

ARKANSAS REGISTER

Proposed Rule Cover Sheet



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Name of Department _____

Agency or Division Name _____

Other Subdivision or Department, If Applicable _____

Previous Agency Name, If Applicable _____

Contact Person _____

Contact E-mail _____

Contact Phone _____

Name of Rule _____

Newspaper Name _____

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Marked-Up Version

Proposed

Proposed amendments to the following Rules of the Arkansas Securities Commissioner are set out with strike-through and underline marks as follows:

RULE 102

102.01 DEFINITIONS

- (6) **APA.** The Arkansas Administrative Procedures Act (“APA”), as amended, codified at Arkansas Code Sections 25-15-201 through 25-19-219220.

...

- (9) **CLIENT.** For purposes of Sections 23-42-102(9)(E)(ii) of the Act, the following shall be deemed a single client:

...

- (18) **ENGAGED IN THE BUSINESS OF EFFECTING TRANSACTIONS IN SECURITIES.** As used in Section 23-42-102(2)(3) of the Act, the term “engaged in the business of effecting transactions in securities,” includes any person who holds himself out as being able to effect transactions in securities for the accounts of others or for his own account regardless of whether any transactions have actually been effected. ~~The term shall not include a business broker who as part of the facilitation of the sale of business, including securities of the business, takes a fee provided all of the following conditions are met:~~

- (A) ~~The business broker has a limited role in negotiations between the purchaser and the seller;~~
- (B) ~~The businesses represented by the business broker are going concerns and are not “shell” organizations;~~
- (C) ~~Only assets are advertised or otherwise offered for sale by the business broker;~~
- (D) ~~Transactions effected by means of securities convey all of the business’ equity to a single purchaser or group of purchasers formed without the assistance of the business broker;~~

- (E) ~~The business broker does not advise the parties whether to issue securities or assess the value of any securities sold;~~
- (F) ~~The business broker's compensation does not vary according to the form of conveyance the parties agree to; and~~
- (G) ~~The business broker does not assist purchasers in obtaining financing other than to provide to a party a list of potential lenders.~~

...

(25) LIFE SETTLEMENT CONTRACT. An agreement for the purchase, sale, assignment, transfer, devise, or bequest of any portion of the death benefit or ownership of a life insurance policy or certificate for consideration that is less than the expected death benefit of the life insurance policy or certificate. Life settlement contract does not include the following:

- (A) The assignment, transfer, sale, devise or bequest of a death benefit, life insurance policy or certificate of insurance by the insured to the life settlement provider pursuant to the Life Settlements Act, Ark. Code Ann. Sections 23-81-801 through 23-81-818;

...

(29) OFFER OR OFFER TO SELL. For the purposes of Sections 23-42-501 and 23-42-502 of the Act, the term "offer" or "offer to sell" as defined in Section 23-42-102(13)(A)(ii)(15)(A)(ii) of the Act shall not include negotiations, agreements or similar communications with respect to a proposed reorganization provided the negotiations, agreements or similar communications are incidental to the formulation of a proposal of a reorganization and, except for the merger of a subsidiary entity into its parent, a vote of approval and consent of security holders is required to effectuate the proposed transactions.

204.01 GENERAL.

The following provisions apply to all applications, petitions, notice filings, amendments, reports, complaints, or other documents required under the Act, Rules, or any order of the Commissioner:

- (a) **FILING.** A document is deemed filed when it is received in the office of the Commissioner.
 - (1) All communications and inquiries shall be addressed or delivered to: the Arkansas Securities Commissioner, 201 East Markham, Suite 300, Little Rock, Arkansas 72201, Telephone (501) 324-9260, 1 Commerce Way, Suite 402, Little Rock, Arkansas 72202, Telephone 501.324.9260.

(c) **FORMS.** The following forms have been adopted for use.

(1) **BROKER-DEALER REGISTRATION.**

(A) Uniform Application ~~to Register~~ for Broker-Dealer Registration
(Form BD)

...

(D) Uniform Termination Notice for Securities Industry Registration
(Form U5)

(E) ~~Notice of Withdrawal from Registration as Broker-Dealer~~ Uniform
Request for Broker-Dealer Withdrawal (Form BDW).

(F) Broker-Dealer Independent Contractor Acknowledgement Form.

(G) Life Disclosure Settlement Document I and II

(2) **INVESTMENT ADVISER REGISTRATION.**

(C) Notice of Withdrawal from Registration as Investment Adviser
(Form ~~ADV-W~~ ADV-W).

(D) Investment Adviser Independent Contractor Acknowledgement
Form.

(E) Certificate of Accounting of Client Securities and Funds in the
Possession or Custody of an Investment Adviser (Form ADV-E).

(F) Bond Continuation Certificate.

(3) **SECURITIES AGENT, AGENT OF AN ISSUER AND INVESTMENT
ADVISER REPRESENTATIVE.**

(F) Agent of the Issuer Renewal Registration ~~Letter~~ Application.

(G) Model Accredited Investor Exemption Uniform Notice of
Transaction

(4) **SECURITIES REGISTRATION AND EXEMPTION.**

(G) Model Accredited Investor Exemption.

...

(5) **NOTICE FILINGS.**

(C) Uniform Notice Filing of Regulation A – Tier 2 Offering

301.01 GENERAL PROVISIONS

(c) SUPERVISION REQUIREMENTS

(2)(J) Periodic Inspections.

- (i) Each place of business shall be periodically inspected to ensure that the written procedures and systems are enforced.
- (a) An office of supervisory jurisdiction of a broker-dealer shall be inspected at least annually. For the purposes of this section, the term “office of supervisory jurisdiction” shall have the same meaning as that term is defined in FINRA ~~Rules 3010(e)~~ Rule 3110(f).

302.01 GENERAL PROVISIONS

- (b)(1)(A) Submit to the CRD a completed Form BD and Form BR designating Arkansas as a state in which the applicant requests to be registered, along with the fees set forth in Section 23-42-304 of the Act and any other fee required by FINRA; and

...

(f) REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS

- (1) Except as provided in subsections (2) and (3), a merger and acquisitions broker shall be exempt from registration pursuant to Section 23-42-301 of the Act.
- (2) Excluded Activities. A merger and acquisition broker is not exempt from registration under this section if the merger and acquisition broker:
 - (A) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction;
 - (B) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the SEC under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under 15 U.S.C. § 78o(d); or

- (C) Engages on behalf of any party in a transaction involving a public shell company.
- (3) Disqualifications. A merger and acquisition broker is not exempt from registration under this section if the merger and acquisition broker is subject to:
 - (A) Suspension or revocation of registration under section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4);
 - (B) A statutory disqualification described in section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(39);
 - (C) A disqualification under the rules adopted by the SEC under section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 77d; or
 - (D) A final order described in paragraph (4)(H) of Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4)(H).
- (4) Definitions – for the purposes of this Rule:
 - (A) CONTROL – The term “control” means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control for any person who:
 - (i) Is a director, general partner, member, or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);
 - (ii) Has the right to vote 20 percent (20%) or more of a class of voting securities or the power to sell or direct the sale of 20 percent (20%) or more of a class of voting securities; or
 - (iii) In the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 20 percent (20%) or more of the capital.
 - (B) ELIGIBLE PRIVATELY HELD COMPANY. The term “eligible privately held company” means a company meeting both of the following conditions:
 - (i) The company does not have any class of securities registered, or required to be registered, with the SEC under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78l, or with respect to which the company files, or is

required to file, periodic information, documents, and reports under subsection (d), 15 U.S.C. 78o(d).

(ii) In the fiscal year ending immediately before the fiscal year in which the services of the merger and acquisition broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions (determined in accordance with the historical financial accounting records of the company):

(a) The earnings of the company before interest, taxes, depreciation, and amortization are less than \$25,000,000.

(b) The gross revenues of the company are less than \$250,000,000.

(C) MERGER AND ACQUISITION BROKER. “Merger and Acquisition Broker” means any broker and any person associated with a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether that broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving, securities or assets of the eligible privately held company:

(i) If the broker reasonably believes that upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert, will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(ii) If any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent fiscal year-end financial statements of the issuer of the securities as customarily prepared by its management in the normal course of operations and, if the financial statements of the issuer are audited, reviewed, or compiled, any related statement by the independent accountant; a balance sheet dated not more than 120 days before the date of the exchange offer; and information pertaining to the management, business, results

of operations for the period covered by the foregoing financial statements, and any material loss contingencies of the issuer.

(D) PUBLIC SHELL COMPANY. “Public Shell Company” is a company that at the time of a transaction with an eligible privately held company:

- (i) Has any class of securities registered, or required to be registered with the SEC under Section 12, 15 U.S.C. 78l, or with respect to which the company files, or is required to file, periodic information, documents, and reports under subdivision (d), 15 U.S.C. 78o(d); and
- (ii) Has no or nominal operations; and
- (iii) Has:
 - (a) No or nominal assets;
 - (b) Assets consisting solely of cash and cash equivalents; or
 - (c) Assets consisting of any amount of cash and cash equivalents and nominal other assets.

(E) INFLATION ADJUSTMENT

- (i) On the date that is five years after the date of the enactment of the rule, and every five years thereafter, each dollar amount in subparagraph (E)(ii)(II) shall be adjusted by:
 - (a) Dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers (or any successor index), as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index (or successor) for the calendar year ending December 31, 2019; and
 - (b) Multiplying such dollar amount by the quotient obtained under sub clause (i).
- (ii) ROUNDING – Each dollar amount determined under clause (i) shall be rounded to the nearest multiple of \$100,000.

302.02 INVESTMENT ADVISER.

- (g) BROCHURE REQUIREMENT.** Unless otherwise provided in this Rule, an investment adviser registered or required to be registered pursuant to Section 23-42-301 of the Act shall furnish each advisory client and prospective advisory client with a written disclosure statement that shall be Form ADV Part 2A, the brochure;;

Part 2B, the brochure supplement; and any other information as the Commissioner may require.

...

(h) REGISTRATION EXEMPTION FOR INVESTMENT ADVISERS TO PRIVATE FUNDS.

(2)(C) the private fund adviser pays the fees specified in Section 23-42-304(a)(6) of the Act.

(i) INFORMATION SECURITY AND PRIVACY.

(1) Physical Security and Cybersecurity Policies and Procedures. Every investment adviser registered or required to be registered shall establish, implement, update, and enforce written physical security and cybersecurity policies and procedures reasonably designed to ensure the confidentiality, integrity, and availability of physical and electronic records and information. The policies and procedures must be tailored to the investment adviser's business model, taking into account the size of the firm, type(s) of services provided, and the number of locations of the investment adviser.

(A) The physical security and cybersecurity policies and procedures must:

- (i) Protect against reasonably anticipated threats or hazards to the security or integrity of client records and information;
- (ii) Ensure that the investment adviser safeguards confidential client records and information; and
- (iii) Protect any records and information the release of which could result in harm or inconvenience to any client.

(B) The physical security and cybersecurity policies and procedures must cover at least five functions:

- (i) Identify. Develop the organizational understanding to manage information security risk to systems, assets, data, and capabilities;
- (ii) Protect. Develop and implement the appropriate safeguards to ensure delivery of critical infrastructure services;

- (iii) Detect. Develop and implement the appropriate activities to identify the occurrence of an information security event;
 - (iv) Respond. Develop and implement the appropriate activities to take action regarding a detected information security event; and
 - (v) Recover. Develop and implement the appropriate activities to maintain plans for resilience and to restore any capabilities or services that were impaired due to an information security event.
- (C) Maintenance. The investment adviser must review, no less frequently than annually, and modify, as needed, these policies and procedures to ensure the adequacy of the security measures and the effectiveness of their implementation.
- (2) Privacy Policy. The investment adviser must deliver upon the investment adviser's engagement by a client, and on an annual basis thereafter, a privacy policy to each client that is reasonably designed to aid in the client's understanding of how the investment adviser collects and shares, to the extent permitted by state and federal law, non-public personal information. The investment adviser must promptly update and deliver to each client an amended privacy policy if any of the information in the policy becomes inaccurate.

306.02 RECORDS AND REPORTS OF INVESTMENT ADVISERS.

- (b) **BUSINESS RECORDS.** The business records required to be maintained shall include:
- (26) Physical Security and Cybersecurity Policies and Procedures and Privacy Policy
- (A) The investment adviser must maintain a current copy of these policies and procedures pursuant to Rule 301.01(c)(2)(L) either in hard copy in a separate location or stored on electronic storage media that is separate from and not dependent upon access to the investment adviser's computers or a network;
 - (B) All records documenting the investment adviser's compliance with Rule 301.01(c)(2)(L) including, but not limited to, evidence of the annual review of the policies and procedures;

- (C) A record of any violation of the Rule 301.01(c)(2)(L) and of any action taken as a result of the violation.

306.02 RECORDS AND REPORTS OF INVESTMENT ADVISERS.

- (j) An investment adviser subject to subsection (a) of this Rule, before ceasing to conduct or discontinuing business as an investment adviser shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this Rule for the remainder of the period specified in this Rule, and shall notify the Commissioner in writing of the exact address where the books and records will be maintained during the period.

RULE 307 UNLAWFUL ACTS BY INVESTMENT ADVISERS.

307.01 PERFORMANCE - BASED COMPENSATION EXEMPTION.

- (2) If an investment adviser was not required to register pursuant to Section 23-42-301 of the Act and was not registered, Section 23-42-307(b)(1) 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.

RULE 308 DENIAL, SUSPENSION, REVOCATION, OR WITHDRAWAL OF REGISTRATION.

308.01 UNFAIR, MISLEADING, AND UNETHICAL PRACTICES OF BROKER-DEALER OR AGENT.

Each broker-dealer and agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. The following conduct shall be considered unethical and grounds for denial, suspension or revocation of a broker-dealer or agent registration, in addition to other unethical practices within the meaning of Sections 23-42-308 and 23-42-507 of the Act:

...

- (d) **RECOMMENDATIONS TO CUSTOMERS.** Recommending to a customer the purchase, sale or exchange of any security when a broker-dealer or agent does not have reasonable grounds for believing that the recommendation is suitable for the customer upon the basis of the facts, if any, disclosed by the customer as to his other security holdings and as to his financial situation and needs, or encouraging a customer to invest beyond his immediate financial resources. It may be presumed that investments in non-traded direct participation programs including

non-traded real estate investment trusts by unaccredited investors are deemed to be unsuitable if the aggregate investment in these securities exceeds 10% of the investor's liquid net worth.

308.02 FRAUDULENT, DECEPTIVE, DISHONEST OR UNETHICAL PRACTICES OF INVESTMENT ADVISERS.

Investment advisers have a duty to act primarily for the benefit of their clients. All investment advisers and representatives shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. The following conduct shall constitute fraudulent or deceptive practices and shall be considered grounds for denial, suspension or revocation of an investment adviser or representative registration, or for the issuance of a cease and desist order or other action under Section 23-42-209 of the Act, in addition to other dishonest or unethical practices within the meaning of Sections 23-42-307 and 23-42-308 of the Act. The provisions of this Rule shall apply to an investment adviser that is neither registered nor required to register pursuant to Section 23-42-301(c) of the Act only to the extent permitted by the National Securities Markets Improvement Act of -1996.

- (a) Recommending to a client to whom investment supervisory, management or consulting services are provided, the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation, risk tolerance and needs, and any other information known or acquired by the investment adviser after reasonable analysis of the client's information and records as may be provided to the investment adviser. It may be presumed that investments in non-traded direct participation programs including non-traded real estate investment trusts by unaccredited investors are deemed to be unsuitable if the aggregate investment in these securities exceeds 10% of the investor's liquid net worth.

- (m) Publishing, circulating, or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940 or that does the following:
 - (6) Represents, directly or indirectly, that the commissioner has approved any advertisement.

 - ~~(6)~~(7) For the purposes of this Rule the term "advertisement" shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any electronic publication, by radio or television, or by any medium that offers any of the following:

...

- (x)(3) There is a rebuttable presumption that a designation or certifying organization is not disqualified solely for purposes of Rule 308.02(x)(2)(D) when the organization has been accredited by the following:
 - (A) The American National Standards ~~for Certifying~~ Institute;
- (y) Accessing a client's account by using the client's own unique identifying information (such as username and password).
- (z) Failure to establish, maintain, and enforce a required policy or procedure.
- (aa) Other fraudulent, deceptive, dishonest or unethical practices. The activities set forth above are not all inclusive. Any other activities employing any device, scheme or artifice to defraud or engaging in any act, practice or course of business that operates or would operate as a fraud or deceit shall constitute grounds for denial, suspension or revocation under Section 23-42-308 of the Act, or for the institution of a cease and desist order or other action under Section 23-42-209 of the Act.

404.01 GENERAL REQUIREMENTS.

- (x) **USE OF ELECTRONIC OFFERING DOCUMENTS AND ELECTRONIC SIGNATURES.** An issuer of securities or agent acting on behalf of the issuer may deliver Offering Documents over the Internet or by other electronic means and may provide for the use of electronic signatures if done in compliance with the NASAA Statement of Policy Regarding Use of Electronic Offering Documents and Electronic Signatures.

503.01 CLASSES OF EXEMPT SECURITIES.

- (a) **SECURITIES EXEMPTED UNDER SECTION 23-42-503(a).**
 - (7) Non-Profit Organization Securities. In order to be exempt under Section 23-42-503(a)(7), a security must meet the qualifications as set forth in the appropriate NASAA Statement of Policies on Church Bonds, ~~Health Care Facility Offerings, or Guidelines for General Obligation Financing by Religious Denominations, or Church Extension Fund Securities.~~ The proof of exemption required to be filed pursuant to Section 23-42-503(d) shall contain the following unless waived by the Commissioner:

...

504.01 TRANSACTIONS EXEMPT UNDER SECTION 23-42-504(a).

(a) SPECIFIC TYPES OF EXEMPT TRANSACTIONS.

(2) Manual Exemption.

(A) ~~The following will be considered recognized manuals, including the electronic formats on CD-ROM and the Internet:~~

- ~~(i) — S&P Capital IQ Standard Corporation Descriptions;~~
- ~~(ii) — Mergent's Industrial Manual;~~
- ~~(iii) — Mergent's Bank and Finance Manual;~~
- ~~(iv) — Mergent's Municipal and Government Manual;~~
- ~~(v) — Mergent's Transportation Manual;~~
- ~~(vi) — Mergent's Public Utility Manual;~~
- ~~(vii) — Mergent's OTC Industrial Manual; and~~
- ~~(viii) — Mergent's International Manual.~~

Nationally recognized securities manual or its electronic equivalent shall mean: Fitch Investor Service, Mergent's Investor Service, and OTC Markets Group Inc. with respect to securities included in the OTCQX and OTCQB markets.

...

(a)(13)(K) **REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS**

- (iv) In connection with the transaction, no commission or other remuneration is paid or given directly or indirectly to any person, other than a ~~business broker~~ merger and acquisition broker acting as such and meeting the conditions set forth in Rule ~~402.01(18)~~, 302.01(f) for soliciting any prospective purchaser; ~~all parties have had the opportunity to consult with counsel.~~

509.01 NOTICE FILINGS.

(a) A notice filing for covered securities under Section 18(b)(2) of the Securities Act of 1933 shall contain the following:

(1) Initial Offerings.

(A) ~~Fees as set forth in~~ The filing fee prescribed by Section 23-42-509(a)(1) of the Act.

...

(2) Renewed Offerings.

- (A) ~~Fees as set forth in~~ The filing fee prescribed by Section 23-42-509(a)(1) of the Act.

...

(3) Amended Offerings.

- (A) ~~Fees as set forth in~~ The filing fee prescribed by Section 23-42-509(b) of the Act.

(b) A notice filing for covered securities under Section 18(b)(4)(F) of the Securities Act of 1933 shall meet the following requirements:

- (1) ~~Filing fee as set forth in~~ The filing fee prescribed by Section 23-42-509(c) of the Act.

...

(c) The following provisions apply to offerings made under Tier 2 of federal Regulation A and Section 18(b)(3) of the Securities Act of 1933:

- (1) Initial filing. The notice filing period is effective for twelve consecutive months from the date of effectiveness. An issuer planning to offer and sell securities in this state in an offering exempt under Tier 2 of federal Regulation A shall submit to the Commissioner prior to the initial offer or sale in this state the following:

- (A) A completed Regulation A -- Tier 2 notice filing form or copies of all documents filed with the SEC;
- (B) A consent to service of process on Form U-2 if not filing on the Regulation A -- Tier 2 notice filing form; and
- (C) The filing fee as prescribed by Section 23-42-509(e)(2) of the Act;.

(c) (2) Renewal. For each additional twelve-month period in which the same offering is continued, an issuer conducting a Tier 2 offering under federal Regulation A may renew the unsold portion of its notice filing by ~~filing with submitting to the commissioner the Regulation A -- Tier 2 notice filing form marked “renewal”~~ on or before the expiration of the notice filing the following:

- (A) The Regulation A -- Tier 2 notice filing form marked “renewal”; and
- (B) The filing fee as prescribed by Section 23-42-509(e)(2) of the Act.

- (d) With respect to an issuer of a covered security under Section 18(b)(4)(C) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(4)(C), if the issuer's principal place of business is located in this state or purchasers of fifty percent (50%) or greater of the aggregate amount of the offering are residents of this state, then the issuer shall submit to the commissioner concurrently when the issuer files with the SEC the following:
- (1) The information required to be filed with the SEC under Section 4A(b) of the Securities Act of 1933, 15 U.S.C. Section 77d-1(b); and
 - (2) The filing fee as prescribed by Section 23-42-509(d)(2) of the Act.
- ~~(e)(d)~~ The ~~Commissioner~~ commissioner requires separate notice filings and fees for each portfolio or series of an investment company, but there is no separate filing or fee for classes of securities.