered discriminatory—

(i) merely because the benefits under the plan which are first determined in a nondiscriminatory manner within the meaning of subparagraph (A) are then reduced by any sick, accident, or unemployment compensation benefits received under State or Federal law (or reduced by a portion of such benefits if determined in a nondiscriminatory manner), or

(ii) merely because the plan provides only for employees who are not eligible to receive sick, accident, or unemployment compensation benefits under State or Federal law the same benefits (or a portion of such benefits if determined in a nondiscriminatory manner) which such employees would receive under such laws if such employees were eligible for such benefits, or

(iii) merely because the plan provides only for employees who are not eligible under another plan (which meets the requirements of subparagraph (A)) of supplemental unemployment compensation benefits provided wholly by the employer the same benefits (or a portion of such benefits if determined in a nondiscriminatory manner) which such employees would receive under such other plan if such employees were eligible under such other plan, but only if the employees eligible under both plans would make a classification which would be nondiscriminatory within the meaning of subparagraph (A).

(C) A plan shall be considered to meet the requirements of subparagraph (A) during the whole of any year of the plan if on one day in each quarter it satisfies such requirements.

(D) The term "supplemental unemployment compensation benefits" means only—

(i) benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, and

(ii) sick and accident benefits subordinate to the benefits described in clause (i).

(E) Exemption shall not be denied under subsection (a) to any organization entitled to such exemption as an association described in paragraph (9) of this subsection merely because such organization provides for the payment of supplemental unemployment benefits (as defined in subparagraph (D)(i)).

(18) A trust or trusts created before June 25, 1959, forming part of a plan providing for the payment of benefits under a pension plan funded only by contributions of employees, if—

(A) under the plan, it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the plan, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of benefits under the plan,

(B) such benefits are payable to employees under a classification which is set forth in the plan and which is found by the Secretary not to be discriminatory in favor of employees who are highly compensated employees (within the meaning of section 414(q)),

(C) such benefits do not discriminate in favor of employees who are highly compensated employees (within the meaning of section 414(q)). A plan shall not be considered discriminatory within the meaning of this subparagraph merely because the benefits received under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of the employees covered by the plan, and

(D) in the case of a plan under which an employee may designate certain contributions as deductible—

(i) such contributions do not exceed the amount with respect to which a deduction is allowable under section 219(b)(3),

(ii) requirements similar to the requirements of section 401(k)(3)(A)(ii) are met with respect to such elective contributions,

(iii) such contributions are treated as elective deferrals for purposes of section 402(g), and

(iv) the requirements of section 401(a)(30) are met.

For purposes of subparagraph (D)(ii), rules similar to the rules of section 401(k)(8) shall apply. For purposes of section 4979, any excess contribution under clause (ii) shall be treated as an excess contribution under a cash or deferred arrangement.

(19) A post or organization of past or present members of the Armed Forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions,

(B) at least 75 percent of the members of which are past or present members of the Armed Forces of the United States and substantially all of the other members of which are individuals who are cadets or are spouses, widows,,[3] widowers, ancestors, or lineal descendants of past or present members of the Armed Forces of the United States or of cadets, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(20) an [4] organization or trust created or organized in the United States, the exclusive function of which is to form part of a qualified group legal services plan or plans, within the meaning of section 120. An organization or trust which receives contributions because of section 120(c)(5)(C) shall not be prevented from qualifying as an organization described in this paragraph merely because it provides legal services or indemnification against the cost of legal services unassociated with a qualified group legal services plan.

(21)(A) A trust or trusts established in writing, created or organized in the United States, and contributed to by any person (except an insurance company) if—

(i) the purpose of such trust or trusts is exclusively—

(I) to satisfy, in whole or in part, the liability of such person for, or with respect to, claims for compensation for disability or death due to pneumoconiosis under Black Lung Acts,

(II) to pay premiums for insurance exclusively covering such liability,

(III) to pay administrative and other incidental expenses of such trust in connection with the operation of the trust and the processing of claims against such person under Black Lung Acts, and

(IV) to pay accident or health benefits for retired miners and their spouses and dependents (including administrative and other incidental expenses of such trust in connection therewith) or premiums for insurance exclusively covering such benefits; and

(ii) no part of the assets of the trust may be used for, or diverted to, any purpose other than—

(I) the purposes described in clause (i),

(II) investment (but only to the extent that the trustee determines that a portion of the assets is not currently needed for the purposes described in clause (i)) in qualified investments, or

(III) payment into the Black Lung Disability Trust Fund established under section 9501, or into the general fund of the United States Treasury (other than in satisfaction of any tax or other civil or criminal liability of the person who established or contributed to the trust).

(B) No deduction shall be allowed under this chapter for any payment described in subparagraph (A)(i)(IV) from such trust.

(C) Payments described in subparagraph (A)(i)(IV) may be made from such trust during a taxable year only to the extent that the aggregate amount of such payments during such taxable year does not exceed the excess (if any), as of the close of the preceding taxable year, of—

(i) the fair market value of the assets of the trust, over

(ii) 110 percent of the present value of the liability described in subparagraph (A)(i)(I) of such person.

The determinations under the preceding sentence shall be made by an independent actuary using actuarial methods and assumptions (not inconsistent with the regulations prescribed under section 192(c)(1)(A)) each of which is reasonable and which are reasonable in the aggregate.

(D) For purposes of this paragraph:

(i) The term "Black Lung Acts" means part C of title IV of the Federal Mine Safety and Health Act of 1977, and any State law providing compensation for disability or death due to that pneumoconiosis.

(ii) The term "qualified investments" means—

(I) public debt securities of the United States,

(II) obligations of a State or local government which are not in default as to principal or interest, and

(III) time or demand deposits in a bank (as defined in section 581) or an insured credit union (within the meaning of section 101(7) of the Federal Credit Union Act, 12 U.S.C. 1752 (7)) located in the United States.

(iii) The term "miner" has the same meaning as such term has when used in section 402(d) of the Black Lung Benefits Act (30 U.S.C. 902(d)).

(iv) The term "incidental expenses" includes legal, accounting, actuarial, and trustee expenses.

(22) A trust created or organized in the United States and established in writing by the plan sponsors of multiemployer plans if—

(A) the purpose of such trust is exclusively—

(i) to pay any amount described in section 4223(c) or (h) of the Employee Retirement Income Security Act of 1974, and

(ii) to pay reasonable and necessary administrative expenses in connection with the establishment and operation of the trust and the processing of claims against the trust,

(B) no part of the assets of the trust may be used for, or diverted to, any purpose other than—

(i) the purposes described in subparagraph (A), or

(ii) the investment in securities, obligations, or time or demand deposits described in clause (ii) of paragraph (21)(D),

(C) such trust meets the requirements of paragraphs (2), (3), and (4) of section 4223(b), 4223 (h), or, if applicable, section 4223(c) of the Employee Retirement Income Security Act of 1974, and

(D) the trust instrument provides that, on dissolution of the trust, assets of the trust may not be paid other than to plans which have participated in the plan or, in the case of a trust established under section 4223(h) of such Act, to plans with respect to which employers have participated in the fund.

(23) Any association organized before 1880 more than 75 percent of the members of which are present or past members of the Armed Forces and a principal purpose of which is to provide insurance and other benefits to veterans or their dependents.

(24) A trust described in section 4049 of the Employee Retirement Income Security Act of 1974 (as in effect on the date of the enactment of the Single-Employer Pension Plan Amendments Act of 1986).

(25)(A) Any corporation or trust which—

(i) has no more than 35 shareholders or beneficiaries,

(ii) has only 1 class of stock or beneficial interest, and

(iii) is organized for the exclusive purposes of—

(I) acquiring real property and holding title to, and collecting income from, such property, and

(II) remitting the entire amount of income from such property (less expenses) to 1 or more organizations described in subparagraph (C) which are shareholders of such corporation or beneficiaries of such trust.

For purposes of clause (iii), the term "real property" shall not include any interest as a tenant in common (or similar interest) and shall not include any indirect interest.

(B) A corporation or trust shall be described in subparagraph (A) without regard to whether the corporation or trust is organized by 1 or more organizations described in subparagraph (C).

(C) An organization is described in this subparagraph if such organization is—

(i) a qualified pension, profit sharing, or stock bonus plan that meets the requirements of section 401(a),

(ii) a governmental plan (within the meaning of section 414(d)),

(iii) the United States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing, or

(iv) any organization described in paragraph (3).

(D) A corporation or trust shall in no event be treated as described in subparagraph (A) unless such corporation or trust permits its shareholders or beneficiaries—

(i) to dismiss the corporation's or trust's investment adviser, following reasonable notice, upon a vote of the shareholders or beneficiaries holding a majority of interest in the corporation or trust, and

(ii) to terminate their interest in the corporation or trust by either, or both, of the following alternatives, as determined by the corporation or trust:

(I) by selling or exchanging their stock in the corporation or interest in the trust (subject to any Federal or State securities law) to any organization described in subparagraph (C) so long as the sale or exchange does not increase the number of shareholders or beneficiaries in such corporation or trust above 35, or

(II) by having their stock or interest redeemed by the corporation or trust after the shareholder or beneficiary has provided 90 days notice to such corporation or trust.

(E)(i) For purposes of this title—

(I) a corporation which is a qualified subsidiary shall not be treated as a separate corporation, and

(II) all assets, liabilities, and items of income, deduction, and credit of a qualified subsidiary shall be treated as assets, liabilities, and such items (as the case may be) of the corporation or trust described in subparagraph (A).

(ii) For purposes of this subparagraph, the term "qualified subsidiary" means any corporation if, at all times during the period such corporation was in existence, 100 percent of the stock of such corporation is held by the corporation or trust described in subparagraph (A).

(iii) For purposes of this subtitle, if any corporation which was a qualified subsidiary ceases to meet the requirements of clause (ii), such corporation shall be treated as a new corporation acquiring all of its assets (and assuming all of its liabilities) immediately before such cessation from the corporation or trust described in subparagraph (A) in exchange for its stock.

(F) For purposes of subparagraph (A), the term "real property" includes any personal property which is leased under, or in connection with, a lease of real property, but only if the rent attributable to such personal property (determined under the rules of section 856(d)(1)) for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease.

(G)(i) An organization shall not be treated as failing to be described in this paragraph merely by reason of the receipt of any otherwise disqualifying income which is incidentally derived from the holding of real property.

(ii) Clause (i) shall not apply if the amount of gross income described in such clause exceeds 10 percent of the organization's gross income for the taxable year unless the organization establishes to the satisfaction of the Secretary that the receipt of gross income described in clause (i) in excess of such limitation was inadvertent and reasonable steps are being taken to correct the circumstances giving rise to such income.

(26) Any membership organization if—

(A) such organization is established by a State exclusively to provide coverage for medical care (as defined in section 213(d)) on a not-for-profit basis to individuals described in subparagraph (B) through—

(i) insurance issued by the organization, or

(ii) a health maintenance organization under an arrangement with the organization,

(B) the only individuals receiving such coverage through the organization are individuals—

(i) who are residents of such State, and

(ii) who, by reason of the existence or history of a medical condition—

(I) are unable to acquire medical care coverage for such condition through insurance or from a health maintenance organization, or

(II) are able to acquire such coverage only at a rate which is substantially in excess of the rate for such coverage through the membership organization,

(C) the composition of the membership in such organization is specified by such State, and

(D) no part of the net earnings of the organization inures to the benefit of any private shareholder or individual.

A spouse and any qualifying child (as defined in section 24(c)) of an individual described in subparagraph (B) (without regard to this sentence) shall be treated as described in subparagraph (B).

(27)(A) Any membership organization if—

(i) such organization is established before June 1, 1996, by a State exclusively to reimburse its members for losses arising under workmen's compensation acts,

(ii) such State requires that the membership of such organization consist of—

(I) all persons who issue insurance covering workmen's compensation losses in such State, and

(II) all persons and governmental entities who self-insure against such losses, and

(iii) such organization operates as a non-profit organization by—

(I) returning surplus income to its members or workmen's compensation policyholders on a periodic basis, and

(II) reducing initial premiums in anticipation of investment income.

(B) Any organization (including a mutual insurance company) if—

(i) such organization is created by State law and is organized and operated under State law exclusively to—

(I) provide workmen's compensation insurance which is required by State law or with respect to which State law provides significant disincentives if such insurance is not purchased by an employer, and

(II) provide related coverage which is incidental to workmen's compensation insurance,

(ii) such organization must provide workmen's compensation insurance to any employer in the State (for employees in the State or temporarily assigned out-of-State) which seeks such insurance and meets other reasonable requirements relating thereto,

(iii)(I) the State makes a financial commitment with respect to such organization either by extending the full faith and credit of the State to the initial debt of such organization or by providing the initial operating capital of such organization, and (II) in the case of periods after the date of enactment of this subparagraph, the assets of such organization revert to the State upon dissolution or State law does not permit the dissolution of such organization, and

(iv) the majority of the board of directors or oversight body of such organization are appointed by the chief executive officer or other executive branch official of the State, by the State legislature, or by both.

(28) The National Railroad Retirement Investment Trust established under section 15(j) of the Railroad Retirement Act of 1974.

(29) CO–OP HEALTH INSURANCE ISSUERS.—

(A) IN GENERAL.—A qualified nonprofit health insurance issuer (within the meaning of section 1322 of the Patient Protection and Affordable Care Act) which has received a loan or grant under the CO–OP program under such section, but only with respect to periods for which the issuer is in compliance with the requirements of such section and any agreement with respect to the loan or grant.

(B) CONDITIONS FOR EXEMPTION.—Subparagraph (A) shall apply to an organization only if—

(i) the organization has given notice to the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of its status under this paragraph,

(ii) except as provided in section 1322(c)(4) of the Patient Protection and Affordable Care Act, no part of the net earnings of which inures to the benefit of any private shareholder or individual,

(iii) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and

(iv) the organization does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

(d) Religious and apostolic organizations

The following organizations are referred to in subsection (a): Religious or apostolic associations or corporations, if such associations or corporations have a common treasury or community treasury, even if such associations or corporations engage in business for the common benefit of the members, but only if the members thereof include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the taxable income of the association or corporation for such year. Any amount so included in the gross income of a member shall be treated as a dividend received.

(e) Cooperative hospital service organizations

For purposes of this title, an organization shall be treated as an organization organized and operated exclusively for charitable purposes, if—

(1) such organization is organized and operated solely—

(A) to perform, on a centralized basis, one or more of the following services which, if performed on its own behalf by a hospital which is an organization described in subsection (c)(3) and exempt from taxation under subsection (a), would constitute activities in exercising or performing the purpose or function constituting the basis for its exemption: data processing, purchasing (including the purchasing of insurance on a group basis), warehousing, billing and collection (including the purchase of patron accounts receivable on a recourse basis), food,

clinical, industrial engineering, laboratory, printing, communications, record center, and personnel (including selection, testing, training, and education of personnel) services; and

(B) to perform such services solely for two or more hospitals each of which is—

(i) an organization described in subsection (c)(3) which is exempt from taxation under subsection (a),

(ii) a constituent part of an organization described in subsection (c)(3) which is exempt from taxation under subsection (a) and which, if organized and operated as a separate entity, would constitute an organization described in subsection (c)(3), or

(iii) owned and operated by the United States, a State, the District of Columbia, or a possession of the United States, or a political subdivision or an agency or instrumentality of any of the foregoing;

(2) such organization is organized and operated on a cooperative basis and allocates or pays, within 8½ months after the close of its taxable year, all net earnings to patrons on the basis of services performed for them; and

(3) if such organization has capital stock, all of such stock outstanding is owned by its patrons.

For purposes of this title, any organization which, by reason of the preceding sentence, is an organization described in subsection (c)(3) and exempt from taxation under subsection (a), shall be treated as a hospital and as an organization referred to in section 170(b)(1)(A)(iii).

(f) Cooperative service organizations of operating educational organizations

For purposes of this title, if an organization is—

(1) organized and operated solely to hold, commingle, and collectively invest and reinvest (including arranging for and supervising the performance by independent contractors of investment services related thereto) in stocks and securities, the moneys contributed thereto by each of the members of such organization, and to collect income therefrom and turn over the entire amount thereof, less expenses, to such members,

(2) organized and controlled by one or more such members, and

(3) comprised solely of members that are organizations described in clause (ii) or (iv) of section 170(b)(1)(A)—

(A) which are exempt from taxation under subsection (a), or

(B) the income of which is excluded from taxation under section 115(a),

then such organization shall be treated as an organization organized and operated exclusively for charitable purposes.

(g) Definition of agricultural

For purposes of subsection (c)(5), the term "agricultural" includes the art or science of cultivating land, harvesting crops or aquatic resources, or raising livestock.

(h) Expenditures by public charities to influence legislation

(1) General rule

In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally—

(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

(2) Definitions

For purposes of this subsection—

(A) Lobbying expenditures

The term "lobbying expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911(d)).

(B) Lobbying ceiling amount

The lobbying ceiling amount for any organization for any taxable year is 150 percent of the lobbying nontaxable amount for such organization for such taxable year, determined under section 4911.

(C) Grass roots expenditures

The term "grass roots expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911(d) without regard to paragraph (1)(B) thereof).

(D) Grass roots ceiling amount

The grass roots ceiling amount for any organization for any taxable year is 150 percent of the grass roots nontaxable amount for such organization for such taxable year, determined under section 4911.

(3) Organizations to which this subsection applies

This subsection shall apply to any organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of this subsection apply to such organization and which, for the taxable year which includes the date the election is made, is described in subsection (c)(3) and—

(A) is described in paragraph (4), and

(B) is not a disqualified organization under paragraph (5).

(4) Organizations permitted to elect to have this subsection apply

An organization is described in this paragraph if it is described in—

(A) section 170(b)(1)(A)(ii) (relating to educational institutions),

(B) section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),

(C) section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),

(D) section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),

(E) section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or

(F) section 509(a)(3) (relating to organizations supporting certain types of public charities) except that for purposes of this subparagraph, section 509(a)(3) shall be applied without regard to the last sentence of section 509(a).

(5) Disqualified organizations

For purposes of paragraph (3) an organization is a disqualified organization if it is—

(A) described in section 170(b)(1)(A)(i) (relating to churches),

(B) an integrated auxiliary of a church or of a convention or association of churches, or

(C) a member of an affiliated group of organizations (within the meaning of section 4911(f)(2)) if one or more members of such group is described in subparagraph (A) or (B).

(6) Years for which election is effective

An election by an organization under this subsection shall be effective for all taxable years of such organization which—

(A) end after the date the election is made, and

(B) begin before the date the election is revoked by such organization (under regulations prescribed by the Secretary).

(7) No effect on certain organizations

With respect to any organization for a taxable year for which—

(A) such organization is a disqualified organization (within the meaning of paragraph (5)), or

(B) an election under this subsection is not in effect for such organization,

nothing in this subsection or in section 4911 shall be construed to affect the interpretation of the phrase, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation," under subsection (c)(3).

(8) Affiliated organizations

For rules regarding affiliated organizations, see section 4911(f).

(i) Prohibition of discrimination by certain social clubs

Notwithstanding subsection (a), an organization which is described in subsection (c)(7) shall not be exempt from taxation under subsection (a) for any taxable year if, at any time during such taxable year, the charter, bylaws, or other governing instrument, of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race, color, or religion. The preceding sentence to the extent it relates to discrimination on the basis of religion shall not apply to—

(1) an auxiliary of a fraternal beneficiary society if such society—

(A) is described in subsection (c)(8) and exempt from tax under subsection (a), and

(B) limits its membership to the members of a particular religion, or

(2) a club which in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude individuals of a particular race or color.

(j) Special rules for certain amateur sports organizations

(1) In general

In the case of a qualified amateur sports organization—

(A) the requirement of subsection (c)(3) that no part of its activities involve the provision of athletic facilities or equipment shall not apply, and

(B) such organization shall not fail to meet the requirements of subsection (c)(3) merely because its membership is local or regional in nature.

(2) Qualified amateur sports organization defined

For purposes of this subsection, the term "qualified amateur sports organization" means any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national or international competition in sports.

(k) Treatment of certain organizations providing child care

For purposes of subsection (c)(3) of this section and sections 170(c)(2), 2055(a)(2), and 2522(a)(2), the term "educational purposes" includes the providing of care of children away from their homes if—

(1) substantially all of the care provided by the organization is for purposes of enabling individuals to be gainfully employed, and

(2) the services provided by the organization are available to the general public.

(l) Government corporations exempt under subsection (c)(1)

For purposes of subsection (c)(1), the following organizations are described in this subsection:

(1) The Central Liquidity Facility established under title III of the Federal Credit Union Act (12 U.S.C. 1795 et seq.).

(2) The Resolution Trust Corporation established under section 21A [1] of the Federal Home Loan Bank Act.

(3) The Resolution Funding Corporation established under section 21B of the Federal Home Loan Bank Act.

(4) The Patient-Centered Outcomes Research Institute established under section 1181(b) of the Social Security Act.

(m) Certain organizations providing commercial-type insurance not exempt from tax

(1) Denial of tax exemption where providing commercial-type insurance is substantial part of activities

An organization described in paragraph (3) or (4) of subsection (c) shall be exempt from tax under subsection (a) only if no substantial part of its activities consists of providing commercial-type insurance.

(2) Other organizations taxed as insurance companies on insurance business

In the case of an organization described in paragraph (3) or (4) of subsection (c) which is exempt from tax under subsection (a) after the application of paragraph (1) of this subsection—

(A) the activity of providing commercial-type insurance shall be treated as an unrelated trade or business (as defined in section 513), and

(B) in lieu of the tax imposed by section 511 with respect to such activity, such organization shall be treated as an insurance company for purposes of applying subchapter L with respect to such activity.

(3) Commercial-type insurance

For purposes of this subsection, the term "commercial-type insurance" shall not include—

(A) insurance provided at substantially below cost to a class of charitable recipients,

(B) incidental health insurance provided by a health maintenance organization of a kind customarily provided by such organizations,

(C) property or casualty insurance provided (directly or through an organization described in section 414(e)(3)(B)(ii)) by a church or convention or association of churches for such church or convention or association of churches,

(D) providing retirement or welfare benefits (or both) by a church or a convention or association of churches (directly or through an organization described in section 414(e)(3)(A) or 414(e)(3)(B)(ii)) for the employees (including employees described in section 414(e)(3)(B)) of such church or convention or association of churches or the beneficiaries of such employees, and

(E) charitable gift annuities.

(4) Insurance includes annuities

For purposes of this subsection, the issuance of annuity contracts shall be treated as providing insurance.

(5) Charitable gift annuity

For purposes of paragraph (3)(E), the term "charitable gift annuity" means an annuity if—

(A) a portion of the amount paid in connection with the issuance of the annuity is allowable as a deduction under section 170 or 2055, and

(B) the annuity is described in section 514(c)(5) (determined as if any amount paid in cash in connection with such issuance were property).

(n) Charitable risk pools

(1) In general

For purposes of this title—

(A) a qualified charitable risk pool shall be treated as an organization organized and operated exclusively for charitable purposes, and

(B) subsection (m) shall not apply to a qualified charitable risk pool.

(2) Qualified charitable risk pool

For purposes of this subsection, the term "qualified charitable risk pool" means any organization—

(A) which is organized and operated solely to pool insurable risks of its members (other than risks related to medical malpractice) and to provide information to its members with respect to loss control and risk management,

(B) which is comprised solely of members that are organizations described in subsection (c)(3) and exempt from tax under subsection (a), and

(C) which meets the organizational requirements of paragraph (3).

(3) Organizational requirements

An organization (hereinafter in this subsection referred to as the "risk pool") meets the organizational requirements of this paragraph if—

(A) such risk pool is organized as a nonprofit organization under State law provisions authorizing risk pooling arrangements for charitable organizations,

(B) such risk pool is exempt from any income tax imposed by the State (or will be so exempt after such pool qualifies as an organization exempt from tax under this title),

(C) such risk pool has obtained at least $1,000,000 in startup capital from nonmember charitable organizations,

(D) such risk pool is controlled by a board of directors elected by its members, and

(E) the organizational documents of such risk pool require that—

(i) each member of such pool shall at all times be an organization described in subsection (c)(3) and exempt from tax under subsection (a),

(ii) any member which receives a final determination that it no longer qualifies as an organization described in subsection (c)(3) shall immediately notify the pool of such determination and the effective date of such determination, and

(iii) each policy of insurance issued by the risk pool shall provide that such policy will not cover the insured with respect to events occurring after the date such final determination was issued to the insured.

An organization shall not cease to qualify as a qualified charitable risk pool solely by reason of the failure of any of its members to continue to be an organization described in subsection (c)(3) if, within a reasonable period of time after such pool is notified as required under subparagraph (E)(ii), such pool takes such action as may be reasonably necessary to remove such member from such pool.

(4) Other definitions

For purposes of this subsection—

(A) Startup capital

The term "startup capital" means any capital contributed to, and any program-related investments (within the meaning of section 4944(c)) made in, the risk pool before such pool commences operations.

(B) Nonmember charitable organization

The term "nonmember charitable organization" means any organization which is described in subsection (c)(3) and exempt from tax under subsection (a) and which is not a member of the

risk pool and does not benefit (directly or indirectly) from the insurance coverage provided by the pool to its members.

(o) Treatment of hospitals participating in provider-sponsored organizations

An organization shall not fail to be treated as organized and operated exclusively for a charitable purpose for purposes of subsection (c)(3) solely because a hospital which is owned and operated by such organization participates in a provider-sponsored organization (as defined in section 1855(d) of the Social Security Act), whether or not the provider-sponsored organization is exempt from tax. For purposes of subsection (c)(3), any person with a material financial interest in such a provider-sponsored organization shall be treated as a private shareholder or individual with respect to the hospital.

(p) Suspension of tax-exempt status of terrorist organizations

(1) In general

The exemption from tax under subsection (a) with respect to any organization described in paragraph (2), and the eligibility of any organization described in paragraph (2) to apply for recognition of exemption under subsection (a), shall be suspended during the period described in paragraph (3).

(2) Terrorist organizations

An organization is described in this paragraph if such organization is designated or otherwise individually identified—

(A) under section 212(a)(3)(B)(vi)(II) or 219 of the Immigration and Nationality Act as a terrorist organization or foreign terrorist organization,

(B) in or pursuant to an Executive order which is related to terrorism and issued under the authority of the International Emergency Economic Powers Act or section 5 of the United Nations Participation Act of 1945 for the purpose of imposing on such organization an economic or other sanction, or

(C) in or pursuant to an Executive order issued under the authority of any Federal law if—

(i) the organization is designated or otherwise individually identified in or pursuant to such Executive order as supporting or engaging in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act) or supporting terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989); and

(ii) such Executive order refers to this subsection.

(3) Period of suspension

With respect to any organization described in paragraph (2), the period of suspension—

(A) begins on the later of—

(i) the date of the first publication of a designation or identification described in paragraph (2) with respect to such organization, or

(ii) the date of the enactment of this subsection, and

(B) ends on the first date that all designations and identifications described in paragraph (2) with respect to such organization are rescinded pursuant to the law or Executive order under which such designation or identification was made.

(4) Denial of deduction

No deduction shall be allowed under any provision of this title, including sections 170, 545(b)(2), 556(b)(2),[1] 642(c), 2055, 2106(a)(2), and 2522, with respect to any contribution to an organization described in paragraph (2) during the period described in paragraph (3).

(5) Denial of administrative or judicial challenge of suspension or denial of deduction

Notwithstanding section 7428 or any other provision of law, no organization or other person may challenge a suspension under paragraph (1), a designation or identification described in paragraph (2), the period of suspension described in paragraph (3), or a denial of a deduction under paragraph (4) in any administrative or judicial proceeding relating to the Federal tax liability of such organization or other person.

(6) Erroneous designation

(A) In general

If—

(i) the tax exemption of any organization described in paragraph (2) is suspended under paragraph (1),

(ii) each designation and identification described in paragraph (2) which has been made with respect to such organization is determined to be erroneous pursuant to the law or Executive order under which such designation or identification was made, and

(iii) the erroneous designations and identifications result in an overpayment of income tax for any taxable year by such organization,

credit or refund (with interest) with respect to such overpayment shall be made.

(B) Waiver of limitations

If the credit or refund of any overpayment of tax described in subparagraph (A)(iii) is prevented at any time by the operation of any law or rule of law (including res judicata), such credit or refund may nevertheless be allowed or made if the claim therefor is filed before the close of the 1-year period beginning on the date of the last determination described in subparagraph (A)(ii).

(7) Notice of suspensions

If the tax exemption of any organization is suspended under this subsection, the Internal Revenue Service shall update the listings of tax-exempt organizations and shall publish appropriate notice to taxpayers of such suspension and of the fact that contributions to such organization are not deductible during the period of such suspension.

(q) Special rules for credit counseling organizations

(1) In general

An organization with respect to which the provision of credit counseling services is a substantial purpose shall not be exempt from tax under subsection (a) unless such organization is described in paragraph (3) or (4) of subsection (c) and such organization is organized and operated in accordance with the following requirements:

(A) The organization—

(i) provides credit counseling services tailored to the specific needs and circumstances of consumers,

(ii) makes no loans to debtors (other than loans with no fees or interest) and does not negotiate the making of loans on behalf of debtors,

(iii) provides services for the purpose of improving a consumer's credit record, credit history, or credit rating only to the extent that such services are incidental to providing credit counseling services, and

(iv) does not charge any separately stated fee for services for the purpose of improving any consumer's credit record, credit history, or credit rating.

(B) The organization does not refuse to provide credit counseling services to a consumer due to the inability of the consumer to pay, the ineligibility of the consumer for debt management plan enrollment, or the unwillingness of the consumer to enroll in a debt management plan.

(C) The organization establishes and implements a fee policy which—

(i) requires that any fees charged to a consumer for services are reasonable,

(ii) allows for the waiver of fees if the consumer is unable to pay, and

(iii) except to the extent allowed by State law, prohibits charging any fee based in whole or in part on a percentage of the consumer's debt, the consumer's payments to be made pursuant to a debt management plan, or the projected or actual savings to the consumer resulting from enrolling in a debt management plan.

(D) At all times the organization has a board of directors or other governing body—

(i) which is controlled by persons who represent the broad interests of the public, such as public officials acting in their capacities as such, persons having special knowledge or expertise in credit or financial education, and community leaders,

(ii) not more than 20 percent of the voting power of which is vested in persons who are employed by the organization or who will benefit financially, directly or indirectly, from the organization's activities (other than through the receipt of reasonable directors' fees or the repayment of consumer debt to creditors other than the credit counseling organization or its affiliates), and

(iii) not more than 49 percent of the voting power of which is vested in persons who are employed by the organization or who will benefit financially, directly or indirectly, from the organization's activities (other than through the receipt of reasonable directors' fees).

(E) The organization does not own more than 35 percent of—

(i) the total combined voting power of any corporation (other than a corporation which is an organization described in subsection (c)(3) and exempt from tax under subsection (a)) which is in the trade or business of lending money, repairing credit, or providing debt management plan services, payment processing, or similar services,

(ii) the profits interest of any partnership (other than a partnership which is an organization described in subsection (c)(3) and exempt from tax under subsection (a)) which is in the trade or business of lending money, repairing credit, or providing debt management plan services, payment processing, or similar services, and

(iii) the beneficial interest of any trust or estate (other than a trust which is an organization described in subsection (c)(3) and exempt from tax under subsection (a)) which is in the trade or business of lending money, repairing credit, or providing debt management plan services, payment processing, or similar services.

(F) The organization receives no amount for providing referrals to others for debt management plan services, and pays no amount to others for obtaining referrals of consumers.

(2) Additional requirements for organizations described in subsection (c)(3)

(A) In general

In addition to the requirements under paragraph (1), an organization with respect to which the provision of credit counseling services is a substantial purpose and which is described in paragraph (3) of subsection (c) shall not be exempt from tax under subsection (a) unless such organization is organized and operated in accordance with the following requirements:

(i) The organization does not solicit contributions from consumers during the initial counseling process or while the consumer is receiving services from the organization.

(ii) The aggregate revenues of the organization which are from payments of creditors of consumers of the organization and which are attributable to debt management plan services do not exceed the applicable percentage of the total revenues of the organization.

(B) Applicable percentage

(i) In general

For purposes of subparagraph (A)(ii), the applicable percentage is 50 percent.

(ii) Transition rule

Notwithstanding clause (i), in the case of an organization with respect to which the provision of credit counseling services is a substantial purpose and which is described in paragraph (3) of subsection (c) and exempt from tax under subsection (a) on the date of the enactment of this subsection, the applicable percentage is—

(I) 80 percent for the first taxable year of such organization beginning after the date which is 1 year after the date of the enactment of this subsection, and

(II) 70 percent for the second such taxable year beginning after such date, and

(III) 60 percent for the third such taxable year beginning after such date.

(3) Additional requirement for organizations described in subsection (c)(4)

In addition to the requirements under paragraph (1), an organization with respect to which the provision of credit counseling services is a substantial purpose and which is described in paragraph (4) of subsection (c) shall not be exempt from tax under subsection (a) unless such organization notifies the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition as a credit counseling organization.

(4) Credit counseling services; debt management plan services

For purposes of this subsection—

(A) Credit counseling services

The term "credit counseling services" means—

(i) the providing of educational information to the general public on budgeting, personal finance, financial literacy, saving and spending practices, and the sound use of consumer credit,

(ii) the assisting of individuals and families with financial problems by providing them with counseling, or

(iii) a combination of the activities described in clauses (i) and (ii).

(B) Debt management plan services

The term "debt management plan services" means services related to the repayment, consolidation, or restructuring of a consumer's debt, and includes the negotiation with creditors of lower interest rates, the waiver or reduction of fees, and the marketing and processing of debt management plans.

(r) Additional requirements for certain hospitals

(1) In general

A hospital organization to which this subsection applies shall not be treated as described in subsection (c)(3) unless the organization—

(A) meets the community health needs assessment requirements described in paragraph (3),

(B) meets the financial assistance policy requirements described in paragraph (4),

(C) meets the requirements on charges described in paragraph (5), and

(D) meets the billing and collection requirement described in paragraph (6).

(2) Hospital organizations to which subsection applies

(A) In general

This subsection shall apply to—

(i) an organization which operates a facility which is required by a State to be licensed, registered, or similarly recognized as a hospital, and

(ii) any other organization which the Secretary determines has the provision of hospital care as its principal function or purpose constituting the basis for its exemption under subsection (c)(3) (determined without regard to this subsection).

(B) Organizations with more than 1 hospital facility

If a hospital organization operates more than 1 hospital facility—

(i) the organization shall meet the requirements of this subsection separately with respect to each such facility, and

(ii) the organization shall not be treated as described in subsection (c)(3) with respect to any such facility for which such requirements are not separately met.

(3) Community health needs assessments

(A) In general

An organization meets the requirements of this paragraph with respect to any taxable year only if the organization—

(i) has conducted a community health needs assessment which meets the requirements of subparagraph (B) in such taxable year or in either of the 2 taxable years immediately preceding such taxable year, and

(ii) has adopted an implementation strategy to meet the community health needs identified through such assessment.

(B) Community health needs assessment

A community health needs assessment meets the requirements of this paragraph if such community health needs assessment—

(i) takes into account input from persons who represent the broad interests of the community served by the hospital facility, including those with special knowledge of or expertise in public health, and

(ii) is made widely available to the public.

(4) Financial assistance policy

An organization meets the requirements of this paragraph if the organization establishes the following policies:

(A) Financial assistance policy

A written financial assistance policy which includes—

(i) eligibility criteria for financial assistance, and whether such assistance includes free or discounted care,

(ii) the basis for calculating amounts charged to patients,

(iii) the method for applying for financial assistance,

(iv) in the case of an organization which does not have a separate billing and collections policy, the actions the organization may take in the event of non-payment, including collections action and reporting to credit agencies, and

(v) measures to widely publicize the policy within the community to be served by the organization.

(B) Policy relating to emergency medical care

A written policy requiring the organization to provide, without discrimination, care for emergency medical conditions (within the meaning of section 1867 of the Social Security Act (42 U.S.C. 1395dd)) to individuals regardless of their eligibility under the financial assistance policy described in subparagraph (A).

(5) Limitation on charges

An organization meets the requirements of this paragraph if the organization—

(A) limits amounts charged for emergency or other medically necessary care provided to individuals eligible for assistance under the financial assistance policy described in paragraph (4)(A) to not more than the amounts generally billed to individuals who have insurance covering such care, and

(B) prohibits the use of gross charges.

(6) Billing and collection requirements

An organization meets the requirement of this paragraph only if the organization does not engage in extraordinary collection actions before the organization has made reasonable efforts to determine whether the individual is eligible for assistance under the financial assistance policy described in paragraph (4)(A).

(7) Regulatory authority

The Secretary shall issue such regulations and guidance as may be necessary to carry out the provisions of this subsection, including guidance relating to what constitutes reasonable efforts to determine the eligibility of a patient under a financial assistance policy for purposes of paragraph (6).

(s) Cross reference

For nonexemption of Communist-controlled organizations, see section 11(b) of the Internal Security Act of 1950 (64 Stat. 997; 50 U.S.C. 790(b)).

(Aug. 16, 1954, ch. 736, 68A Stat. 163; Mar. 13, 1956, ch. 83, §5(2), 70 Stat. 49; Pub. L. 86–428, §1, Apr. 22, 1960, 74 Stat. 54; Pub. L. 86–667, §1, July 14, 1960, 74 Stat. 534; Pub. L. 87–834, §8(d), Oct. 16, 1962, 76 Stat. 997; Pub. L. 89–352, §1, Feb. 2, 1966, 80 Stat. 4; Pub. L. 89–800, §6(a), Nov. 8, 1966, 80 Stat. 1515; Pub. L. 90–364, title I, §109(a), June 28, 1968, 82 Stat. 269; Pub. L. 91–172, title I, §§101(j)(3)–(6), 121(b)(5)(A), (6)(A), Dec. 30, 1969, 83 Stat. 526, 527, 541; Pub. L. 91–618, §1, Dec. 31, 1970, 84 Stat. 1855; Pub. L. 92–418, §1(a), Aug. 29, 1972, 86 Stat. 656; Pub. L. 93–310, §3(a), June 8, 1974, 88 Stat. 235; Pub. L. 93–625, §10(c), Jan. 3, 1975, 88 Stat. 2119; Pub. L. 94–455, title XIII, §§1307(a)(1), (d)(1)(A), 1312(a), 1313(a), title XIX, §1906(b)(13)(A), title XXI, §§2113(a), 2134(b), Oct. 4, 1976, 90 Stat. 1720, 1727, 1730, 1834, 1907, 1927; Pub. L. 94–568, §§1(a), 2(a), Oct. 20, 1976, 90 Stat. 2697; Pub. L. 95–227, §4(a), Feb. 10, 1978, 92 Stat. 15; Pub. L. 95–345, §1(a), Aug. 15, 1978, 92 Stat. 481; Pub. L. 95–600, title VII, §703(b)(2), (g)(2)(A), (B), Nov. 6, 1978, 92 Stat. 2939, 2940; Pub. L. 96–222, title I, §108(b)(2)(B), Apr. 1, 1980, 94 Stat. 226; Pub. L. 96–364, title II, §209(a), Sept. 26, 1980, 94 Stat. 1290; Pub. L. 96–601, §3(a), Dec. 24, 1980, 94 Stat. 3496; Pub. L. 96–605, title I, §106(a), Dec. 28, 1980, 94 Stat. 3523; Pub. L. 97–119, title I, §103(c)(1), Dec. 29, 1981, 95 Stat. 1638; Pub. L. 97–248, title II, §286(a), title III, §354(a), (b), Sept. 3, 1982, 96 Stat. 569, 640, 641; Pub. L. 97–448, title III, §306(b)(5), Jan. 12, 1983, 96 Stat. 2406; Pub. L. 98–369, div. A, title X, §§1032(a), 1079, div. B, title VIII, §2813(b), July 18, 1984, 98 Stat. 1033, 1056, 1206; Pub. L. 99–272, title XI, §11012(b), Apr. 7, 1986, 100 Stat. 260; Pub. L. 99–514, title X, §§1012(a), 1024(b), title XI, §§1109(a), 1114(b)(14), title XVI, §1603(a), title XVIII, §§1879(k)(1), 1899A(15), Oct. 22, 1986, 100 Stat. 2390, 2406, 2435, 2451, 2768, 2909, 2959; Pub. L. 100–203, title X, §10711(a)(2), Dec. 22, 1987, 101 Stat. 1330–464; Pub. L. 100–647, title I, §§1010(b)(4), 1011(c)(7)(D), 1016(a)(1)(A), (2)–(4), 1018(u)(14), (15), (34), title II, §2003(a)(1), (2), title VI, §6202(a), Nov. 10, 1988, 102 Stat. 3451, 3458, 3573, 3574, 3590, 3592, 3597, 3598, 3730; Pub. L. 101–73, title XIV, §1402(a), Aug. 9, 1989, 103 Stat. 550; Pub. L. 102–486, title XIX, §1940(a), Oct. 24, 1992, 106 Stat. 3034; Pub. L. 103–66, title XIII, §13146(a), (b), Aug. 10, 1993, 107 Stat. 443; Pub. L. 104–168, title XIII, §1311(b)(1), July 30, 1996, 110 Stat. 1477; Pub. L. 104–188, title I, §§1114(a), 1704(j)(5), Aug. 20, 1996, 110 Stat. 1759, 1882; Pub. L. 104–191, title III, §§341(a), 342(a), Aug. 21, 1996, 110 Stat. 2070; Pub. L. 105–33, title IV, §4041(a), Aug. 5, 1997, 111 Stat. 360; Pub. L. 105–34, title I, §101(c), title IX, §§963(a), (b), 974(a), Aug. 5, 1997, 111 Stat. 799, 892, 898; Pub. L. 105–206, title VI, §6023(6), (7), July 22, 1998, 112 Stat. 825; Pub. L. 107–16, title VI, §611(d)(3)(C), June 7, 2001, 115 Stat. 98; Pub. L. 107–90, title II, §202, Dec. 21, 2001, 115 Stat. 890;

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Title 15 - COMMERCE AND TRADE
CHAPTER 2A - SECURITIES AND TRUST INDENTURES
SUBCHAPTER I - DOMESTIC SECURITIES
Sec. 77c - Classes of securities under this subchapter
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§77c. Classes of securities under this subchapter

(a) Exempted securities

Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(1) Reserved.

(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(3)]; or any security which is an industrial development bond (as defined in section 103(c)(2) [1] of title 26) the interest on which is excludable from gross income under section 103(a)(1) [1] of title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) [1] of title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)),[1] paragraph (1) of such section 103(c) [1] does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of title 26, (B) an annuity plan which meets the requirements for the deduction of the employer's contributions under section 404(a)(2) of title 26, (C) a governmental plan as defined in section 414(d) of title 26 which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (D) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)], other than any plan described in subparagraph (A), (B), (C), or (D) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of title 26 (other than a person participating in a church plan who is described in section 414(e)

(3)(B) of title 26), or (iii) which is a plan funded by an annuity contract described in section 403(b) of title 26 (other than a retirement income account described in section 403(b)(9) of title 26, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of title 26 establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account). The Commission, by rules and regulations or order, shall exempt from the provisions of section 77e of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of title 26, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.];

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual, or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)];

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of title 26, (ii) a corporation described in section 501(c)(16) of title 26 and exempt from tax under section 501(a) of title 26, or (iii) a corporation described in section 501(c)(2) of title 26 which is exempt from tax under section 501(a) of title 26 and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii);

(6) Any interest in a railroad equipment trust. For purposes of this paragraph "interest in a railroad equipment trust" means any interest in an equipment trust, lease, conditional sales contract, or other similar arrangement entered into, issued, assumed, guaranteed by, or for the benefit of, a common carrier to finance the acquisition of rolling stock, including motive power;

(7) Certificates issued by a receiver or by a trustee or debtor in possession in a case under title 11, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9) Except with respect to a security exchanged in a case under title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(12) Any equity security issued in connection with the acquisition by a holding company of a bank under section 1842(a) of title 12 or a savings association under section 1467a(e) of title 12, if—

(A) the acquisition occurs solely as part of a reorganization in which security holders exchange their shares of a bank or savings association for shares of a newly formed holding company with no significant assets other than securities of the bank or savings association and the existing subsidiaries of the bank or savings association;

(B) the security holders receive, after that reorganization, substantially the same proportional share interests in the holding company as they held in the bank or savings association, except for nominal changes in shareholders' interests resulting from lawful elimination of fractional interests and the exercise of dissenting shareholders' rights under State or Federal law;

(C) the rights and interests of security holders in the holding company are substantially the same as those in the bank or savings association prior to the transaction, other than as may be required by law; and

(D) the holding company has substantially the same assets and liabilities, on a consolidated basis, as the bank or savings association had prior to the transaction.

For purposes of this paragraph, the term "savings association" means a savings association (as defined in section 1813(b) of title 12) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(13) Any security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)].

(14) Any security futures product that is—

(A) cleared by a clearing agency registered under section 78q–1 of this title or exempt from registration under subsection (b)(7) of such section 78q–1; and

(B) traded on a national securities exchange or a national securities association registered pursuant to section 78o–3(a) of this title.

(b) Additional exemptions

(1) Small issues exemptive authority

The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $5,000,000.

(2) Additional issues

The Commission shall by rule or regulation add a class of securities to the securities exempted pursuant to this section in accordance with the following terms and conditions:

(A) The aggregate offering amount of all securities offered and sold within the prior 12-month period in reliance on the exemption added in accordance with this paragraph shall not exceed $50,000,000.

(B) The securities may be offered and sold publicly.

(C) The securities shall not be restricted securities within the meaning of the Federal securities laws and the regulations promulgated thereunder.

(D) The civil liability provision in section 77l(a)(2) of this title shall apply to any person offering or selling such securities.

(E) The issuer may solicit interest in the offering prior to filing any offering statement, on such terms and conditions as the Commission may prescribe in the public interest or for the protection of investors.

(F) The Commission shall require the issuer to file audited financial statements with the Commission annually.

(G) Such other terms, conditions, or requirements as the Commission may determine necessary in the public interest and for the protection of investors, which may include—

(i) a requirement that the issuer prepare and electronically file with the Commission and distribute to prospective investors an offering statement, and any related documents, in such form and with such content as prescribed by the Commission, including audited financial statements, a description of the issuer's business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters; and

(ii) disqualification provisions under which the exemption shall not be available to the issuer or its predecessors, affiliates, officers, directors, underwriters, or other related persons, which shall be substantially similar to the disqualification provisions contained in the regulations adopted in accordance with section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. 77d note).

(3) Limitation

Only the following types of securities may be exempted under a rule or regulation adopted pursuant to paragraph (2): equity securities, debt securities, and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities.

(4) Periodic disclosures

Upon such terms and conditions as the Commission determines necessary in the public interest and for the protection of investors, the Commission by rule or regulation may require an issuer of a class of securities exempted under paragraph (2) to make available to investors and file with the Commission periodic disclosures regarding the issuer, its business operations, its financial condition, its corporate governance principles, its use of investor funds, and other appropriate matters, and also may provide for the suspension and termination of such a requirement with respect to that issuer.

(5) Adjustment

Not later than 2 years after April 5, 2012,[1] and every 2 years thereafter, the Commission shall review the offering amount limitation described in paragraph (2)(A) and shall increase such amount as the Commission determines appropriate. If the Commission determines not to increase such amount, it shall report to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate on its reasons for not increasing the amount.

(c) Securities issued by small investment company

The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section

any class of securities issued by a small business investment company under the Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.] if it finds, having regard to the purposes of that Act, that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors.

(May 27, 1933, ch. 38, title I, §3, 48 Stat. 75; June 6, 1934, ch. 404, title II, §202, 48 Stat. 906; Feb. 4, 1887, ch. 104, title II, §214, as added Aug. 9, 1935, ch. 498, 49 Stat. 557; amended June 29, 1938, ch. 811, §15, 52 Stat. 1240; May 15, 1945, ch. 122, 59 Stat. 167; Aug. 10, 1954, ch. 667, title I, §5, 68 Stat. 684; Pub. L. 85–699, title III, §307(a), Aug. 21, 1958, 72 Stat. 694; Pub. L. 91–373, title IV, §401(a), Aug. 10, 1970, 84 Stat. 718; Pub. L. 91–547, §27(b), (c), Dec. 14, 1970, 84 Stat. 1434; Pub. L. 91–565, Dec. 19, 1970, 84 Stat. 1480; Pub. L. 91–567, §6(a), Dec. 22, 1970, 84 Stat. 1498; Pub. L. 94–210, title III, §308(a)(1), (3), Feb. 5, 1976, 90 Stat. 56, 57; Pub. L. 95–283, §18, May 21, 1978, 92 Stat. 275; Pub. L. 95–425, §2, Oct. 6, 1978, 92 Stat. 962; Pub. L. 95–598, title III, §306, Nov. 6, 1978, 92 Stat. 2674; Pub. L. 96–477, title III, §301, title VII, §701, Oct. 21, 1980, 94 Stat. 2291, 2294; Pub. L. 97–261, §19(d), Sept. 20, 1982, 96 Stat. 1121; Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 100–181, title II, §§203, 204, Dec. 4, 1987, 101 Stat. 1252; Pub. L. 103–325, title III, §320, Sept. 23, 1994, 108 Stat. 2225; Pub. L. 104–62, §3, Dec. 8, 1995, 109 Stat. 684; Pub. L. 104–290, title V, §508(b), Oct. 11, 1996, 110 Stat. 3447; Pub. L. 106–102, title II, §221(a), Nov. 12, 1999, 113 Stat. 1401; Pub. L. 106–554, §1(a)(5) [title II, §208(a)(2)], Dec. 21, 2000, 114 Stat. 2763, 2763A–435; Pub. L. 108–359, §1(b), Oct. 25, 2004, 118 Stat. 1666; Pub. L. 111–203, title IX, §985(a)(1), July 21, 2010, 124 Stat. 1933; Pub. L. 112–106, title IV, §401(a), Apr. 5, 2012, 126 Stat. 323; Pub. L. 112–142, §2, July 9, 2012, 126 Stat. 989.)

REFERENCES IN TEXT

Section 103 of title 26, referred to in subsec. (a)(2), which related to interest on certain governmental obligations was amended generally by Pub. L. 99–514, title XIII, §1301(a), Oct. 22, 1986, 100 Stat. 2602, and as so amended relates to interest on State and local bonds. Section 103(b)(2) (formerly section 103(c)(2)), which prior to the general amendment defined industrial development bond, relates to the applicability of the interest exclusion to arbitrage bonds.

The Investment Company Act of 1940, referred to in subsec. (a)(2), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, as amended, which is classified generally to subchapter I (§80a–1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a–51 of this title and Tables.

Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, referred to in subsec. (b)(2)(G)(ii), is section 926 of Pub. L. 111–203, which is set out as a note under section 77d of this title.

April 5, 2012, referred to in subsec. (b)(5), was in the original "the date of enactment of the Small Company Capital Formation Act of 2011", and was translated as meaning the date of enactment of the Jumpstart Our Business Startups Act, Pub. L. 112–106, which enacted subsec. (b)(5), to reflect the probable intent of Congress.

The Small Business Investment Act of 1958, referred to in subsec. (c), is Pub. L. 85–699, Aug. 21, 1958, 72 Stat. 689, as amended, which is classified principally to chapter 14B (§661 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

2012—Subsec. (a)(2). Pub. L. 112–142 inserted "(other than a retirement income account described in section 403(b)(9) of title 26, to the extent that the interest or participation in such single trust fund or collective trust fund is issued to a church, a convention or association of churches, or an organization described in section 414(e)(3)(A) of title 26 establishing or maintaining the retirement income account or to a trust established by any such entity in connection with the retirement income account)" after "403(b) of title 26" and "(other than a person participating in a church plan who is described in section 414(e)(3)(B) of title 26)" after "(ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of title 26".

Subsec. (b). Pub. L. 112–106 inserted subsec. heading, designated existing provisions as par. (1), inserted par. heading, and added pars. (2) to (5).

2010—Subsec. (a)(4). Pub. L. 111–203 substituted "individual," for "individual;".

NEBRASKA ADMINISTRATIVE CODE

Title 48 - ~~Department of Banking and Finance~~DEPARTMENT OF BANKING AND FINANCE

Chapter 37 - SALES OF SECURITIES AT FINANCIAL INSTITUTIONS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 8-1120(3) of the Securities Act of Nebraska ("Act").

001.02 The Department has determined that this Rule is consistent with investor protection and is in the public interest.

001.03 The Director may, on a case-by-case basis, and with prior written notice to the affected persons, require adherence to additional standards or policies, as deemed necessary in the public interest.

001.04 The definitions in 48 NAC 2 shall apply to the provisions of this Rule, unless otherwise specified.

001.05 This Rule applies exclusively to broker-dealer services conducted by broker-dealers on the premises of a financial institution where retail deposits are taken. It does not alter or abrogate a broker-dealer's obligations to comply with other applicable laws, rules, or regulations that may govern the operations of broker-dealers and their agents, including but not limited to, supervisory obligations. ~~These rules~~This rule does not apply to broker-dealer services provided to non-retail customers.

001.06 Federal statutes and rules of the Securities and Exchange Commission ("SEC") or the Financial Industry Regulatory Authority ("FINRA") referenced herein shall mean those statutes and rules as amended on or before the effective date of this Rule. A copy of the applicable statutes or rule referenced in this Rule is attached hereto.

002 ~~Definitions~~DEFINITIONS. For purposes of these rules, the following terms have the meanings indicated:

002.01 "Financial institution" means federal and state-chartered banks, savings and loan associations, savings banks, credit unions, and the subsidiaries and service corporations of such institutions located in Nebraska.

002.02 "Networking arrangement" means a contractual or other arrangement between a broker-dealer and a financial institution pursuant to which the broker-dealer conducts broker-dealer services on the premises of such financial institution where retail deposits are taken.

002.03 "Broker-dealer services" means the investment banking or securities business as defined in paragraph ~~(p)~~(u) of Article I of the By-Laws of the ~~National Association of Securities Dealers, Inc.~~Financial Industry Regulatory Authority, Inc.

003 ~~Standards For Broker-Dealer Conduct.~~ STANDARDS FOR BROKER-DEALER CONDUCT. No broker-dealer shall conduct broker-dealer services on the premises of a financial institution where retail deposits are taken unless the broker-dealer complies initially and continuously with the following requirements:

003.01 Wherever practical, broker-dealer services shall be conducted in a physical location distinct from the area in which the financial institution's retail deposits are taken. In those situations where there is insufficient space to allow separate areas, the broker-dealer has a heightened responsibility to distinguish its services from those of the financial institution. In all situations, the broker-dealer shall identify its services in a manner that clearly distinguishes those services from the financial institution's retail deposit-taking activities. The broker-dealer's name shall be clearly displayed in the area in which the broker-dealer conducts its services.

003.02 Networking arrangements shall be governed by a written agreement that sets forth the responsibilities of the parties and the compensation arrangements. Networking arrangements must provide that supervisory personnel of the broker-dealer and representatives of state securities authorities, where authorized by state law, will be permitted access to the financial institution's premises where the broker-dealer conducts broker-dealer services in order to inspect the books and records and other relevant information maintained by the broker-dealer with respect to its broker-dealer services. Management of the broker-dealer shall be responsible for ensuring that the networking arrangement clearly outlines the duties and responsibilities of all parties, including those of financial institution personnel.

003.03 At or prior to the time that a customer's securities brokerage account is opened by a broker-dealer on the premises of a financial institution where retail deposits are taken, the broker-dealer shall:

003.03A Disclose, orally and in writing, that the securities products purchased or sold in a transaction with the broker-dealer:

003.03A1 Are not insured by the Federal Deposit Insurance Corporation ("FDIC") or by the National Credit Union Administration ("NCUA"), as applicable;

003.03A2 Are not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and

003.03A3 Are subject to investment risks, including possible loss of the principal invested.

003.03B Make reasonable efforts to obtain from each customer during the account opening process a written acknowledgment of the disclosures required by Section 003.03A1.

003.03C If broker-dealer services include any written or oral representations concerning insurance coverage, other than FDIC or NCUA insurance coverage, as applicable, then clear and accurate written or oral explanations

of the coverage must also be provided to the customers when such representations are first made.

004 ~~Communications With The Public.~~ COMMUNICATIONS WITH THE PUBLIC.

004.01

004.01A All of the broker-dealer's confirmations and account statements must indicate clearly that the broker-dealer services are provided by the broker-dealer.

004.01B Advertisements and sales literature that announce the location of a financial institution where broker-dealer services are provided by the broker-dealer, or that are distributed by the broker-dealer on the premises of a financial institution, must disclose that securities products; are not insured by the FDIC or the NCUA, as applicable; are not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and are subject to investment risks, including possible loss of the principal invested. The shorter, logo format described in Section 004.02A may be used to provide these disclosures.

004.01C Recommendations by a broker-dealer concerning non-deposit investment products with a name similar to that of a financial institution must only occur pursuant to policies and procedures reasonably designed to minimize risk of customer confusion.

004.02

004.02A The following shorter, logo format disclosures may be used by a broker-dealer in advertisements and sales literature, including material published, or designed for use, in radio or television broadcasts, Automated Teller Machine ("ATM") screens, billboards, signs, posters and brochures, to comply with the requirements of Section 004.01B, provided that such disclosures are displayed in a conspicuous manner:

004.02A1 Not FDIC Insured or Not NCUA Insured, as applicable

004.02A2 No Financial Institution Guarantee

004.02A3 May Lose Value

004.02B As long as the omission of the disclosures required by Section 004.01B would not cause the advertisement or sales literature to be misleading in light of the context in which the material is presented, such disclosures are not required with respect to messages contained in:

004.02B1 Radio broadcasts of ~~30~~thirty seconds or less;

004.02B2 Electronic signs, including billboard-type signs that are electronic, time, and temperature signs and ticker tape signs, but

excluding messages contained in such media as television, on-line computer services, or ATMs; and

004.02B3 Signs, such as banners and posters, when used only as location indicators.

005 ~~Notification Of Termination.~~ NOTIFICATION OF TERMINATION. The broker-dealer must promptly notify the financial institution if any agent of the broker-dealer who is employed by the financial institution is terminated for cause by the broker-dealer.

006 ~~Conflict With Federal Regulations~~ CONFLICT WITH FEDERAL REGULATIONS. The Director may by order suspend any provision of this ~~Chapter~~ Rule upon a showing that such provision conflicts with any regulation promulgated by a federal regulatory agency or a self-regulatory organization of an industry affected by this ~~Chapter~~Rule.

FINRA

Print

ARTICLE I DEFINITIONS

When used in these By-Laws, unless the context otherwise requires, the term:

(a) "Act" means the Securities Exchange Act of 1934, as amended;

(b) "bank" means (1) a banking institution organized under the laws of the United States, (2) a member bank of the Federal Reserve System, (3) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87-722 (12 U.S.C. § 92a), and which is supervised and examined by a State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of the Act, and (4) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (1), (2), or (3) of this subsection;

(c) "Board" means the Board of Governors of the Corporation;

(d) "branch office" means an office defined as a branch office in the Rules of the Corporation;

(e) "broker" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;

(f) "Closing" means the closing of the consolidation of certain member firm regulatory functions of NYSE Regulation, Inc. and the Corporation;

(g) "Commission" means the Securities and Exchange Commission;

(h) "controlling" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith, as an agent, bank, broker, nominee, custodian or trustee for one or more owners who do not individually or as a group have control of such entity;

(i) "Corporation" means the National Association of Securities Dealers, Inc. or any future name of this entity;

(j) "day" means calendar day;

(k) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for such individual's or entity's own account, through a broker or otherwise, but does not include a bank, or any person insofar as such person buys or sells securities for such person's own account, either individually or in some fiduciary capacity, but not as part of a regular business;

(l) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;

(m) "district" means a district established by the NASD Regulation Board pursuant to the NASD Regulation By-Laws;

(n) "Floor Member Governor" means a member of the Board appointed as such who is a person associated with a member (or a firm in the process of becoming a member) which is a specialist or floor broker on the New York Stock Exchange trading floor;

(o) "government securities broker" shall have the same meaning as in Section 3(a)(43) of the Act except that it shall not include financial institutions as defined in Section 3(a)(46) of the Act;

(p) "government securities dealer" shall have the same meaning as in Section 3(a)(44) of the Act except that it shall not include financial institutions as defined in Section 3(a)(46) of the Act;

(q) "Governor" means a member of the Board;

(r) "Independent Dealer/Insurance Affiliate Governor" means a member of the Board appointed as such who is a person associated with a member which is an independent contractor financial planning member firm or an insurance company, or an affiliate of such a member;

(s) "Industry Director" means a Director of the NASD Regulation Board or NASD Dispute Resolution Board (excluding the Presidents) who: (1) is or has served in the prior year as an officer, director (other than as an independent director), employee or controlling person of a broker or dealer, or (2) has a consulting or employment relationship with or provides professional services to a self regulatory organization registered under the Act, or has had any such relationship or provided any such services at any time within the prior year;

(t) "Industry Governor" or "Industry committee member" means the Floor Member Governor, the Independent Dealer/Insurance Affiliate Governor and the Investment Company Affiliate Governor and any other Governor (excluding the Chief Executive Officer of the Corporation and, during the Transitional Period, the Chief Executive Officer of NYSE Regulation, Inc.) or committee member who: (1) is or has served in the prior year as an officer, director (other than as an independent director), employee or controlling person of a broker or dealer, or (2) has a consulting or employment relationship with or provides professional services to a self regulatory organization registered under the Act, or has had any such relationship or provided any such services at any time within the prior year;

(u) "investment banking or securities business" means the business, carried on by a broker, dealer, or municipal securities dealer (other than a bank or department or division of a bank), or government securities broker or dealer, of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others;

(v) "Investment Company" means an "investment company" as such term is defined in The Investment Company Act of 1940, as amended;

(w) "Investment Company Affiliate Governor" means a member of the Board appointed as such who is a person associated with a member which is an Investment Company or an affiliate of such a member;

(x) "Joint Public Governor" means the one Public Governor to be appointed as such by the Board of Directors of NYSE Group, Inc. and the Board in office prior to the Closing jointly;

(y) "Large Firm" means any broker or dealer admitted to membership in the Corporation which, at the time of determination, has 500 or more registered persons;

(z) "Large Firm Governor" means a member of the Board to be elected by Large Firm members, provided, however, that in order to be eligible to serve, a Large Firm Governor must be an Industry Governor and must be registered with a member which is a Large Firm member;

(aa) "Large Firm Governor Committee" means a committee of the Board comprised of all of the Large Firm Governors;

(bb) "Lead Governor" means a member of the Board elected as such by the Board, provided, however, that any member of the Board who is concurrently serving as a member of the Board of Directors of NYSE Group, Inc. shall not be eligible to serve as the Lead Governor;

(cc) "Mid-Size Firm" means any broker or dealer admitted to membership in the Corporation which, at the time of determination, has at least 151 and no more than 499 registered persons;

(dd) "Mid-Size Firm Governor" means a member of the Board to be elected by Mid-Size Firm members, provided, however, that in order to be eligible to serve, a Mid-Size Firm Governor must be an Industry Governor and must be registered with a member which is a Mid-Size Firm member;

(ee) "member" means any broker or dealer admitted to membership in the Corporation;

(ff) "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond as defined by Section 3(a)(29) of the Act;

(gg) "municipal securities broker" means a broker, except a bank or department or division of a bank, engaged in the business of effecting transactions in municipal securities for the account of others;

(hh) "municipal securities dealer" means any person, except a bank or department or division of a bank, engaged in the business of buying and selling municipal securities for such person's own account, through a broker or otherwise, but does not include any person insofar as such person buys or sells securities for such person's own account either individually or in some fiduciary capacity, but not as a part of a regular business;

(ii) "NASD Dispute Resolution" means NASD Dispute Resolution, Inc. or any future name of this entity;

(jj) "NASD Group Committee" means a committee of the Board comprised of the five Public Governors and the Independent Dealer/Insurance Affiliate Governor appointed as such by the Board in office prior to Closing, and the Small Firm Governors which were nominated for election as such by the Board in office prior to Closing, and in each case their successors;

(kk) "NASD Public Governors" means the five Public Governors to be appointed as such by the Board in office prior to the Closing effective as of Closing;

(ll) "NASD Regulation" means NASD Regulation, Inc. or any future name of this entity;

(mm) "NASD Regulation Board" means the Board of Directors of NASD Regulation;

(nn) "National Adjudicatory Council" means a body appointed pursuant to Article V of the NASD Regulation By-Laws;

(oo) "Nominating Committee" means the Nominating Committee appointed pursuant to Article VII, Section 9 of these By-Laws;

(pp) "NYSE Group Committee" means a committee of the Board comprised of the five Public Governors and the Floor Member Governor appointed as such by the Board of Directors of NYSE Group, Inc., and the Large Firm Governors which were nominated for election as such by the Board of Directors of NYSE Group, Inc., and in each case their successors;

(qq) "NYSE Public Governors" shall mean the five Public Governors to be appointed as such by the Board of Directors of NYSE Group, Inc. effective as of Closing;

(rr) "person associated with a member" or "associated person of a member" means: (1) a natural person who is registered or has applied for registration under the Rules of the Corporation; (2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member;

(ss) "Public Director" means a Director of the NASD Regulation Board or NASD Dispute Resolution Board who is not an Industry Director and who otherwise has no material business relationship with a broker or dealer or a self regulatory organization registered under the Act (other than serving as a public director of such a self regulatory organization);

(tt) "Public Governor" or "Public committee member" means any Governor or committee member who is not the Chief Executive Officer of the Corporation or, during the Transitional Period, the Chief Executive Officer of NYSE Regulation, Inc., who is not an Industry Governor and who otherwise has no material business relationship with a broker or dealer or a self regulatory organization registered under the Act (other than serving as a public director of such a self regulatory organization);

(uu) "registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer" means any broker, dealer, municipal securities broker or dealer, or government securities broker or dealer which is registered with the Commission under the Act;

(vv) "Rules of the Corporation" or "Rules" means the numbered rules set forth in the manual of the Corporation beginning with the Rule 0100 Series, as adopted by the Board pursuant to these By-Laws, as hereafter amended or supplemented;

(ww) "Small Firm" means any broker or dealer admitted to membership in the Corporation which, at the time of determination, has at least 1 and no more than 150 registered persons;

(xx) "Small Firm Governor" means a member of the Board to be elected by Small Firm members, provided, however, that in order to be eligible to serve, a Small Firm Governor must be registered with a member which is a Small Firm member and must be an Industry Governor;

(yy) "Small Firm Governor Committee" means a committee of the Board comprised of all the Small Firm Governors; and

(zz) "Transitional Period" means the period commencing on the date of the Closing and ending on the third anniversary of the date of the Closing.

Amended by SR-NASD-2007-023 eff. July 30, 2007.
Amended by SR-NASD-2006-104 eff. Dec. 20, 2006.
Amended by SR-NASD-2006-135 eff. Dec. 20, 2006.
Amended by SR-NASD-2004-110 eff. Dec. 31, 2004.
Amended by SR-NASD-2001-06 eff. May 8, 2001.
Amended by SR-NASD-99-35 eff. Dec. 1, 1999.
Amended by SR-NASD-98-56 eff. Oct. 30, 1998.
Amended by SR-NASD-97-71 eff. Jan. 15, 1998.
Amended by SR-NASD-95-39 eff. Aug 20, 1996.
Amended by SR-NASD-94-64 eff. Feb. 9, 1995.
Amended eff. Mar. 9, 1988 and Sept. 4, 1990.

Selected Notices: 87-14, 87-37, 87-41, 88-51, 94-52, 99-95.