

Marked-Up Version

Proposed

Amendments to the following Rules of the Arkansas Securities Commissioner

|                    |                                                                                                                                       |
|--------------------|---------------------------------------------------------------------------------------------------------------------------------------|
| 204.01(b)          | Fees                                                                                                                                  |
| 301.01(a)          | Broker-dealer and Investment Adviser - Eligibility Requirements                                                                       |
| 301.01(b)          | Broker-dealer and Investment Adviser - Expiration and Renewal of Registration                                                         |
| 301.01(c)          | Broker-dealer and Investment Adviser - Supervision Requirements                                                                       |
| 302.01(c)(5)       | Registration Procedure - Broker-dealer or Agent - Examination of Agents and Supervisors                                               |
| 302.02(b)(1)       | Registration Procedure - Investment Adviser - Initial Applications                                                                    |
| 302.02(b)(3)       | Registration Procedure - Investment Adviser - Updates and Amendments                                                                  |
| 302.02(f)          | Registration Procedure - Investment Adviser - Examination of Investment Adviser Representative                                        |
| 305.01             | Corporate Surety Bonds                                                                                                                |
| 306.01(b)(20)      | Records and Reports of Investment Advisers - Business Records                                                                         |
| 306.01(b)(23)      | Records and Reports of Investment Advisers - Business Records                                                                         |
| 306.01(d)          | Records and Reports of Investment Advisers - Form of Records and Safety                                                               |
| 306.01(e)- (i)     | Records and Reports of Investment Advisers - Complaint File (and numbering)                                                           |
| 307.01             | Unlawful Acts by Investment Advisers - Performance-Based Compensation Exemption                                                       |
| 307.02(b)          | Custody of Client funds or securities by Investment Advisers - Exceptions                                                             |
| 308.01(v)and(w)    | Unfair, Misleading, and unethical practices of broker-dealer or agent                                                                 |
| 308.02(r) and (x)  | Fraudulent, deceptive, dishonest, or unethical practices of Investment Advisers                                                       |
| 502.01             | Filing of Prospectus, Sales Literature, Etc. - Advertising                                                                            |
| 503.01(a)(9)       | Exempted Securities - Securities Exempted by Rule Pursuant to Section 23-42-504(a)(9) of the Act.                                     |
| 503.01(b)(1)(A)(i) | Exempted Securities - Small Business Offering                                                                                         |
| 504.01(a)(2)(A)(i) | Exempted Transactions - Manual Exemption                                                                                              |
| 509.01             | Covered Securities - Notice Filings                                                                                                   |
| 509.02             | Covered Securities - Agent Requirements                                                                                               |
| 607.01             | Practice and Procedure - Registration of Individuals - Broker-dealer, Agent, Investment Adviser, or Investment Adviser Representative |

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

## **RULE 204    RULES, FORMS, AND ORDERS OF SECURITIES COMMISSIONER.**

### **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:

...

#### **(b)    FEES.**

- (1) Unless a filing is made electronically or as otherwise set forth specifically in the Rules, all filing fees must accompany the application, or supplemental amendment to which they pertain.
- (2) Filing fees for notice filings shall accompany the notice filing when possible or as soon thereafter as is practical.
- (3) Copies of documents filed and recorded in the office of the Commissioner will be provided at a charge of ten cents (10¢) per page.
- (4) Certified copies will be provided at an additional charge of one dollar (\$1.00) per document.
- (5) Postage, shipping fees, and additional costs related to providing information to the public may be charged.
- (6) Unless paid electronically, fee payments made directly to the Department shall be by check or money order made payable to the Arkansas Securities Department.

## CHAPTER 3 - BROKER-DEALERS AND INVESTMENT ADVISERS

### RULE 301 REGISTRATION REQUIRED.

#### 301.01 GENERAL PROVISIONS

##### (a) ELIGIBILITY REQUIREMENTS

- (1) Each non-resident broker-dealer, agent, investment adviser, or representative must be registered, exempt, excepted from registration, or qualified to engage in business as a broker-dealer, agent, investment adviser, or representative in the state of the registrant's primary residence or, in the case of broker-dealers or investment advisers that are not natural persons, in the state in which the broker-dealer or investment adviser has its principal place of business.
- (2) Each partner or officer of a registered broker-dealer or issuer may act as an agent only if registered as an agent as required by the Act.
- (3) Except upon approval of the Commissioner, an agent or representative may not be registered with more than one broker-dealer, investment adviser, issuer, or any combination thereof, unless the business entities are affiliated. An Agreement of Joint Supervision for Dual Registration from all unaffiliated firms shall be submitted to the Commissioner for approval.
- (4) Each registered broker-dealer shall have at least one (1) registered agent and each registered investment adviser shall have at least one (1) registered representative.

##### (b) EXPIRATION AND RENEWAL OF REGISTRATION All broker-dealer, agent, investment adviser, and representative registrations hereunder, and SEC registered investment adviser notice filings, shall automatically expire on December 31 of each year without notification by the Commissioner, unless the registration or notice filing has been properly renewed, or is withdrawn, terminated or cancelled.

- (1) When a registration or notice filing expires without the filing of a renewal, a subsequent application shall be considered in all respects as an original application or notice filing unless an extension has been requested and granted in writing by the Commissioner prior to expiration.
- (2) The registration of an agent or representative terminates upon the termination of the registrant's employment with the broker-dealer or investment adviser. A Form U5 must be used to report a termination of an agent or representative. If a Form U4 is received from the agent or representative whose employment has terminated and is processed by the

Commissioner prior to the receipt of the Form U5 from the broker-dealer or investment adviser with which the registrant was formerly employed, the Form U4 shall be considered not only an application for initial registration with the new broker-dealer or investment adviser, but also notification of termination or withdrawal of the previous registration or application, unless pursuant to the agent or representative has complied with the dual registration requirements of Rule 301.01(a)(3), the agent or representative is dually registered.

- (3) Termination of a broker-dealer or investment adviser registration for any reason shall automatically constitute a termination of all underlying agent or representative registrations.

**(c) SUPERVISION REQUIREMENTS**

- (1) Supervisor.

- (A) Broker-dealer. An agent of a broker-dealer appointed to carry out supervisory responsibilities for a broker-dealer, pursuant to Section 23-42-301 of the Act, shall be registered in this state and comply with the examination requirements of Rule 302.01(c)(1)(C)(3) and (4).

...

- (5) Final responsibility for proper supervision shall rest with the broker-dealer or investment adviser. It is the responsibility of the broker-dealer or investment adviser to ensure through inspections of each business location in this state that the written procedures are enforced and the supervisory obligations imposed by this Rule are being honored.

**RULE 302 REGISTRATION PROCEDURE**

**302.01 BROKER-DEALER OR AGENT.**

...

- (c) EXAMINATION OF AGENTS AND SUPERVISORS.** The Commissioner requires that written examinations on general securities knowledge and state securities law be taken and passing scores achieved within a two (2) year period immediately preceding the filing date of the application before an applicant will be considered eligible for registration.

...

- (5) Any individual who has been registered as a general securities agent, ~~or~~ general securities principal, or investment adviser representative in any state, commonwealth, territory, district, or province in the United States or Canada within the two (2) years immediately preceding the filing of a ~~completed~~ an application and who has at any time in the past met the requirements of Rule 302.01(c) shall not be required to repeat the examinations in order to become registered.

### **302.02 INVESTMENT ADVISER.**

...

#### **(b) APPLICATION FOR INVESTMENT ADVISER REGISTRATION.**

- (1) INITIAL APPLICATIONS. The application for initial registration as an investment adviser pursuant to Section 23-42-302(a) of the Act shall be made by doing the following:
  - (A) Completing and filing Form ADV, in accordance with the form instructions, along with the fee as set forth in Section 23-42-304(a) of the Act, with the IARD; and
  - (B) Submitting directly to the Commissioner the following:
    - (i) Financial Statements. Each investment adviser applying for initial registration must submit an unaudited balance sheet in a form prepared in accordance with generally accepted accounting principles dated within thirty (30) days of the filing. The balance sheet shall be certified as true and accurate by the chief financial officer of the applicant as indicated on the Form ADV, or, if there is no chief financial officer, the person executing the Form ADV. If the applicant has been engaged in business for one (1) year or more preceding the filing of the applicant, the applicant may submit audited financial statements for the last fiscal period along with an unaudited balance sheet in a form acceptable to the Commissioner dated within thirty (30) days of the filing;
    - (ii) For an investment adviser applicant that maintains a principal place of business in a state other than Arkansas, the requirements of Rule 302.02(b)(1)(B)(i) above may be satisfied by filing with the commissioner a copy of any

financial reports required by and filed with the securities commissioner or director in the other state. When deemed necessary, the applicant shall furnish any further information required by the Commissioner;

- (iii) A corporate surety bond of fifty thousand dollars (\$50,000.00) covering the applicant and each representative if the applicant has custody of any customer funds or securities, unless the applicant has custody solely as a consequence of its authority to make withdrawals from client accounts to pay its advisory fee and complies with the terms described under Rule 307.02(b)(3)(A)(B) and (C). However, no surety bond is required if an applicant maintains its principal place of business in a state other than Arkansas and is the following:
  - (a) Registered or licensed as an investment adviser in that state; and
  - (b) Is in compliance with the applicable bonding requirements of that state;
- (iv) Copies of investment advisory contracts to be used by the investment adviser;
- (v) Independent Contractor Acknowledgment Form; and
- (vi) Any other information not specifically required by the Act or the Rules that the Commissioner may reasonably require, including, but not limited to, copies of orders, pleadings, or documents relating to any past or present litigation, regulatory proceedings, and customer complaints.

(3) UPDATES AND AMENDMENTS.

- (A) Each year, an investment adviser must file an annual updating amendment for Form ADV with IARD within ninety (90) days after the end of the registrant's fiscal year. In addition to the annual updating amendment, any material information that becomes inaccurate must be filed promptly, (within thirty (30) days of the event that requires the filing of the amendment), according to the Form ADV general instructions.
- (B) Each year, an investment adviser must file directly with the Commissioner, within ninety (90) days after the close of the fiscal year unless written permission to file at some other date is granted

by the Commissioner in advance of the date for filing, the following:

- (i) a copy of its current proof of corporate surety bond coverage for the investment adviser and each representative if the investment adviser has custody of any customer funds or securities, unless the custody is solely as a consequence to the authority to make withdrawals from client accounts to pay advisory fees and the investment adviser complies with the terms described under Rule 307.02(b)(3)(A)(B) and (C);
- (ii) any amendments to its investment advisory contracts;
- (iii) An investment adviser must file directly with the Commissioner annual financial statements as follows:
  - a. An investment adviser that has custody of client funds or securities, or that requires prepayment of client fees of more than five hundred dollars (\$500) per client and more than six (6) months in advance shall submit audited financial statements with the Commissioner, if that investment adviser has been in business for twelve (12) months or more. All audited financial statements shall be prepared by an independent certified public accountant in accordance with generally accepted accounting principles and audited by an independent certified public accountant in conformity with generally accepted auditing standards and in conformity with generally accepted accounting principles;
  - b. Notwithstanding Rule 302.02(b)(3)(B)(iii) a., an investment adviser that has custody of client funds or securities solely due to its role as the adviser to a private fund or pooled investment vehicle, when all conditions of Rule 307.02(b)(4) are met, including a proper audit of the fund that is provided to the Commissioner and all investors, shall submit an unaudited balance sheet in a form prepared in accordance with generally accepted accounting principles;
  - c. Notwithstanding Rule 302.02(b)(3)(B)(iii) a., an investment adviser that has custody of client funds or securities solely as a consequence of its authority

to make withdrawals from client accounts to pay its advisory fee and that complies with the terms described under Rule 307.02(b)(3)(A)(B) and (C), shall submit an unaudited balance sheet in a form prepared in accordance with generally accepted accounting principles;

- d. An investment adviser that does not have custody of client funds or securities, or that has not been in business for at least twelve (12) months, shall submit an unaudited balance sheet in a form prepared in accordance with generally accepted accounting principles; dated within thirty (30) days of the filing.
- e. An ~~The~~ unaudited balance sheet filed with the Commissioner shall be certified as true and accurate by the chief financial officer of the registrant as indicated on the Form ADV, or if there is no chief financial officer, by the person executing the Form ADV; and
- f. For an investment adviser registrant that maintains a principal place of business in a state other than Arkansas, the requirements of Rule 302.02(b)(3)(B) (iii) ~~above~~ may be satisfied by filing with the Commissioner a copy of any financial reports required by and filed with the securities commissioner in the other state. When deemed necessary, the registrant shall furnish any further information as required by the Commissioner.

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

### **302.02 INVESTMENT ADVISER.**

...

#### **(f) EXAMINATION OF INVESTMENT ADVISER REPRESENTATIVE.**

- (1) Examination Requirements. An individual applying to be registered as an investment adviser representative under the Act shall provide the Commissioner with proof of knowledge of the investment advisory

business and the Act by obtaining a passing score(s) within the two (2) year period immediately preceding the filing date of the application, on either of the following examinations:

- (A) Series 65 - Uniform Investment Adviser Law; or
  - (B) Series 7 - General Securities Representative, combined with Series 66 - Uniform Combined State Law
- (2) Waivers. The examination requirements under Rule 302.02(gf)(1) shall not apply to an individual who currently holds and maintains in good standing one (1) of the following professional designations:
- (A) Certified Financial Planner (CFP) awarded by the Certified Financial Planner Board of Standards;
  - (B) Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, Pennsylvania;
  - (C) Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants;
  - (D) Chartered Financial Analyst (CFA) awarded by the CFA Institute;
  - (E) Chartered Investment Counselor (CIC) awarded by The Investment Adviser Association; or
  - (F) Any other professional designation as the Commissioner may by rule or order accept.
- (3) Any individual who has been registered as an investment adviser representative or broker dealer agent in any state, commonwealth, territory, district, or province in the United States or Canada within the two years immediately preceding the filing of ~~a completed~~ an application and who has at any time in the past met the requirements of Rule 302.02(f)(1) shall not be required to repeat the examinations in order to become registered as an investment adviser representative.
- (4) Solely in those cases where circumstances warrant because of the limited time; amount; or nature of the issue or transaction involved; or the specific circumstances unique to the applicant, the Commissioner may, upon petition and good cause shown by the applicant, waive, any or all of the examination requirements set forth above.
- (5) An applicant who is an agent for a broker-dealer/investment adviser and who is not required by the agent's home jurisdiction to make a separate filing on CRD as an investment adviser representative but who has

previously met the requirements of Rule 302.02(f)(1) shall not be required to repeat the examinations in order to become registered as an investment adviser representative in this state.

## **RULE 305 CORPORATE SURETY BONDS.**

### **305.01 SURETY BONDS.**

A surety bond, as required by Section 23-42-305 of the Act, for a registered broker-dealer, investment adviser, or agent of the issuer shall be maintained and in effect at all times as follows:

- (a) A broker-dealer shall satisfy the fidelity bond requirements imposed by FINRA.
- (b) An investment adviser that has custody of customer funds or securities shall have a surety bond in the amount of fifty thousand dollars (\$50,000). An investment adviser that has custody solely due to direct fee deduction and that complies with the terms described under Rule 307.02(b)(3)(A)(B) and (C) and related books and records requirements, shall not be required to comply with this bonding requirement.
- (c) An agent of the issuer shall maintain a surety bond in the amount of twenty-five thousand dollars (\$25,000).

## **RULE 306 RECORDS AND REPORTS – EXAMINATIONS.**

### **306.01 RECORDS AND REPORTS OF INVESTMENT ADVISERS.**

...

- (b) **BUSINESS RECORDS.** The business records required to be maintained shall include:

...

- (20) Where the adviser inadvertently held or obtained a client's securities or funds and returned them to the client within three (3) business days of receiving them, or has forwarded checks drawn by a client and made payable to a third party within twenty-four (24) hours three (3) business days of receiving them, the adviser will be considered as not having custody, but shall keep for all securities or funds inadvertently held, a ledger containing the following information:
  - (A) Issuer;
  - (B) Type of security and series;
  - (C) Date of issue;
  - (D) For debt instruments, the denomination, interest rate, and maturity date;

- (E) Certificate number, including alphabetical prefix or suffix;
- (F) Name in which registered;
- (G) Date given to the adviser;
- (H) Date sent to client or sender;
- (I) Form of delivery to client or sender, or copy of the form of delivery to client or sender; ~~and~~
- (J) Mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return; and
- (K) Date each check was received and forwarded.

...

- (23) If an investment adviser has custody, unless it has custody solely as a consequence of its authority to make withdrawals from client accounts to pay its advisory fee and complies with the terms described under Rule 307.02(b)(3)(A)(B) and (C), the records required to be made and kept shall include the following:

(A) ...

- (c) **LENGTH OF TIME RECORDS KEPT.** Unless specifically provided otherwise, all books and records shall be maintained and preserved in an easily accessible place for a period of not less than five (5) years from the end of the fiscal year during which the last entry was made on the record.

**(d) FORM OF RECORDS AND SAFETY**

- (1) Records required to be maintained and preserved may be maintained and preserved for the required time, and immediately produced or reproduced by the investment adviser by:**

- (A) Paper or hard copy form, as those records are kept in their original form;
- (B) Electronic storage media, including any digital storage medium or system that meets and complies with the other requirements of this Rule; or
- (C) Other similar medium that meets and complies with the other requirements of this Rule.

- (2) Records must be easily accessible and retrievable in a form that is legible, true, and complete.**

- (3) Records created or maintained on electronic storage media:**

- (A) Must be maintained and preserved in a manner to reasonably safeguard them from loss, alteration, or destruction;
- (B) Must be only accessible to properly authorized personnel and the Commissioner or representatives of the Commissioner.

~~(d)~~(e) **SEGREGATED ACCOUNTS.** Registered investment advisers shall at all times keep their customers' securities and funds in trust and segregated from their own securities and funds.

~~(e)~~(f) **SUPERVISED OR MANAGED ACCOUNTS.** Every registered investment adviser who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate, and current, the following:

- (1) Records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase and sale.
- (2) For each security in which any client has a current position, information from which the investment adviser can promptly furnish the name of each client, and the current amount or interest of the client.

~~(f)~~(g) **COMMINGLING OF ACCOUNTS PROHIBITED.** When a registered investment adviser is engaged in more than one enterprise or activity, it shall maintain separate books of accounts and records relating to its securities business and the assets shall not be commingled with those of other businesses, and there shall be a clearly defined division with respect to income and expenses.

~~(g)~~(h) **COMPLAINT FILE.** Every registered investment adviser shall keep and maintain for a period of five (5) years a complaint file or compliance file which shall contain all complaints made against the firm or its representatives by individuals, financial institutions and other investors. The complaint file should disclose any legal action in process, settled, or threatened against the investment adviser or its representatives. If the original documents are not maintained in the complaint file, the copy of the document should show the disposition of the original document. If the home office of the investment adviser is not in Arkansas, then a branch office located in Arkansas shall maintain this complaint file for any complaints involving Arkansas ~~agents~~ representatives or customers.

~~(h)~~(i) **RECORD SYSTEM.** In accordance with Section 23-42-205(d)(2) of the Act, any books or records required by this Rule may be maintained by the investment adviser in a manner that the identity of any client to whom such investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

## **RULE 307 UNLAWFUL ACTS BY INVESTMENT ADVISERS.**

### **307.01 PERFORMANCE - BASED COMPENSATION EXEMPTION.**

~~(a)~~ — It shall be unlawful for an investment adviser to enter into, extend or renew an investment

advisory contract that provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds, or any portion of the funds, of the client unless the following conditions of this Rule are met:

- (1) ~~Nature of the Client.~~ The client entering into the contract must be the following:
  - (A) ~~A natural person or a company who, immediately after entering into the contract has at least one million dollars (\$1,000,000) under the management of the investment adviser; or~~
  - (B) ~~A person who the investment advisers and their investment adviser representatives reasonably believe, immediately before entering into the contract, is a natural person or a company whose net worth, at the time the contract is entered into, exceeds two million dollars (\$2,000,000). The net worth of a natural person may include assets held jointly with that person's spouse.~~
- (2) ~~Compensation Formula.~~ The compensation paid to the investment adviser under this Rule with respect to the performance of any securities over a given period shall be based on a formula that does the following:
  - (A) ~~Includes, in the case of securities for which market quotations are readily available, the realized capital losses and unrealized capital depreciation of the securities over the period;~~
  - (B) ~~Includes, in the case of securities for which market quotations are not readily available:~~
    - (i) ~~The realized capital losses of the securities over the period; and~~
    - (ii) ~~If the unrealized capital appreciation of the securities over the period is included, the unrealized capital depreciation of the securities over the period; and~~
  - (C) ~~Provides that any compensation paid to the investment adviser under this Rule is based on the gains less the losses computed in accordance with Rule 307.01(a)(2)(A) and (B) in the client's account for a period of not less than one (1) year.~~
- (3) ~~Disclosure.~~ Before entering into the advisory contract and in addition to the requirements of Form ADV Part 2A, the brochure, and Part 2B, the brochure supplement, the investment adviser must disclose in writing to the client or the client's independent agent all material information concerning the proposed advisory arrangement, including the following:
  - (A) ~~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;~~
  - (B) ~~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;~~
  - (C) ~~The periods that will be used to measure investment performance throughout the contract and their significance in the computation of the fee;~~
  - (D) ~~The nature of any index that 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~~

~~(E) — 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, how the securities will be valued and the extent to which the valuation will be independently determined.~~

~~(4) — Contract. The investment adviser (and any investment adviser representative) that enters into the contract must reasonably believe, immediately before entering into the contract that the contract represents an arm’s length arrangement between the parties and that the client, alone or together with the client’s independent agent, understands the proposed method of compensation and its risks. The representative of a company may be a partner, director, officer or an employee of the company or the trustee, where the company is a trust, or any other person designated by the company or trustee.~~

(a) Notwithstanding Section 23-42-307(b)(1) ~~402(c)(1)~~ of the Act, an investment adviser may enter into, extend or renew an investment advisory contract which provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds, or any portion of the funds, of the client if the following conditions are met:

(1) The client entering into the contract is a “qualified client”, as defined by Rule 205-3 under the Investment Advisers Act of 1940 (17 Code of Federal Regulations §275.205-3); and

(2) To the extent not otherwise disclosed on 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:

(A) 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;

(B) 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;

(C) The periods which will be used to measure investment performance throughout the contract and their significance in the computation of the fee;

(D) 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

- (E) 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.
- (b) In the case of a private investment company, as defined in subsection (d)(2) of this rule, 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 subsection (a) of this rule.
- (c) Transition rules:
- (1) 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.
- (2) If an investment adviser was not required to register pursuant to Section ~~204~~ 23-42-301 of the Act and was not registered, Section ~~102(c)(1)~~ 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.
- (3) Solely for purposes of subsections (c)(1) and (c)(2) of this rule, 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 ~~102(c)(1)~~ 23-42-307(b)(1) of the Act to apply to such transferee.
- (d) The following definitions apply for purposes of this rule:
- (1) "Company" shall have 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.

(2) “Private investment company” shall mean 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)].

~~(b)~~(e) **INDEPENDENT AGENT.** Nothing in this Rule shall relieve a client’s independent agent from any obligation to the client under applicable law.

### **307.02 CUSTODY OF CLIENT FUNDS OR SECURITIES BY INVESTMENT ADVISERS.**

...

#### **(b) EXCEPTIONS.**

...

- (4) Limited Partnerships Subject to Annual Audit. An investment adviser is not required to comply with Rules 307.02(a)(3) and (a)(4) and shall be deemed to have complied with Rule 307.02(a)(6) with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) if each of the following conditions are met:
- (A) 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 (or members or other beneficial owners) and the Commissioner within one hundred and twenty (120) days of the end of its fiscal year;
  - (B) The audit is performed by an independent certified public accountant that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules;
  - (C) Upon liquidation, the adviser distributes the fund’s final audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) and the Commissioner promptly after the completion of the audit. If liquidation occurs within six months of the previous fiscal year end, the limited partnership (or like entity) may incorporate the previous year annual audit into the final audit;
  - (D) The written agreement with the independent certified public accountant

must require the independent certified public accountant to, upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, notify the Commissioner within four (4) business days accompanied by a statement that includes the following:

- (i) The date of the resignation, dismissal, removal, or other termination, and the name, address, and contact information of the independent certified public accountant; and
- (ii) An explanation of any problems relating to audit scope or procedure that contributed to the resignation, dismissal, removal, or other termination.

## **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:

...

- (v) **FURNISHING DOCUMENTS AND TESTIMONY.** Unreasonably failing to promptly deliver or provide documents or information in possession of or under control of the registrant, or appear to provide testimony or documents to the Commissioner after receipt of a written request from the Commissioner.
- (w) **DISHONEST USE OF CERTIFICATIONS, PROFESSIONAL DESIGNATIONS, SENIOR-SPECIFIC CERTIFICATIONS, OR SENIOR-SPECIFIC PROFESSIONAL DESIGNATIONS.**
  - (1) The use of a certification, professional designation, senior-specific certification, or senior-specific professional designation by any person in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing clients, in such a way as to

mislead any person shall be a dishonest and unethical practice within the meaning of Rule 308.01.

- (2) The prohibited use of certifications or professional designations includes, but is not limited to, the following:
  - (A) Use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use the certification or designation;
  - (B) Use of a nonexistent or self-conferred certification or professional designation;
  - (C) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; and
  - (D) Use of a certification or professional designation that was obtained from a designating or certifying organization that meets the following:
    - (i) Is primarily engaged in the business of instruction in sales and/or marketing;
    - (ii) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;
    - (iii) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or
    - (iv) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.
- (3) There is a rebuttable presumption that a designation or certifying organization is not disqualified solely for purposes of Rule 308.01(w)(2)(D) when the organization has been accredited by the following:
  - (A) The American National Standards for Certifying Institute; or
  - (B) The National Commission for Certifying Agencies; or
  - (C) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and

the designation or credential issued there from does not primarily apply to sales and/or marketing.

...

### **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 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.

...

- (r) Unreasonably failing to deliver or provide documents or information in possession of or under control of the registrant, or appear to provide testimony or documents to the Commissioner, after receipt of a written request from the Commissioner.

...

- (x) Dishonest Use of Certifications, Professional Designations, Senior-Specific Certifications, or Senior-Specific Professional Designations.
  - (1) The use of a certification, professional designation, senior-specific certification, or senior-specific professional designation by any person in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing clients, in such a way as to mislead any person shall be a dishonest and unethical practice within the meaning of Rule 308.02.

- (2) The prohibited use of certifications or professional designations includes, but is not limited to, the following:
- (A) Use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;
  - (B) Use of a nonexistent or self-conferred certification or professional designation;
  - (C) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; and
  - (D) Use of a certification or professional designation that was obtained from a designating or certifying organization that meets the following:
    - (i) Is primarily engaged in the business of instruction in sales and/or marketing;
    - (ii) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;
    - (iii) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or
    - (iv) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.
- (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;
  - (B) The National Commission for Certifying Agencies; or
  - (C) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued there from does not primarily apply to sales and/or marketing.
- (4) In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation

indicating or implying that a person has special certification or training in advising or servicing clients, factors to be considered shall include the following:

- (A) Use of one (1) or more words such as “senior,” “retirement,” “elder,” or like words, combined with one (1) or more words such as “certified,” “registered,” “chartered,” “adviser,” “specialist,” “consultant,” “planner,” or like words, in the name of the certification or professional designation; and
  - (B) The manner in which those words are combined.
- (5) For purposes of this Rule, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title indicates seniority or standing within the organization, or specifies an individual’s area of specialization within the organization. For purposes of this subsection, financial services regulatory agency includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.
- (6) Nothing in this Rule shall limit the Commissioner’s authority to enforce existing provisions of law.

...

## CHAPTER 5 REGULATION OF TRANSACTIONS

...

### **RULE 502 FILING OF PROSPECTUS, SALES LITERATURE, ETC.**

#### **502.01 ADVERTISING.**

- (a) **GENERAL PROVISIONS.** Any public advertising in connection with the sale and promotion of a public offering of registered securities or securities exempted under Sections 23-42-503(a)(7) and 23-42-503(c) of the Act and Rule 503.01~~(B)~~(b)(1) shall be subject to the following requirements and restrictions:
- ~~(b)~~(1) Filing Requirement. All sales literature or promotional material, other than that exempted by the Act or this Rule, shall be governed by the following:
- ~~(4)~~(A) The applicant shall submit to the Commissioner, at least five (5) days prior to its intended use or dissemination, one (1) copy of such the proposed material;

- ~~(2)~~(B) If not disallowed by the Commissioner by written notice or otherwise within three (3) days from the date filed, the use of the material as submitted will be permitted; and
- ~~(3)~~(C) The Commissioner will not issue formal approval of the literature, and it is the responsibility of the user to determine the accuracy and reliability of the statements and material so used and in conformity with this Rule.
- ~~(e)~~(2) Specific Prohibitions. The following devices or sales presentations, and the use thereof, will be deemed deceptive or misleading practices:
- ~~(4)~~(A) Comparison charts or graphs showing a distorted, unfair, or unrealistic relationship between the issuer's past performance, progress, or success and that of another company, business, industry, or investment media;
- ~~(2)~~(B) Lay-out, format, size, kind, and color of type used so as to attract attention to favorable or incomplete portions of the advertising matter, or to minimize less favorable, modified, or modifying portions necessary to make the entire advertisement a fair and truthful representation;
- ~~(3)~~(C) Statements or representations that by themselves predict future profit, success, appreciation, performance, or otherwise related to the merit or potential of the securities that are positive or imperative in form; the statements or representations should clearly indicate that they represent solely the opinion of the publisher thereof;
- ~~(4)~~(D) Generalizations, generalized conclusions, opinions, representations, and general statements based upon a particular set of facts and circumstances unless those facts and circumstances are stated and modified or explained by additional facts or circumstances as are necessary to make the entire advertisement a full, fair, and truthful representation;
- ~~(5)~~(E) Sales kits, film clips, displays, or exposures, which alone or by sequence and progressive compilation tend to present an accumulative or composite picture or impression of certain, or exaggerated potential, profit, safety, return, or extraordinary investment opportunity, or similar benefit to the prospective purchaser;
- ~~(6)~~(F) Distribution of any non-factual or inaccurate data or material by words, pictures, charts, graphs, or otherwise, based on conjectural, unfounded, extravagant, or flamboyant claims, assertions, predictions or excessive optimism; or
- ~~(7)~~(G) Any package or bonus deal, prize, gift, gimmick, or similar inducement, combined with or dependent upon the sale of some other product, contract, or service, unless the unit or combination has been fully disclosed and specifically described and identified in the application as the security being offered.

~~(d)~~ **EXEMPTION.** ~~Public advertising by any means, including the forms and types set forth in Rule 502.01(E), of securities being offered for sale in transactions exempted by Sections 23-42-504(a)(9) of the Act is prohibited.~~

~~(e)~~(b) **EXCEPTIONS.** The following forms and types of advertising are permitted without the necessity for filing or prior authorization by the Commissioner, unless specifically prohibited:

- (1) So-called “tombstone” advertising, containing no more than the following information:
  - (A) Name and address of issuer;
  - (B) Identity of title of security;
  - (C) Per unit offering price, number of shares and amount of offering;
  - (D) Brief, general description of business;
  - (E) Name and address of underwriter, or address where offering circular or prospectus can be obtained; and
  - (F) Date of issuance.
- (2) Dividend notices, proxy statements, and reports to shareholders, including investment company quarterly and semi-annual reports.
- (3) Sales literature, advertising, or market letters prepared in conformity with the applicable regulations and in compliance with the filing requirements of the SEC, FINRA, or recognized securities exchanges.
- (4) Factual or informative letters, bulletins or releases, similar to “news letters,” relating to issuer’s progress or activities, or current financial condition.
- (5) Dissemination of any data incorporated in the offering circular or prospectus, so long as the use of the material, out of context, does not tend to detract from, distort, supersede, or express a different meaning of the representations or disclosures contained therein.

~~(f)~~(c) **VIOLATIONS.** Any person who prepares, distributes, or causes to be issued or published any sales literature that is knowingly inaccurate, false, misleading or tending to mislead in any material respect or otherwise in violation of the provisions herein may be held responsible and accountable therefore in any administrative or civil proceeding arising under the Act or the Rules.

### **RULE 503 EXEMPTED SECURITIES.**

These Rules do not exempt securities from the remaining provisions of the Act or the Rules, including Section 23-42-507 of the Act.

## 503.01 CLASSES OF EXEMPT SECURITIES.

### (a) SECURITIES EXEMPTED UNDER SECTION 23-42-503(a).

...

(9) Securities Exempted by Rule Pursuant to Section 23-42-503(a)(9) of the Act. The following securities have been determined by the Commissioner to be exempt from the registration requirements of the Act. In addition, any individual who represents an issuer in effecting transactions in securities exempted under subdivisions (A) through ~~(H)~~(I) below shall not be deemed to be an agent if the transaction involves offers or sales to existing security holders of the issuer and no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this state.

- (A) Any security listed or approved for listing upon its issuance on the following exchanges:
  - (i) Chicago Stock Exchange, Inc.
  - (ii) CME Group, Inc.
  - (iii) NYSE Group, Inc.
  - (iv) The Chicago Board Options Exchange, Inc.
  - (v) Any other stock exchange approved by the Commissioner.
- (B) Securities listed on Tier I of the NASDAQ OMX PHLX.
- (C) Options traded on the NASDAQ OMX PHLX that are issued by the Options Clearing Corporation.
- (D) Any security of an issuer which is of senior or substantially equal rank to a security of the same issuer listed in subdivisions (A), (B), or (C) above.
- (E) Any security called for by subscription rights or warrants that are exempt under subdivisions (A), (B), (C), or (D) above.
- (F) Any warrant or right to purchase or subscribe to any security that is exempt under subdivisions (A), (B), (C), (D), or (E) above.
- (G) Any warrant or right to purchase or subscribe to any security that is covered pursuant to Section 18(b)(1) of the Securities Act of 1933.
- (H) Any security called for by a subscription right or warrant that is covered pursuant to Section 18(b)(1) of the Securities Act of 1933.

- (I) Any security issued under a written compensatory benefit plan or contract that is exempt from registration under Rule 701 under the Securities Act of 1933.

**(b) SECURITIES EXEMPTED UNDER SECTION 23-42-503(b).** Pursuant to Section 23-42-503(b) of the Act, the following securities offered for sale or sold in Arkansas in an aggregate amount not exceeding the gross amount as set forth in Section 23-42-503(b) of the Act during the period of the offering or any consecutive twelve (12) month period, whichever shall first occur, shall be exempt from Sections 23-42-501 and 23-42-502 of the Act.

(1) Small Business Offering.

- (A) All of the following requirements must be complied with prior to offering the securities in this state:

- (i) A filing fee of ~~one hundred dollars (\$100.00)~~ shall be paid as set forth in Section 23-42-503(d)(5) of the Act.

#### **504.01 TRANSACTIONS EXEMPT UNDER SECTION 23-42-504(a) OF THE ACT.**

**(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) ~~Standard & Poor's Standard Corporation Records~~ S&P Capital IQ Standard Corporation Descriptions;

...

#### **RULE 509 COVERED SECURITIES.**

##### **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 Section 23-42-509(a)(1) of the Act.

- (B) Form NF. For issuers paying less than the maximum filing fee, a sales report of the amount of securities sold in this State during the filing period

shall be provided on Form NF. The sales report shall be provided no later than ~~thirty (30) days~~ two (2) months after the issuer's fiscal year end.

(C) Form U-2.

(2) Renewed Offerings.

(A) Fees as set forth in Section 23-42-509(a)(1) of the Act.

(B) Form NF. For issuers paying less than the maximum filing fee, a sales report of the amount of securities sold in this State during the previous filing period shall be provided on Form NF. The sales report shall be provided no later than ~~thirty (30) days~~ two (2) months after the issuer's fiscal year end.

(3) Amended Offerings.

(A) Fees as set forth in Section 23-42-509(b) of the Act.

(B) Form NF.

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

...

## **509.02 AGENT REQUIREMENTS.**

...

(b) Any person who represents an issuer in effecting transactions in covered securities exempted by Section 18(b)(4)(~~DE~~) of the Securities Act of 1933 is not an agent if no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in Arkansas.

...

## **CHAPTER 6 - PRACTICE AND PROCEDURE**

### **RULE 607 REGISTRATION OF INDIVIDUALS.**

#### **607.01 BROKER-DEALER, AGENT, INVESTMENT ADVISER, OR INVESTMENT ADVISER REPRESENTATIVE.**

(a) An applicant for registration or a registrant seeking withdrawal from registration may agree in writing to allow the Commissioner or the Staff additional time to investigate or

examine facts or transactions prior to the registration or the termination becoming effective, thus extending the thirty (30) day time limitation for the review by the Commissioner or the Staff.

- (b) When the Staff or the Commissioner learns, through examination or otherwise, of an applicant's or registrant's possible failure to comply with the Act or Rules or when it is determined that the applicant or registrant might be subject to one of the provisions set forth in Section 23-42-308(a) of the Act ~~or a cancellation of registration pursuant to Section 23-42-308(d) of the Act~~, the Staff shall notify such applicant or registrant of the alleged violation or action and set a period of time in which the applicant or registrant must show compliance. If the applicant's or registrant's response to the Staff's letter is deemed not to show compliance with the Act or Rules ~~or shows the applicant or registrant to be subject to Section 23-42-308(d) of the Act~~, a pleading may be filed by the Staff with the Commissioner requesting that the matter be set for a hearing. Notification to the applicant or registrant of the alleged violation(s) shall not be deemed to be the institution of a proceeding.
- (c) If the Staff files a pleading with the Commissioner or the Commissioner summarily suspends, ~~or~~ postpones, or cancels a registration, the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an agent or an investment adviser representative) shall be promptly served with a copy of the pleading or order. An affected applicant or registrant may request a hearing of the matter by making a written request to the commissioner within thirty (30) days of receipt of a summary order. A requested hearing shall be held within fifteen (15) days of receipt of a written request, but if no hearing is requested and none is ordered by the commissioner, the order will remain in effect as a final order.
- (d) If the Commissioner issues an order which imposes a suspension, revocation, or cancellation of the registration of a person or bars that person from further association with any registrant, the registrant shall not allow that person to remain associated with it in any capacity, including clerical or ministerial functions. When an individual is suspended, a registrant, in addition to the above, shall not pay or credit any salary, commission, profit, or other remuneration that results directly or indirectly from any security transaction, that individual might have earned during the period of suspension.