

NASAA REQUEST FOR PUBLIC COMMENT

PROPOSED AMENDMENTS TO THE *NASAA UNETHICAL BUSINESS PRACTICES OF INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES, AND FEDERAL COVERED INVESTMENT ADVISERS MODEL RULE 102(a)(4)-1*; *NASAA PROHIBITED CONDUCT OF INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES, AND FEDERAL COVERED INVESTMENT ADVISERS MODEL RULE 2002 502(b)*; AND *NASAA RECORDKEEPING REQUIREMENTS FOR INVESTMENT ADVISERS MODEL RULE 203(a)-2 AND USA 2002 411(c)-1*

July 29, 2025

Comment Deadline: August 28, 2025

The Regulatory Policy and Review Project Group (“Project Group”) of the Investment Adviser Section (“Section”) of the North American Securities Administrators Association, Inc. (“NASAA”) is seeking public comment on proposed amendments to the *NASAA Unethical Business Practices of Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers Model Rule 102(a)(4)-1*; *NASAA Prohibited Conduct of Investment Advisers, Investment Adviser Representatives and Federal Covered Investment Advisers Model Rule 2002 502(b)*; and *NASAA Recordkeeping Requirements for Investment Advisers Model Rule 203(a)-2 and USA 2002 411(c)-1*.¹ The amendments would update model rules under the 1956 and 2002 Uniform Securities Acts to incorporate a long form model rule option that is consistent with the United States Securities and Exchange (“SEC”) Marketing Rule adopted in December 2020 with an effective date of May 4, 2021 (“SEC Marketing Rule”), and would rescind the existing long-form model rule language that prohibits various practices that are conditionally permitted by the SEC Marketing Rule. The result would be a long-form model rule consistent with the SEC Marketing Rule, and an option for incorporation by reference.

There are also some technical clean-ups included in the attached rule revisions. The proposed technical clean-ups would replace some capital letters with lower case; replace the

¹ The current text of the *Unethical Business Practices of Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers NASAA Model Rule 102(a)(4)-1* is available at <https://www.nasaa.org/wp-content/uploads/2019/05/NASAA-IA-Unethical-Business-Practices-Model-Rule.pdf>. The current text of the *NASAA Prohibited Conduct of Investment Advisers, Investment Adviser Representatives and Federal Covered Investment Advisers Model Rule 2002 502(b)* is available at <https://www.nasaa.org/wp-content/uploads/2019/05/NASAA-IA-Prohibited-Conduct-Model-Rule.pdf>. The current texts of the *NASAA Recordkeeping Requirements for Investment Advisers Model Rule 203(a)-2* and *USA 2002 Rule 411(c)-1* are available at <https://www.nasaa.org/wp-content/uploads/2024/04/model-rule-investment-adviser-recordkeeping20240418.pdf>.

word “subsection” with “rule” where appropriate; and separate two paragraphs that were inadvertently combined previously. These revisions show up in the attached marked-up version of the proposed amendments.

Comments are due on or before the deadline stated above. We are only accepting comments by email. Please email your comments to the NASAA Comments inbox (nasaacomment@nasaa.org), cc: Jonathan Bashi (Jonathan.Bashi@ag.ny.gov) and Stephen Brey (breys@michigan.gov), Co-Chairs of the Project Group. All comments received in response to this request will be posted to NASAA’s website (www.nasaa.org) without edit or redaction after the close of the comment period, though inappropriate comments will not be posted. Accordingly, please do not include any information in your comment that you do not wish to become publicly available. After the close of the comment period, the Project Group and the Section will review all comments and consider whether to present the proposal, in its current or revised form, to the NASAA Board of Directors for potential adoption by the NASAA membership.

I. Background

The SEC adopted [Release IA-5653](#) on December 22, 2020 to rescind existing rules addressing investment adviser advertising and cash solicitation by investment advisers, and replaced them with the Marketing Rule. Release IA-5653 also implemented changes to Form ADV and recordkeeping rules related to marketing by investment advisers. The “SEC Marketing Rule” became effective on May 4, 2021.

The most notable changes made by the SEC Marketing Rule included the allowance of previously prohibited advertising activities by SEC-registered advisers if they complied with conditions imposed by the rule. Testimonials, endorsements, third-party ratings, and performance advertising are specifically permitted provided the investment adviser complies with various conditions imposed by the specific subrules. Under existing NASAA model rules, testimonials, endorsements, and third-party ratings are explicitly prohibited, while past specific recommendations are restricted unless the investment adviser also provides full information about all recommendations made by the investment adviser, including the name of each security, the date and nature of the recommendation, the price at the time, the price at which the recommendation was to be acted upon, and the most recently available market price of each security.

Under the SEC Marketing Rule, some advertising activities specifically prohibited for state-registered investment advisers would be permitted. The ability of federal-covered advisers to advertise in ways that state-registered advisers may not could put state-registered advisers at a competitive disadvantage.

While some NASAA members continue to believe that some marketing activities conditionally permitted by the SEC Marketing Rule should remain prohibited, most members and the Project Group believe that consistency among state and federal securities laws is paramount. With that in mind, the Project Group recommends that the existing model rule on investment adviser advertising be amended to remove any prohibitions that would be permissible under the SEC Marketing Rule. The proposed additional language incorporating the language of the SEC Marketing Rule will be referred to as “the Model Marketing Rule” in this document, while the existing iteration will be referred to as “the Advertising Rule.”

The Model Marketing Rule is a long form version of the SEC Marketing Rule for members to adopt should they choose to do so. In addition, the Project Group proposes modifications to related recordkeeping provisions should members implement the SEC Marketing Rule, whether by reference or in the long form version. A discussion of the various components of the proposal follows, along with the proposed model rule revisions as Appendices to this Request for Public Comment.

II. Proposed Amendments to the *NASAA Unethical Business Practices of Investment Advisers, Investment Adviser Representatives, and Federal Covered Investment Advisers Model Rule 102(a)(4)-1; NASAA Prohibited Conduct of Investment Advisers, Investment Adviser Representatives and Federal Covered Investment Advisers Model Rule 2002 502(b); and NASAA Recordkeeping Requirements for Investment Advisers Model Rule 203(a)-2 and USA 2002 411(c)-1*

A. Definition of Advertising

The SEC Marketing Rule changes the definition of “advertisement” from the existing Advertising Rule. In the Advertising Rule, advertisements took the form of written communications to more than one person or announcements in any publication or by radio or television. Advertisements included content that offered an investment advisory service with regard to securities, an analysis or report concerning securities, or a graph or other device to be used to make a determination regarding purchase or sale of securities. Under the SEC Marketing Rule and the Model Marketing Rule, the form of the advertisement is expanded to include direct or indirect communications the adviser makes to more than one person, except for “extemporaneous, live, oral communications.”

Under the SEC Marketing Rule and the Model Marketing Rule, advisements include content that offers an adviser’s investment advisory services with regard to securities to prospective clients or, in an expansion from the Advertising Rule and the cash solicitation rule, prospective investors in a private fund advised by the investment adviser. Advertisements also

extend to communications to current clients or investors but only with regard to new investment advisory services. Information in a statutory or regulatory required notice is excluded from the definition of advertisement as long as the information is reasonably designed to satisfy the requirements of such notice. Finally, the definition of advertisement extends to communication to a single client or prospective client if the communication includes hypothetical performance, unless such communication was in response to an unsolicited request or was made to current or prospective investors in a private fund.

The SEC Marketing Rule and the Model Marketing Rule define “advertisement” to also include endorsements and testimonials that are paid for directly or indirectly by the adviser. This is an expansion from the Advertising Rule, which did not specifically address endorsements or testimonials. Under the SEC Marketing Rule and Model Marketing Rule, both endorsements and testimonials include statements about the speaker’s experience with an investment adviser, solicitations, and referrals. Endorsements also include recommendations of an investment adviser. They define testimonials as statements made by a current client and endorsements to be statements made by someone other than a current client. Like the hypothetical performance communications described above, testimonials and endorsements are included in the definition of advertising even if they are made to one person. The SEC Marketing Rule and Model Marketing Rule also expand the now-rescinded cash solicitation rule’s scope to non-cash compensation of promoters.

B. Regulation of Endorsements and Testimonials

The Advertising Rule prohibited testimonials in adviser advertising. The SEC Marketing Rule and the Model Marketing Rule permit them if certain requirements are met. If the requirements are not met, the adviser may not advertise using testimonials or endorsements or provide direct or indirect compensation for a testimonial or endorsement. The requirements fall into three main categories: required disclosures, adviser oversight and compliance, and disqualification.

At the same time a testimonial or endorsement is disseminated, up to three pieces of information must be clearly and prominently disclosed. The first piece of information is either a statement that the testimonial was given by a current client or investor or a statement that the endorsement was given by someone other than a current client or investor, as applicable. Second, if compensation was provided for the testimonial or endorsement, the required information includes a statement of that fact. Third, a brief statement of any material conflicts of interest on the part of the person providing the testimonial or endorsement must be disclosed. Such conflicts include those resulting from the adviser’s relationship with the person and those resulting from a compensation arrangement. In addition to the three noted disclosures, a statement of the material terms of any compensation arrangement must be disclosed at the same time as the advertisement.

The SEC Marketing Rule and Model Marketing Rule disclosure requirements differ from those in the cash solicitation rule. The cash solicitation rule required that the solicitor provide the client with two written documents at the time of the solicitation, a solicitor disclosure document and the Adviser's Form ADV Part 2A. Under the cash solicitation rule, the solicitor disclosure document needed to contain certain information including a statement that the solicitor will be compensated by the adviser, the terms of the compensation arrangement, and any amount the client will need to pay relating to the solicitation. Unlike the cash solicitation rule, the SEC Marketing Rule does not require that the disclosure be in writing or be made by the solicitor. Further, the brochure requirement was eliminated as duplicative as the adviser is also required to provide this document to clients. Finally, under the Advertising Rule, advisers were required to obtain a signed statement from a client affirming that they had received the two documents. The SEC Marketing Rule and the Model Marketing Rule do not include this requirement. In its place is the requirement that the adviser has a reasonable basis to believe the rule's requirements are being met.

The SEC Marketing Rule and Model Marketing Rule also impose oversight and compliance responsibilities on advisers. As was required under the cash solicitation rule, under the marketing rules the adviser and the provider of the testimonial or endorsement must enter into a written agreement. Under the SEC or the Model Marketing Rule, the agreement must include the scope of activities and terms of compensation for those activities.

As with the cash solicitation rule, there are certain persons who the adviser may not compensate for an endorsement or testimonial. Under the SEC Marketing Rule and Model Marketing Rule, ineligible persons are persons the adviser knows or should know have been the subject of a conviction or a final order within the past 10 years for certain crimes or investment-related statutory violations. Under the cash solicitation rule, persons were ineligible even if the adviser did not know of the disqualifying events. Certain persons affiliated with the subject of the conviction or order are also disqualified pursuant to the rule. While there has been revision of the events that are disqualifying under the cash solicitation and marketing rules, there is substantial overlap.

The SEC Marketing Rule includes an exception relating to *de minimis* compensation not found in the cash solicitation rule. Under the SEC Marketing Rule, if a person providing the testimonial or endorsement was compensated \$1,000 or less during the past 12 months, then the adviser need not enter into a written agreement with the person. Further, a person who is not compensated for a testimonial or endorsement may provide one even if the person is the subject of an event that would otherwise disqualify them. The Model Marketing Rule includes for a note the *de minimis* amount so that a jurisdiction may decide what it would consider "*de minimis*" given its unique market circumstances.

C. Third Party Ratings

The Model Marketing Rule, like the SEC Marketing Rule, conditionally allows the use of third-party ratings to be used by investment advisers to promote their businesses. A “third-party rating” under the Model Marketing Rule is a rating or ranking of an investment adviser provided by a person who is not a related person of the investment adviser and who provides such ratings or rankings in the ordinary course of business. An adviser’s advertisement may not include a third-party rating unless the adviser conducts due diligence on the third-party rating methodology and makes disclosures about the rating as well as:

- (1) has a reasonable basis to believe that the survey or questionnaire used to prepare the rating is structured such that it is equally easy for the response to be favorable or unfavorable, and that it is not designed to produce a predetermined result; and
- (2) clearly and prominently discloses (or reasonably believes the third-party rater discloses) (a) the date the rating was given and the time period the rating is based upon, (b) the identity of the third party creating and tabulating the rating, and (c) whether compensation was provided directly or indirectly by the adviser to obtain the rating.

With respect to the due diligence component, the SEC Marketing Rule release discusses the ways that an adviser can demonstrate that it has complied. First, an adviser can “satisfy the requirement by accessing the questionnaire or survey that was used in the preparation of the rating.”² If the third-party rater refuses to share proprietary information about how it developed its rating, an adviser “could seek representations from the third-party rating agency regarding general aspects of how the survey or questionnaire is designed, structured, and administered. Alternatively, a third-party rating provider may publicly disclose similar information [itself].”³ According to the SEC, an adviser could form a reasonable belief sufficient to satisfy its due diligence obligation under these circumstances.

With respect to disclosure of the date of a rating, the Marketing Rule requires that the date be provided because it will assist investors to understand the relevance of the rating. Earlier ratings may be stale and less accurate reflections of the adviser’s business, while new ratings are more likely to communicate accurate information about the adviser.⁴

Disclosing the identity of the third-party providing the rating is important because

² SEC, *Investment Adviser Marketing*, Release No. IA-5653 at 161 (Dec. 22, 2020), <https://www.sec.gov/files/rules/final/2020/ia-5653.pdf>.

³ *Id.*

⁴ *Id.* at 162.

investors have a right to know who it is that is providing the information about an adviser.⁵ Without this information, investors are left in the dark about the credibility of the person or entity that is essentially vouching for the adviser.

Disclosure of compensation, whether direct or indirect, by the adviser in exchange for a third-party rating is key to giving investors context when evaluating the weight to give such a rating when considering hiring an adviser.⁶ While not always the case in practice, if an adviser has paid for a third-party rating, then there is an incentive for third-party rater to be positive in its statements. Without that context, investors are without the entire picture when making an investment decision.

The SEC Marketing Rule Release is also careful to note that regardless of the diligence conducted and the disclosures made, a third-party rating must still be accurate:

[W]here an adviser's advertisement references a recent rating and discloses the date, but the rating is based upon an aspect of the adviser's business that has since materially changed, the advertisement would be misleading. Likewise, an adviser's advertisement would be misleading if it indicates that the adviser is highly rated without disclosing that the rating is based solely on a criterion, such as assets under management, that may not related to the quality of the investment advice.⁷

D. Performance Advertising

1. Performance Advertising Generally

The Project Group, like the SEC in the SEC Marketing Rule Release,⁸ believes that performance advertising raises special concerns that justify requirements and restrictions beyond the basic prohibition against advertisements being misleading. The final SEC Marketing Rule permits performance advertising under specific circumstances and with limitation, as does the proposed amendment to NASAA's model Marketing Rule, discussed more fully below.

2. Net Performance Requirement

The Model Marketing Rule will require that any advertisement including gross performance also include a presentation of net performance. This is crucial to ensuring that advertisements are truthful because gross performance presented without the deduction of fees

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 163.

⁸ *Id.*

and expenses can grossly inflate the returns an investor would have actually received. Net performance presentation must be given at least equal prominence as gross performance, and must be formatted to allow investors to compare the two. The net performance presentation must also be calculated over the same time period and using the same methodology as the gross performance returns that are advertised. Advisers should describe the type of performance return that is presented in any given advertisement.

Gross performance is defined as “the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of fees, costs, and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio.” Advisers should disclose what elements are included in the return presented to an audience so that the audience can understand how the calculation is derived. To the extent an adviser’s presentation of gross performance does not reflect the deduction of transaction fees and expenses, an adviser should disclose that fact to avoid being misleading if that would not be clear to the investor from the context of the advertisement.

Net performance means “the performance results of a portfolio... after deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the [adviser’s services]... including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the [adviser] for which the client or investor reimburses the investment adviser...”⁹ Net performance may reflect the exclusion of custodian fees and, if using a model fee, must reflect either the deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted or, the deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is distributed.

A fulsome discussion of risks inherent in the use of gross performance without net performance, and examples of how an adviser can comply with the requirements of the SEC Marketing Rule or the Model Marketing Rule are more fully discussed in the SEC Marketing Rule Release on pages 163 to 180.

3. Prescribed Time Periods

The SEC Marketing Rule and the Model Marketing Rule require that any performance advertising include information for specific time frames. Any performance results, except for private fund advertisements, must include results of the same portfolio for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent

⁹ See *id.* at 172.

than the most recent calendar year-end. If the portfolio whose performance results are being advertised has not existed for the one-, five-, or ten-year period, then the life of the portfolio may be substituted for the period.

The SEC in the Marketing Rule Release¹⁰ discussed the intricacies of the prescribed time periods imposed by the rule. The SEC was concerned, as is the Project Group, that advisers might highlight specific periods of time wherein performance may have exceeded that of other periods that might be relevant to an investor. With that in mind, the SEC Marketing Rule and the Model Marketing Rule would require that an adviser publish multiple years of performance with equal prominence given to each period.

To the extent a required time period does not exist for the portfolio being advertised, then the lifetime of the portfolio could be used. The SEC gave the example of a portfolio that has been in existence for seven years; that adviser would need to give the one-year, five-year, and seven-year performance results in any performance advertising.

The SEC concluded that the one-, five-, and ten-year periods in advertisements “will not provide investors [in private funds] with useful insight into how the advertised portfolio(s) performed during different market or economic conditions.”¹¹ As a result, the SEC Marketing Rule does not apply to performance of a private fund; rather, private funds will be subject to general anti-fraud provisions of federal and state securities laws, as well as the general prohibitions of the final rule.

In short, the time period requirements apply only to registered investment advisers, and not to advisers to private funds.

Advisers are also permitted to advertise performance results for periods other than one-, five-, and ten-years so long as the advertisement also presents those required time periods, and that all periods are given equal prominence. As an example, an adviser could advertise one-year, three-year, five-year, seven-year, and ten-year performance results (assuming all other performance advertising requirements are met) because the adviser has provided the one-, five-, and ten-year required performance results.

4. Related Performance

“Related performance” is the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within

¹⁰ *Id.* at 180-84.

¹¹ *Id.* at 182.

stated criteria. A “portfolio” is a “group of investments managed by the investment adviser,” and may be an account or a private fund. A “related portfolio” is “a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.”

Commenters on the SEC’s initial proposal believed the SEC was overly prescriptive,¹² but the SEC “continue[d] to believe that conditioning the presentation of related performance in advertisements of all related portfolios... [was] necessary to prevent investment advisers from including only related portfolios that have favorable performance results or otherwise ‘cherry picking.’”

An adviser may exclude a related portfolio from an advertisement only if the advertised performance results are not materially higher than if all related portfolios had been included and if the exclusion of any related portfolio does not alter the presentation of any applicable time period required by the rule.

The SEC stated in the Marketing Rule Release¹³ that related performance on a portfolio-by-portfolio basis is also subject to general prohibitions. By way of example, an advertisement presenting related performance on a portfolio-by-portfolio basis could be misleading if it does not disclose the size of the portfolios and the basis on which the adviser selected them. Alternatively, an adviser could use a composite aggregation of all portfolios falling within stated criteria.

5. Extracted Performance

The SEC Marketing Rule and the Model Marketing Rule prohibit an adviser from using an advertisement that presents extracted performance unless the advertisement also provides or offers to promptly provide the performance of the total portfolio from which the performance was extracted. “Extracted performance” under the SEC and Model Marketing Rules is the performance of a subset of investments extracted from a portfolio.

The SEC stated in the Marketing Rule Release¹⁴ that it believed that extracted performance could provide investors with important information about performance actually achieved within a portfolio, including how to attribute performance to specific elements within a portfolio. The requirement that an adviser must contextualize the extracted performance by including the performance of the portfolio from which it is pulled helps to prevent advisers from

¹² *Id.* at 187.

¹³ *Id.* at 191.

¹⁴ *Id.* at 197.

cherry-picking higher performance within a portfolio.

6. Hypothetical Performance

Given that advertisements containing hypothetical performance pose a “high risk of misleading investors,”¹⁵ the SEC Marketing Rule and the Model Marketing Rule prohibit advisers from providing hypothetical performance in advertisements unless the adviser takes specific steps to minimize that potential to mislead.

“Hypothetical performance” includes “performance results that were not actually achieved by any portfolio of the investment adviser” and specifically includes but is not limited to model performance, backtesting, and targeted or projected performance results.

Model performance includes but is not limited to that addressed in the Clover No Action Letter;¹⁶ that is, a model where the adviser applies the same investment strategy to actual investor accounts, but the adviser makes slight adjustments (i.e., allocation and weighting) to accommodate different investor objectives. It also includes computer-generated models and models an adviser creates or purchases from a model provider that is not used for an actual investor.

Backtested performance is also considered hypothetical performance under the SEC and Model Marketing Rules. The SEC recognized that backtesting can be both helpful and misleading to investors,¹⁷ and so it permitted backtesting subject to those conditions applicable to hypothetical performance advertising.

The SEC stated in its Marketing Rule Release that it would not define “targeted return” or “projected return” in the SEC Marketing Rule¹⁸ because those terms have “commonly understood meanings” in the securities industry. That said, both are considered hypothetical performance, as they reflect an adviser’s aspirational performance goals or estimates based on historical data and assumptions. This type of performance advertising raises the significant risk that an adviser may create unrealistic expectations for investors by using assumptions that lead to unrealistic returns that are not reasonably achievable. While the SEC recognized the difference between targeted returns (aspirational returns that may be used as a benchmark to measure success of a strategy) and projected returns (based on historical data and assumptions to predict a

¹⁵ *Id.* at 201.

¹⁶ Clover Capital Management, Inc., Division of Investment Management, SEC No-Action Letter (Oct. 28, 1986), <https://www.sec.gov/divisions/investment/noaction/1986/clovercapital102886.pdf>.

¹⁷ *See* SEC, *supra* note 2, at 210.

¹⁸ *Id.* at n. 699.

likely return), it ultimately lumped them together since most audiences wouldn't discern the difference.¹⁹ The "hypothetical performance" provisions do not apply to projections of general market performance or economic conditions, but only to targeted or projected performance returns "with respect to any portfolio or to any investment advisory services with regard to securities offered in the advertisement."²⁰

The definition also excludes interactive analysis tools, akin to FINRA's Rule 2214, provided the adviser provides a description of the criteria and methodology used, including the tool's limitations and key assumptions; explains that the results may vary with each use and over time; describes, if it applies, the universe of investments considered in the analysis and explains how the tool elects investments or favors investments, and if so, why it selects the way it does; and discloses that the tool generates outcomes that are hypothetical in nature. Further, the SEC Marketing Rule Release clarifies the Commission's belief that an index used as a performance benchmark in an advertisement is not hypothetical performance unless it is presented as performance that could be achieved by the portfolio.²¹

To use any hypothetical performance, an adviser must: (1) adopt and implement policies and procedures reasonably designed to ensure that hypothetical performance is relevant to the likely financial situation and objectives of the intended audience; (2) provide sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating the hypothetical performance; and (3) provide sufficient information to enable the intended audience to understand the risks and limitations of using the hypothetical performance in making investment decisions. With respect to hypothetical performance, advisers do not have to present specific time periods (as required for performance advertising generally) or comply with conditions applicable to extracted performance under the SEC Marketing Rule or the Model Marketing Rule.

7. Predecessor Performance

Individual employees responsible for prior performance of an adviser sometimes leave one firm for another, and take the skills that led to the predecessor performance with them. In these cases, the SEC Marketing Rule and the Model Marketing Rule prohibit advisers from displaying predecessor performance in an advertisement unless the person or persons primarily responsible for the prior performance results manage accounts at the adviser; the accounts managed at the predecessor adviser are sufficiently similar to the accounts managed at the advertising adviser that the performance results would provide relevant information to investors;

¹⁹ *Id.* at 212-13.

²⁰ *Id.* at 214.

²¹ *Id.* at 216-17.

all accounts managed in a substantially similar manner are advertised unless exclusion of an account would not result in materially higher performance and does not alter presentation of any prescribed time periods; and, the advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity. General prohibitions of the SEC Marketing Rule and Model Marketing Rule continue to apply as well.

E. Solicitors under State Laws Defined as Investment Adviser Representatives

The SEC Marketing Rule permits federal covered investment advisers to pay “promoters” in exchange for testimonials and endorsements. The Project Group believes that an adviser paying a person to market the adviser’s services implicates the state law investment adviser representative definition’s “solicit” language, requiring the promoter to be registered or exempt from registration as an investment adviser representative. The proposed rule amendments do not explicitly address this issue, but the Project Group reminds investment advisers that all investment adviser representatives must be registered or exempt from registration under relevant state securities laws. In many jurisdictions, that will include solicitors for state and federal covered investment advisers.

F. Recordkeeping

Proposed amendments to the NASAA Recordkeeping Requirements for Investment Advisers Model Rule 203(a)-2 and Model Rule USA 2002 411(c)-1 include incorporation of various SEC recordkeeping changes made in Release IA-5653.

Proposed amendments include a requirement that an adviser maintain records regarding predecessor performance or rate of return for managed accounts and portfolios.

Proposed amendments to the recordkeeping rules also reflect SEC changes to records regarding oral advertisements. For oral advertisements, an adviser may maintain written materials used in connection with the oral advertisement, while for compensated oral testimonials and endorsements, the adviser may make and keep disclosures provided to clients as required by the long form option three marketing rule. Additionally, for any third-party rating, the adviser must keep a copy of any questionnaire or survey used in the preparation of the rating or appearing in any advertisement in the event the adviser obtains a copy of such questionnaire or survey.

Proposed amendments to the subrule would require disclosures provided to clients if the disclosures are not included in the advertisement, along with documentation substantiating the adviser’s reasonable basis for believing that a testimonial, endorsement, or third-party rating

complies with the conditions of its use under the marketing rule. Additionally, an adviser would need a record of all the adviser's partners, officers, directors, employees, and persons under the control of the adviser. Reference to the now-rescinded SEC cash solicitation rule are proposed to be removed.

Proposed revisions also incorporate recordkeeping requirements for performance advertising related to portfolios, and add a subrule to require the making and maintenance of a record of who the "intended audience" of an advertisement is for purposes of performance advertising.

III. Conclusion and Request for Comment

Please address the following questions in comments that you submit in response to this Request for Public Comment:

- (1) Should NASAA amend its model rules to incorporate the language of the SEC Marketing Rule language as a long-form model rule for states to consider adopting?
- (2) Should the incorporation by reference option of the SEC Marketing Rule be retained as proposed?
- (3) Should the model rule be amended to remove prohibitions on testimonials, endorsements, third-party ratings, and various forms of performance advertising such that the only available NASAA model rules are consistent with the SEC Marketing Rule approach? Why or why not?
- (4) The Project Group believes that compensating an individual to promote the adviser implicates the definition of investment adviser representative and associated requirements to be registered or exempt. Should the model rule amendments require that the investment adviser have a reasonable basis to believe that an individual is registered or exempt from registration as an investment adviser representative before compensating the person for a testimonial or endorsement? Do you agree that advertising for the adviser for compensation constitutes "solicitation" that would implicate the investment adviser representative definition under state laws? Why or why not?
- (5) Should the model rule use the same "de minimis" amount of \$1,000 used by the SEC in the context of payment for testimonials and endorsements, or should the amount be left blank for states to assess what is appropriate in their jurisdictions?
- (6) Do you have any other thoughts or questions regarding the rule proposals?

Attachments

Appendix 1:

- **Proposed Amendments to the *NASAA Unethical Business Practices Of Investment Advisers, Investment Adviser Representatives, And Federal Covered Advisers Model Rule 102(a)(4)-1* (Draft – Clean)**
- **Proposed Amendments to the *NASAA Unethical Business Practices Of Investment Advisers, Investment Adviser Representatives, And Federal Covered Advisers Model Rule 102(a)(4)-1* (Draft – Redline)**

Appendix 2:

- **Proposed Amendments to the *NASAA Prohibited Conduct of Investment Advisers, Investment Adviser Representatives and Federal Covered Investment Advisers Model Rule USA 2002 502(b)* (Draft – Clean)**
- **Proposed Amendments to the *NASAA Prohibited Conduct of Investment Advisers, Investment Adviser Representatives and Federal Covered Investment Advisers Model Rule USA 2002 502(b)* (Draft – Redline)**

Appendix 3:

- **Proposed Amendments to the *NASAA Recordkeeping Requirements for Investment Advisers Model Rule 203(a)-2* (Draft – Clean)**
- **Proposed Amendments to the *NASAA Recordkeeping Requirements for Investment Advisers Model Rule 203(a)-2* (Draft – Redline)**

Appendix 4:

- **Proposed Amendments to the *NASAA Recordkeeping Requirements for Investment Advisers Model Rule USA 2002 411(c)-1* (Draft – Clean)**
- **Proposed Amendments to the *NASAA Recordkeeping Requirements for Investment Advisers Model Rule USA 2002 411(c)-1* (Draft – Redline)**

Appendix 1

**NASAA Unethical Business Practices of Investment Advisers, Investment
Adviser Representatives and Federal Covered Advisers
(Model Rule 102(a)(4)-1)**

**(Adopted April 27, 1997; Amended April 18, 2004, September 11, 2005,
November 6, 2017, May 19, 2019, _____)**

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 1956. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

A person who is an investment adviser, an investment adviser representative or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this rule apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser or an investment adviser representative and its clients and the circumstances of each case, an investment adviser, an investment adviser representative or a federal covered adviser shall not engage in unethical business practices, including the following:

- (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 by the investment adviser.
- (b) Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.
- (c) Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account in light of the fact

that an investment adviser or an investment adviser representative in such situations can directly benefit from the number of securities transactions effected in a client's account. The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a "customer's account."

- (d) Placing an order to purchase or sell a security for the account of a client without authority to do so.
- (e) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.
- (f) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds.
- (g) Loaning money to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.
- (h) Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.
- (i) Providing a report or recommendation to any advisory client prepared by someone other than the adviser without disclosing that fact. (This prohibition does not apply to a situation 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.)
- (j) Charging a client an unreasonable advisory fee.
- (k) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the adviser, or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:
 - (1) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and
 - (2) Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the adviser or its employees.
- (l) Guaranteeing a client that a specific result will be achieved (gain or no loss) with advice

which will be rendered.

(m) **[Alternative 1]** Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.

(m) **[Alternative 2]** Publishing, circulating, or distributing any advertisement which directly or indirectly is in violation of any of the following:

(1) An advertisement may not:

- (i) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading;
- (ii) Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Administrator;
- (iii) Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
- (iv) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without also providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
- (v) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;
- (vi) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
- (vii) Otherwise be materially misleading.

(2) An advertisement may not include any testimonial or endorsement, and an investment adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the following:

- (i) The investment adviser clearly and prominently discloses, or reasonably believes that the person giving the testimonial or endorsement discloses, the

following at the time the testimonial or endorsement is disseminated:

- (A) That the testimonial was given by a current client or investor, and that the endorsement was given by a person other than a current client or investor, as applicable;
 - (B) That cash or non-cash compensation was provided for the testimonial or endorsement, as applicable;
 - (C) A brief statement and description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person; and
- (ii) The investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement discloses the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement.
- (iii) The investment adviser must have all of the following:
 - (A) A reasonable basis for believing that the testimonial or endorsement complies with the requirements of this rule; and
 - (B) A written agreement with any person giving a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of the compensation for those activities.
- (iv) An investment adviser may not compensate a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is an ineligible person at the time the testimonial or endorsement is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under 17 CFR 275.206(4)-3(a)(1)(ii) under the Investment Advisers Act of 1940, as in effect prior to the effective date of this rule.
- (v) A testimonial or endorsement disseminated for no compensation is not required to comply with subsections (m)(2)(ii)(B) or (m)(2)(iii) of this rule;
- (vi) A testimonial or endorsement by the investment adviser's partners, officers,

directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person is not required to comply with subsections (m)(2)(i) and (m)(2)(ii)(B), provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and the investment adviser documents such person's status at the time the testimonial or endorsement is disseminated;

- (vii) A testimonial or endorsement by a broker-dealer registered under the Act is not required to comply with the following:
 - (A) Subsection (m)(2)(i) of this rule if the testimonial or endorsement is a recommendation subject to 17 CFR 240.151-1 (Regulation Best Interest) under the Securities Exchange Act of 1934;
 - (B) Subsections (m)(2)(i) and (ii) of this rule if the testimonial or endorsement is provided to a person that is not a retail customer as that term is defined by 17 CFR 240.151-1 under the Securities Exchange Act of 1934;
 - (C) Subsection (m)(2)(iii) of this rule if the broker-dealer is not subject to statutory disqualification as defined under section 3(a)(39) of the Securities Exchange Act of 1934; and
 - (D) A testimonial or endorsement by a person that is covered under 17 CFR 230.506(d) under the Securities Act of 1933 with respect to an offering under that 17 CFR 230.506 and whose involvement would not disqualify the offering under that rule is not required to comply with subsection (m)(2)(iii) of this rule.

(3) An advertisement may not include any third-party rating unless the investment adviser complies with the following:

- (i) The investment adviser has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and
- (ii) The investment adviser clearly and prominently discloses or reasonably believes that the third-party rating clearly and prominently discloses all of

the following:

- (A) The date on which the rating was given and the period of time upon which the rating was based;
- (B) The identity of the third party that created and tabulated the rating; and
- (C) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.

(4) An investment adviser may not include in any advertisement:

- (i) Any presentation of gross performance, unless the advertisement also presents net performance and complies with both of following:
 - (A) Net performance presentation is given at least equal prominence and is formatted to facilitate comparison with gross performance; and
 - (B) Net performance is calculated over the same time period and using the same type of return and methodology as gross performance.
- (ii) Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the advertisement includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.
- (iii) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Administrator.
- (iv) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios if both of the following are true:
 - (A) The advertised performance results are not materially higher than if all related portfolios had been included; and

- (B) The exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by subsection (m)(4)(ii) of this rule.
- (v) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
- (vi) Any hypothetical performance unless the investment adviser complies with all of the following:
 - (A) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and objectives of the intended audience of the investment;
 - (B) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
 - (C) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in subsections (m)(4)(ii), (iv), and (v) of this rule.
- (vii) Any predecessor performance unless the investment adviser complies with all of the following:
 - (A) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising investment adviser;
 - (B) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;
 - (C) All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any

account does not alter the presentation of any applicable time periods prescribed in subsection (m)(4)(ii) of this rule; and

- (D) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

(5) As used in this rule, the following terms mean:

- (i) “Advertisement” means any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser’s investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, but does not include:
 - (A) Extemporaneous, live, oral communications;
 - (B) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or
 - (C) A communication that includes hypothetical performance that is provided:
 - (1) In response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser; or
 - (2) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and
 - (D) Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.
- (ii) “De minimis compensation” means compensation paid to a person for

providing a testimonial or endorsement of a total of \$1,000 or less [*or such other dollar amount the jurisdiction believes is “de minimis” for its geographic region*] (or the equivalent in non-cash compensation) during the preceding 12 months.

- (iii) “Disqualifying action” means an order of the Administrator, the securities administrator of any other state, the U.S. Securities and Exchange Commission, or any self-regulatory organization barring, denying, suspending, or revoking registration as a broker-dealer, agent investment adviser, or investment adviser representative barring the person from the securities or advisory industry or associating or affiliating with the securities or advisory industry, entered after notice and opportunity for hearing;
- (iv) Except as to such circumstances as may be excluded by operation of subsection (m)(5)(v), a “disqualifying event” is any of the following events that has occurred within the ten years prior to the person disseminating an endorsement or testimonial:
 - (A) A conviction by a court of competent jurisdiction within the United States of any felony, or any misdemeanor involving conduct described in paragraphs (2)(A) through (D) of Section 203(e) of the Investment Advisers Act of 1940;
 - (B) A conviction within the previous ten years of any felony, or any misdemeanor involving conduct described in section 204(a)(2)(C) of the Investment Advisers Act of 1940;
 - (C) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of Section 203(e) of the Investment Advisers Act of 1940;
 - (D) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in sections 204(a)(2)(A), (B) or (F) of the Investment Advisers Act of 1940;
 - (E) The entry of any final order by any entity described in paragraph (9) of Section 203(e) of the Investment Advisers Act of 1940, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms)), of the type described in paragraph (9) of section 203(e) of the

Investment Advisers Act of 1940;

- (F) The entry of an order, judgment or decree described in paragraph (4) of Section 203(e) of the Investment Advisers Act of 1940, and still in effect, by any court of competent jurisdiction within the United States;
- (G) The entry of an order, judgment or decree described in section 204(a)(2)(D) of the Investment Advisers Act of 1940; or
- (H) An order by the Securities and Exchange Commission or the securities or other financial services regulator of any state that a person cease and desist from committing or causing a violation or future violation of:
 - (1) Any scienter-based anti-fraud provision of Federal or state 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 § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder;
 - (2) *[Section 101 of the 1956 Uniform Securities Act or section 501 of the 2002 Uniform Securities Act, as applicable]*;
 - (3) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e); or
 - (4) *[Section 301 of the 1956 Uniform Securities Act or Section 301 of the 2002 Uniform Securities Act, as applicable]*.
- (v) “Disqualifying event” under subsections (m)(5)(iv)(A) through (E) does not include an event, if at the same time, either (a) the person is subject to an order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-9) with respect to such event or (b) the opinion or order that would otherwise constitute the disqualifying event is not a disqualifying action and, as to such opinion or order set forth in clause (a) or (b):
 - (A) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and

- (B) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to an order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission’s or regulator’s website.
- (vi) “Endorsement” means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that:
 - (A) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person’s experience with the investment adviser or its supervised persons;
 - (B) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
 - (C) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
- (vii) “Extracted performance” means the performance results of a subset or investments extracted from a portfolio.
- (viii) “Gross performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of fees, costs, and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio.
- (ix) Except as to such circumstances as may be excluded by operation of subsection (m)(5)(x), “hypothetical performance” means performance results that were not actually achieved by any portfolio of the investment adviser, including but not limited to:
 - (A) Performance derived from model portfolios;
 - (B) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and
 - (C) Targeted or projected performance returns with respect to any

portfolio or to the investment advisory services with regard to securities offered in the advertisement.

- (x) “Hypothetical performance” does not include:
 - (A) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser:
 - (1) Provides a description of the criteria and methodology used, including the investment analysis tool’s limitations and key assumptions;
 - (2) Explains that the results may vary with each use and over time;
 - (3) If applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and
 - (4) Discloses that the tool generates outcomes that are hypothetical in nature.
 - (B) Predecessor performance that is displayed in compliance with subsection (m)(4)(vii) of this rule.
- (xi) “Ineligible person” means a person who is subject to a disqualifying event and the following persons with respect to such ineligible person:
 - (A) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person; and
 - (B) If the ineligible person is a partnership, all general partners, or if the ineligible person is a limited liability company managed by elected managers, all elected managers.

- (xii) “Net performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:
 - (A) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and
 - (B) If using a model fee, must reflect one of the following:
 - (1) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or
 - (2) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.
- (xiii) “Portfolio” means a group of investments managed by an investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliated (as defined in the Form ADV Glossary of Terms).
- (xiv) “Predecessor performance” means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.
- (xv) “Private fund” has the same meaning as in section 202(a)(29) of the Investment Advisers Act of 1940.
- (xvi) “Related performance” means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.
- (xvii) “Related portfolio” means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.

- (xviii) “Supervised person” has the same meaning as in section 202(a)(25) of the Investment Advisers Act of 1940.
- (xix) “Testimonial” means any statement by a current client or investor in a private fund advised by the investment adviser:
 - (A) About the client or investor’s experience with the investment adviser or its supervised persons;
 - (B) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
 - (C) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
- (xx) “Third-party rating” means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of business.
- (n) Disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client.
- (o) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds when the advisor’s action is subject to and does not comply with the requirements of Rule 102e(1)-1. and any subsequent amendments.
- (p) Entering into, extending or renewing any investment advisory contract, unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.
- (q) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940.
- (r) Entering into, extending, or renewing any advisory contract contrary to the provisions of Section 205 of the Investment Advisers Act of 1940. This provision shall apply to all

advisers and investment adviser representatives registered or required to be registered under this Act, notwithstanding whether such adviser or representative would be exempt from federal registration pursuant to Section 203(b) of the Investment Advisers Act of 1940.

- (s) To indicate, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of this act or of the Investment Advisers Act of 1940, or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940.
- (t) Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contrary to the provisions of Section 206(4) of the Investment Advisers Act of 1940, notwithstanding the fact that such investment adviser or investment adviser representative is not registered or required to be registered under Section 203 of the Investment Advisers Act of 1940.
- (u) 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 this act or any rule or regulation thereunder.
- (v) Accessing a client's account by using the client's own unique identifying information (such as username and password).*
- (w) Failing to establish, maintain, and enforce a required policy or procedure.

The conduct set forth above is not inclusive. Engaging in other conduct such as non-disclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers, investment adviser representatives and federal covered advisers to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

* This rule amendment is not intended to apply to data aggregation software where: (a) the investment adviser does not know, or have access to, the client's password(s); (b) there is an agreement between the data aggregation software company and the custodian(s)/online account platform which permits this "back-door" access; and (c) the data is read-only (*i.e.*, the investment adviser can only view the information and cannot effectuate any changes to the client's underlying account(s)).

**NASAA Unethical Business Practices ~~g~~Of Investment Advisers,
Investment Adviser Representatives, ~~a~~And Federal Covered Advisers
(Model Rule 102(a)(4)-1)**

(Adopted April 27, 1997; Amended April 18, 2004, September 11, 2005,
November 6, 2017, May 19, 2019, _____)

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 1956. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

**~~Rule 102(a)(4)-1 Unethical Business Practices Of Investment Advisers, Investment
Adviser Representatives, And Federal Covered Advisers~~**

~~[Introduction]~~ A person who is an investment adviser, an investment adviser representative or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this ~~subsection~~ rule apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser or an investment adviser representative and its clients and the circumstances of each case, an investment adviser, an investment adviser representative or a federal covered adviser shall not engage in unethical business practices, including the following:

- (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 by the investment adviser.
- (b) Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

- (c) Inducing trading in a client’s account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account in light of the fact that an investment adviser or an investment adviser representative in such situations can directly benefit from the number of securities transactions effected in a client’s account. The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a “customer’s account.”
- (d) Placing an order to purchase or sell a security for the account of a client without authority to do so.
- (e) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.
- (f) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds.
- ~~(f)~~(g) Loaning money to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.
- ~~(g)~~(h) Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.
- ~~(h)~~(i) Providing a report or recommendation to any advisory client prepared by someone other than the adviser without disclosing that fact. (This prohibition does not apply to a situation 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.)
- ~~(i)~~(j) Charging a client an unreasonable advisory fee.
- ~~(j)~~(k) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the adviser, or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:
 - (1-) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and
 - (2-) Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the adviser or its employees.

~~(k)(l)~~ (l) Guaranteeing a client that a specific result will be achieved (gain or no loss) with advice which will be rendered.

~~(h)(m)~~ (m) [Alternative 1] Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.

~~(m)~~ [Alternative 2]

~~(1.) Except as otherwise provided in subsection (2.), it shall constitute a dishonest or unethical practice within the meaning of [Uniform Act Sec. 102(a)(4)] for any investment adviser or investment adviser representative, directly or indirectly, to use any advertisement that does any one of the following:~~

~~(i.) Refers to any testimonial of any kind concerning the investment adviser or investment adviser representative or concerning any advice, analysis, report, or other service rendered by such investment adviser or investment adviser representative.~~

~~(ii.) Refers to past specific recommendations of the investment adviser or investment adviser representative that were or would have been profitable to any person; except that an investment adviser or investment adviser representative may furnish or offer to furnish a list of all recommendations made by the investment adviser or investment adviser representative within the immediately preceding period of not less than one year if the advertisement or list also includes both of the following:~~

~~(A) The name of each security recommended, the date and nature of each recommendation, the market price at that time, the price at which the recommendation was to be acted upon, and the most recently available market price of each such security.~~

~~(B) A legend on the first page in prominent print or type that states that the reader should not assume that recommendations made in the future will be profitable or will equal the performance of the securities in the list.~~

~~(iii.) Represents 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 that person's own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such~~

~~advertisement the limitations thereof and the difficulties with respect to its use.~~

~~(iv.) Represents that any report, analysis, or other service will be furnished for free or without charge, unless such report, analysis, or other service actually is or will be furnished entirely free and without any direct or indirect condition or obligation.~~

~~(v.) Represents that the [Administrator] has approved any advertisement.~~

~~(vi.) Contains any untrue statement of a material fact, or that is otherwise false or misleading.~~

~~(2.) With respect to federal covered advisers, the provisions of this section only apply to the extent permitted by Section 203A of the Investment Advisers Act of 1940.~~

~~(3.) For the purposes of this section, the term “advertisement” shall include any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any electronic or paper publication, by radio or television, or by any medium, that offers any one of the following:~~

~~(i.) Any analysis, report, or publication concerning securities.~~

~~(ii.) Any analysis, report, or publication that is to be used in making any determination as to when to buy or sell any security or which security to buy or sell.~~

~~(iii.) 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.~~

~~(iv.) Any other investment advisory service with regard to securities.~~

(m) [Alternative 2] Publishing, circulating, or distributing any advertisement which directly or indirectly is in violation of any of the following:

(1) An advertisement may not:

(i) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading;

- (ii) Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Administrator;
- (iii) Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
- (iv) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without also providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
- (v) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;
- (vi) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
- (vii) Otherwise be materially misleading.

(2) An advertisement may not include any testimonial or endorsement, and an investment adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the following:

- (i) The investment adviser clearly and prominently discloses, or reasonably believes that the person giving the testimonial or endorsement discloses, the following at the time the testimonial or endorsement is disseminated:
 - (A) That the testimonial was given by a current client or investor, and that the endorsement was given by a person other than a current client or investor, as applicable;
 - (B) That cash or non-cash compensation was provided for the testimonial or endorsement, as applicable;
 - (C) A brief statement and description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person; and
- (ii) The investment adviser discloses, or reasonably believes that the person

giving the testimonial or endorsement discloses the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement.

(iii) The investment adviser must have all of the following:

(A) A reasonable basis for believing that the testimonial or endorsement complies with the requirements of this rule; and

(B) A written agreement with any person giving a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of the compensation for those activities.

(iv) An investment adviser may not compensate a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is an ineligible person at the time the testimonial or endorsement is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under 17 CFR 275.206(4)-3(a)(1)(ii) under the Investment Advisers Act of 1940, as in effect prior to the effective date of this rule.

(v) A testimonial or endorsement disseminated for no compensation is not required to comply with subsections (m)(2)(ii)(B) or (m)(2)(iii) of this rule;

(vi) A testimonial or endorsement by the investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person is not required to comply with subsections (m)(2)(i) and (m)(2)(ii)(B), provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and the investment adviser documents such person's status at the time the testimonial or endorsement is disseminated;

(vii) A testimonial or endorsement by a broker-dealer registered under the Act is not required to comply with the following:

(A) Subsection (m)(2)(i) of this rule if the testimonial or endorsement is a recommendation subject to 17 CFR 240.151-1 (Regulation Best

Interest) under the Securities Exchange Act of 1934;

(B) Subsections (m)(2)(i) and (ii) of this rule if the testimonial or endorsement is provided to a person that is not a retail customer as that term is defined by 17 CFR 240.151-1 under the Securities Exchange Act of 1934;

(C) Subsection (m)(2)(iii) of this rule if the broker-dealer is not subject to statutory disqualification as defined under section 3(a)(39) of the Securities Exchange Act of 1934; and

(D) A testimonial or endorsement by a person that is covered under 17 CFR 230.506(d) under the Securities Act of 1933 with respect to an offering under that 17 CFR 230.506 and whose involvement would not disqualify the offering under that rule is not required to comply with subsection (m)(2)(iii) of this rule.

(3) An advertisement may not include any third-party rating unless the investment adviser complies with the following:

(i) The investment adviser has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and

(ii) The investment adviser clearly and prominently discloses or reasonably believes that the third-party rating clearly and prominently discloses all of the following:

(A) The date on which the rating was given and the period of time upon which the rating was based;

(B) The identity of the third party that created and tabulated the rating; and

(C) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.

(4) An investment adviser may not include in any advertisement:

(i) Any presentation of gross performance, unless the advertisement also

presents net performance and complies with both of following:

- (A) Net performance presentation is given at least equal prominence and is formatted to facilitate comparison with gross performance; and
 - (B) Net performance is calculated over the same time period and using the same type of return and methodology as gross performance.
- (ii) Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the advertisement includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.
- (iii) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Administrator.
- (iv) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios if both of the following are true:
 - (A) The advertised performance results are not materially higher than if all related portfolios had been included; and
 - (B) The exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by subsection (m)(4)(ii) of this rule.
- (v) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
- (vi) Any hypothetical performance unless the investment adviser complies with all of the following:
 - (A) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and objectives of the intended audience

of the investment;

- (B) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
- (C) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in subsections (m)(4)(ii), (iv), and (v) of this rule.

(vii) Any predecessor performance unless the investment adviser complies with all of the following:

- (A) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising investment adviser;
- (B) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;
- (C) All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods prescribed in subsection (m)(4)(ii) of this rule; and
- (D) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

(5) As used in this rule, the following terms mean:

- (i) “Advertisement” means any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser’s investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the

investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, but does not include:

- (A) Extemporaneous, live, oral communications;
 - (B) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or
 - (C) A communication that includes hypothetical performance that is provided:
 - (1) In response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser; or
 - (2) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and
 - (D) Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.
- (ii) “De minimis compensation” means compensation paid to a person for providing a testimonial or endorsement of a total of \$1,000 or less [or such other dollar amount the jurisdiction believes is “de minimis” for its geographic region] (or the equivalent in non-cash compensation) during the preceding 12 months.
- (iii) “Disqualifying action” means an order of the Administrator, the securities administrator of any other state, the U.S. Securities and Exchange Commission, or any self-regulatory organization barring, denying, suspending, or revoking registration as a broker-dealer, agent investment adviser, or investment adviser representative barring the person from the securities or advisory industry or associating or affiliating with the securities or advisory industry, entered after notice and opportunity for hearing;

- (iv) Except as to such circumstances as may be excluded by operation of subsection (m)(5)(v), a “disqualifying event” is any of the following events that has occurred within the ten years prior to the person disseminating an endorsement or testimonial:
- (A) A conviction by a court of competent jurisdiction within the United States of any felony, or any misdemeanor involving conduct described in paragraphs (2)(A) through (D) of Section 203(e) of the Investment Advisers Act of 1940;
 - (B) A conviction within the previous ten years of any felony, or any misdemeanor involving conduct described in section 204(a)(2)(C) of the Investment Advisers Act of 1940;
 - (C) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of Section 203(e) of the Investment Advisers Act of 1940;
 - (D) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in sections 204(a)(2)(A), (B) or (F) of the Investment Advisers Act of 1940;
 - (E) The entry of any final order by any entity described in paragraph (9) of Section 203(e) of the Investment Advisers Act of 1940, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms)), of the type described in paragraph (9) of section 203(e) of the Investment Advisers Act of 1940;
 - (F) The entry of an order, judgment or decree described in paragraph (4) of Section 203(e) of the Investment Advisers Act of 1940, and still in effect, by any court of competent jurisdiction within the United States;
 - (G) The entry of an order, judgment or decree described in section 204(a)(2)(D) of the Investment Advisers Act of 1940; or
 - (H) An order by the Securities and Exchange Commission or the securities or other financial services regulator of any state that a person cease and desist from committing or causing a violation or future violation of:

- (1) Any scienter-based anti-fraud provision of Federal or state 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 § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder;
 - (2) [Section 101 of the 1956 Uniform Securities Act or section 501 of the 2002 Uniform Securities Act, as applicable];
 - (3) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e); or
 - (4) [Section 301 of the 1956 Uniform Securities Act or Section 301 of the 2002 Uniform Securities Act, as applicable].
- (v) “Disqualifying event” under subsections (m)(5)(iv)(A) through (E) does not include an event, if at the same time, either (a) the person is subject to an order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-9) with respect to such event or (b) the opinion or order that would otherwise constitute the disqualifying event is not a disqualifying action and, as to such opinion or order set forth in clause (a) or (b):
 - (A) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and
 - (B) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to an order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission’s or regulator’s website.
- (vi) “Endorsement” means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that:
 - (A) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person’s

- experience with the investment adviser or its supervised persons;
- (B) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
- (C) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
- (vii) “Extracted performance” means the performance results of a subset or investments extracted from a portfolio.
- (viii) “Gross performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of fees, costs, and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio.
- (ix) Except as to such circumstances as may be excluded by operation of subsection (m)(5)(x), “hypothetical performance” means performance results that were not actually achieved by any portfolio of the investment adviser, including but not limited to:
- (A) Performance derived from model portfolios;
- (B) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and
- (C) Targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement.
- (x) “Hypothetical performance” does not include:
- (A) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser:

(1) Provides a description of the criteria and methodology used, including the investment analysis tool’s limitations and key assumptions;

(2) Explains that the results may vary with each use and over time;

(3) If applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and

(4) Discloses that the tool generates outcomes that are hypothetical in nature.

(B) Predecessor performance that is displayed in compliance with subsection (m)(4)(vii) of this rule.

(xi) “Ineligible person” means a person who is subject to a disqualifying event and the following persons with respect to such ineligible person:

(A) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person; and

(B) If the ineligible person is a partnership, all general partners, or if the ineligible person is a limited liability company managed by elected managers, all elected managers.

(xii) “Net performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:

(A) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and

- (B) If using a model fee, must reflect one of the following:
- (1) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or
- (2) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.
- (xiii) “Portfolio” means a group of investments managed by an investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliated (as defined in the Form ADV Glossary of Terms).
- (xiv) “Predecessor performance” means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.
- (xv) “Private fund” has the same meaning as in section 202(a)(29) of the Investment Advisers Act of 1940.
- (xvi) “Related performance” means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.
- (xvii) “Related portfolio” means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.
- (xviii) “Supervised person” has the same meaning as in section 202(a)(25) of the Investment Advisers Act of 1940.
- (xix) “Testimonial” means any statement by a current client or investor in a private fund advised by the investment adviser:
- (A) About the client or investor’s experience with the investment adviser or its supervised persons;
- (B) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or

(C) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.

(xx) “Third-party rating” means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of business.

- (n) Disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client.
- (o) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds when the advisor’s action is subject to and does not comply with the requirements of Rule 102e(1)-1. and any subsequent amendments.
- (p) Entering into, extending or renewing any investment advisory contract, unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.
- (q) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940.
- (r) Entering into, extending, or renewing any advisory contract contrary to the provisions of Section 205 of the Investment Advisers Act of 1940. This provision shall apply to all advisers and investment adviser representatives registered or required to be registered under this Act, notwithstanding whether such adviser or representative would be exempt from federal registration pursuant to Section 203(b) of the Investment Advisers Act of 1940.
- (s) To indicate, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of this act or of the Investment Advisers Act of 1940, or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940.
- (t) Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contrary to the provisions of Section 206(4) of the Investment Advisers Act of 1940, notwithstanding the fact that such investment adviser or investment adviser

representative is not registered or required to be registered under Section 203 of the Investment Advisers Act of 1940.

- (u) 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 this act or any rule or regulation thereunder.
- (v) Accessing a client’s account by using the client’s own unique identifying information (such as username and password).*
- (w) Failing to establish, maintain, and enforce a required policy or procedure.

The conduct set forth above is not inclusive. Engaging in other conduct such as non-disclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers, investment adviser representatives and federal covered advisers to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

* This rule amendment is not intended to apply to data aggregation software where: (a) the investment adviser does not know, or have access to, the client’s password(s); (b) there is an agreement between the data aggregation software company and the custodian(s)/online account platform which permits this “back-door” access; and (c) the data is read-only (*i.e.*, the investment adviser can only view the information and cannot effectuate any changes to the client’s underlying account(s)).

Appendix 2

**NASAA Prohibited Conduct of Investment Advisers, Investment Adviser
Representatives and Federal Covered Investment Advisers
(Model Rule 502(b))**

(Adopted September 17, 2008; Amended November 6, 2017, May 19, 2019, ____)

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 2002. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

A person who is an investment adviser, an investment adviser representative or a federal covered investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this rule apply to federal covered investment advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser, an investment adviser representative or a federal covered investment adviser and its clients and the circumstances of each case, an investment adviser, an investment adviser representative or a federal covered investment adviser shall not engage in prohibited fraudulent, deceptive, or manipulative conduct, including but not limited to the following:

- (a) Recommending to a client to whom investment advisory 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 by the investment adviser, investment adviser representative or federal covered investment adviser.
- (b) Exercising any discretionary authority in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary authority relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.
- (c) Inducing trading in a client's account that is excessive in size or frequency in view of

the financial resources, investment objectives and character of the account.¹

- (d) Placing an order to purchase or sell a security for the account of a client without authority to do so.
- (e) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.
- (f) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser or a financial institution engaged in the business of loaning funds.
- (g) Loaning money or securities to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.
- (h) Misrepresenting to any client, or prospective client, the qualifications of the investment adviser, investment adviser representative, federal covered investment adviser, or any employee, or person affiliated with the investment adviser, investment adviser representative or federal covered investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.
- (i) Providing a report or recommendation to any client prepared by someone other than the investment adviser, investment adviser representative or federal covered investment adviser without disclosing that fact. This prohibition does not apply to a situation where the investment adviser, investment adviser representative or federal covered investment adviser uses published research reports or statistical analyses to render advice or where an investment adviser, investment adviser representative or federal covered investment adviser orders such a report in the normal course of providing service.
- (j) Charging a client an unreasonable fee.
- (k) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser, investment adviser

¹ The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a “customer’s account” in light of the fact that an investment adviser or an investment adviser representative in such situations can directly benefit from the number of securities transactions effected in a client’s account.

representative or federal covered investment adviser, or any of its employees, or affiliated persons which could reasonably be expected to impair the rendering of unbiased and objective advice including but not limited to:

- (1) Compensation arrangements connected with investment advisory services to clients which are in addition to compensation from such clients for such services; and
 - (2) Charging a client an investment advisory fee for rendering investment advice when compensation for effecting securities transactions pursuant to such advice will be received by the investment adviser, investment adviser representative or federal covered investment adviser or its employees, or affiliated persons.
- (l) While acting as principal for its own advisory account, to knowingly sell any security to or purchase any security from a client, or while acting as broker-dealer for a person other than the client, to knowingly effect any sale or purchase of any security for the account of the client, without disclosing to the client in writing before the completion of the transaction the capacity in which it is acting and obtaining the consent of the client to the transaction.
- (1) The prohibitions of this subsection shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction.²
 - (2) The prohibitions of this subsection shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer acts as an investment adviser solely:
 - (A) by means of publicly distributed written materials or publicly made oral statements;
 - (B) by means of written materials or oral statements not purporting to meet the objectives or needs of specific individuals or accounts;
 - (C) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or
 - (D) any combination of the foregoing services.³

² Note: 1956 Act § 102(a)(3) not included in 2002 Act.

³ Note: 1956 Rule 102(f)-2(b) not included in 2002 Act.

- (3) Publicly distributed written materials or publicly made oral statements shall disclose that, if the purchaser of the advisory communication uses the investment adviser's services in connection with the sale or purchase of a security which is a subject of the communication, the investment adviser may act as principal for its own account or as agent for another person. Compliance by the investment adviser with the foregoing disclosure requirement shall not relieve it of any other disclosure obligations under the Act.⁴
- (4) Definitions for purposes of this Rule,
 - (A) "Publicly distributed written materials" means written materials which are distributed to 35 or more persons who pay for those materials.
 - (B) "Publicly made oral statements" means oral statements made simultaneously to 35 or more persons who pay for access to those statements.
- (m) The prohibitions of this Rule shall not apply to an investment adviser effecting an agency cross transaction for an advisory client provided the following conditions are met:⁵
 - (1) The advisory client executes a written consent prospectively authorizing the investment adviser to effect agency cross transactions for such client;
 - (2) Before obtaining such written consent from the client, the investment adviser makes full written disclosure to the client that, with respect to agency cross transactions, the investment adviser will act as broker-dealer for, receive commissions from and have a potentially conflicting division of loyalties and responsibilities regarding both parties to the transactions;
 - (3) At or before the completion of each agency cross transaction, the investment adviser or any other person relying on this rule sends the client a written confirmation. The written confirmation shall include:
 - (A) A statement of the nature of the transaction;
 - (B) The date the transaction took place;

⁴ Note: 1956 Rule 102(f)-2(c).

⁵ Note: 1956 Rule 102(f)-1.

- (C) An offer to furnish, upon request, the time when the transaction took place; and
 - (D) The source and amount of any other remuneration the investment adviser received or will receive in connection with the transaction. In the case of a purchase, if the investment adviser was not participating in a distribution, or, in the case of a sale, if the investment adviser was not participating in a tender offer, the written confirmation may state whether the investment adviser has been receiving or will receive any other remuneration and that the investment adviser will furnish the source and amount of such remuneration to the client upon the client's written request;
- (4) At least annually, and with or as part of any written statement or summary of the account from the investment adviser, the investment adviser or any other person relying on this rule sends each client a written disclosure statement identifying:
- (A) The total number of agency cross transactions during the period for the client since the date of the last such statement or summary; and
 - (B) The total amount of all commissions or other remuneration the investment adviser received or will receive in connection with agency cross transactions for the client during the period.
- (5) Each written disclosure and confirmation required by this rule must include a conspicuous statement that the client may revoke the written consent required under subsection (m)(1) of this rule at any time by providing written notice to the investment adviser.
- (6) No agency cross transaction may be effected in which the same investment adviser recommended the transaction to both any seller and any purchaser.
- (7) For purposes of this rule, “agency cross transaction for an advisory client” means a transaction in which a person acts as an investment adviser in relation to a transaction in which the investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, including an investment adviser representative, acts as a broker-dealer for both the advisory client and another person on the other side of the transaction. When acting in such capacity such person is required to be registered [licensed] as a broker-dealer in this state unless excluded from the definition.
- (8) Nothing in this rule shall be construed to relieve an investment adviser or

investment adviser representative from acting in the best interests of the client, including fulfilling his duty with respect to the best price and execution for the particular transaction for the client nor shall it relieve any investment adviser or investment adviser representative of any other disclosure obligations imposed by the Act.

- (n) Guaranteeing a client that a specific result will be achieved with advice rendered.
- (o) **[Alternative 1]** Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.
- (o) **[Alternative 2]** Publishing, circulating, or distributing any advertisement which directly or indirectly is in violation of any of the following:
 - (1) An advertisement may not:
 - (A) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading;
 - (B) Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Administrator;
 - (C) Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
 - (D) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without also providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
 - (E) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;
 - (F) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
 - (G) Otherwise be materially misleading.
 - (2) An advertisement may not include any testimonial or endorsement, and an

investment adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the following:

- (A) The investment adviser clearly and prominently discloses, or reasonably believes that the person giving the testimonial or endorsement discloses, the following at the time the testimonial or endorsement is disseminated:
 - (i) That the testimonial was given by a current client or investor, and that the endorsement was given by a person other than a current client or investor, as applicable;
 - (ii) That cash or non-cash compensation was provided for the testimonial or endorsement, as applicable;
 - (iii) A brief statement and description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person; and
- (B) The investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement discloses the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement.
- (C) The investment adviser must have all of the following:
 - (i) A reasonable basis for believing that the testimonial or endorsement complies with the requirements of this rule; and
 - (ii) A written agreement with any person giving a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of the compensation for those activities.
- (D) An investment adviser may not compensate a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is an ineligible person at the time the testimonial or endorsement is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under 17 CFR 275.206(4)-3(a)(1)(ii) under the Investment Advisers Act of 1940,

as in effect prior to the effective date of this rule.

- (E) A testimonial or endorsement disseminated for no compensation is not required to comply with subsections (o)(2)(B)(ii) or (o)(2)(C) of this rule;
- (F) A testimonial or endorsement by the investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person is not required to comply with subsections (o)(2)(A) and (o)(2)(B)(ii), provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and the investment adviser documents such person's status at the time the testimonial or endorsement is disseminated;
- (G) A testimonial or endorsement by a broker-dealer registered under the Act is not required to comply with the following:
 - (i) Subsection (o)(2)(A) of this rule if the testimonial or endorsement is a recommendation subject to 17 CFR 240.151-1 (Regulation Best Interest) under the Securities Exchange Act of 1934
 - (ii) Subsections (o)(2)(A)(ii) and (iii) of this rule if the testimonial or endorsement is provided to a person that is not a retail customer as that term is defined by 17 CFR 240.151-1 under the Securities Exchange Act of 1934;
 - (iii) Subsection (o)(2)(C) of this rule if the broker-dealer is not subject to statutory disqualification as defined under section 3(a)(39) of the Securities Exchange Act of 1934; and
 - (iv) A testimonial or endorsement by a person that is covered under 17 CFR 230.506(d) under the Securities Act of 1933 with respect to an offering under that 17 CFR 230.506 and whose involvement would not disqualify the offering under that rule is not required to comply with subsection (o)(2)(C) of this rule.
- (3) An advertisement may not include any third-party rating unless the investment adviser complies with the following:
 - (A) The investment adviser has a reasonable basis for believing that any

questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and

- (B) The investment adviser clearly and prominently discloses or reasonably believes that the third-party rating clearly and prominently discloses all of the following:
 - (i) The date on which the rating was given and the period of time upon which the rating was based;
 - (ii) The identity of the third party that created and tabulated the rating; and
 - (iii) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.
- (4) An investment adviser may not include in any advertisement:
 - (A) Any presentation of gross performance, unless the advertisement also presents net performance and complies with both of following:
 - (i) Net performance presentation is given at least equal prominence and is formatted to facilitate comparison with gross performance; and
 - (ii) Net performance is calculated over the same time period and using the same type of return and methodology as gross performance.
 - (B) Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the advertisement includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.
 - (C) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed

by the Administrator.

- (D) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios if both of the following are true:
 - (i) The advertised performance results are not materially higher than if all related portfolios had been included; and
 - (ii) The exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by subsection (o)(4)(B) of this rule.
- (E) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
- (F) Any hypothetical performance unless the investment adviser complies with all of the following:
 - (i) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and objectives of the intended audience of the investment;
 - (ii) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
 - (iii) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in subsections (o)(4)(B), (D), and (E) of this rule.
- (G) Any predecessor performance unless the investment adviser complies with all of the following:
 - (i) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising investment adviser;

- (ii) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;
 - (iii) All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods prescribed in subsection (o)(4)(B) of this rule; and
 - (iv) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.
- (5) As used in this rule, the following terms mean:
 - (A) “Advertisement” means any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser’s investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, but does not include:
 - (i) Extemporaneous, live, oral communications;
 - (ii) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or
 - (iii) A communication that includes hypothetical performance that is provided:
 - (a) In response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser, or
 - (b) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and

- (iv) Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.
- (B) “De minimis compensation” means compensation paid to a person for providing a testimonial or endorsement of a total of \$1,000 or less [or such other dollar amount the jurisdiction believes is “de minimis” for its geographic region] (or the equivalent in non-cash compensation) during the preceding 12 months.
- (C) “Disqualifying action” means an order of the Administrator, the securities administrator of any other state, the U.S. Securities and Exchange Commission, or any self-regulatory organization barring, denying, suspending, or revoking registration as a broker-dealer, agent investment adviser, or investment adviser representative barring the person from the securities or advisory industry or associating or affiliating with the securities or advisory industry, entered after notice and opportunity for hearing;
- (D) Except as to such circumstances as may be excluded by operation of subsection (o)(5)(E), a “disqualifying event” is any of the following events that has occurred within the ten years prior to the person disseminating an endorsement or testimonial:
 - (i) A conviction by a court of competent jurisdiction within the United States of any felony, or any misdemeanor involving conduct described in paragraphs (2)(A) through (D) of Section 203(e) of the Investment Advisers Act of 1940;
 - (ii) A conviction within the previous ten years of any felony, or any misdemeanor involving conduct described in section 204(a)(2)(C) of the Investment Advisers Act of 1940;
 - (iii) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of Section 203(e) of the Investment Advisers Act of 1940;

- (iv) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in sections 204(a)(2)(A), (B) or (F) of the Investment Advisers Act of 1940;
- (v) The entry of any final order by any entity described in paragraph (9) of Section 203(e) of the Investment Advisers Act of 1940, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms)), of the type described in paragraph (9) of section 203(e) of the Investment Advisers Act of 1940;
- (vi) The entry of an order, judgment or decree described in paragraph (4) of Section 203(e) of the Investment Advisers Act of 1940, and still in effect, by any court of competent jurisdiction within the United States;
- (vii) The entry of an order, judgment or decree described in section 204(a)(2)(D) of the Investment Advisers Act of 1940; or
- (viii) An order by the Securities and Exchange Commission or the securities or other financial services regulator of any state that a person cease and desist from committing or causing a violation or future violation of:
 - (a) Any scienter-based anti-fraud provision of Federal or state 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 § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder;
 - (b) *[Section 101 of the 1956 Uniform Securities Act or section 501 of the 2002 Uniform Securities Act, as applicable];*
 - (c) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e);
or
 - (d) *[Section 301 of the 1956 Uniform Securities Act or*

Section 301 of the 2002 Uniform Securities Act, as applicable].

- (E) “Disqualifying event” under subsections (o)(5)(D)(i) through (v) does not include an event, if at the same time, either (a) the person is subject to an order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-9) with respect to such event or (b) the opinion or order that would otherwise constitute the disqualifying event is not a disqualifying action and, as to such opinion or order set forth in clause (a) or (b):
 - (i) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and
 - (ii) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to an order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission’s or regulator’s website.
- (F) “Endorsement” means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that:
 - (i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person’s experience with the investment adviser or its supervised persons;
 - (ii) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
 - (iii) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
- (G) “Extracted performance” means the performance results of a subset or investments extracted from a portfolio.
- (H) “Gross performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of fees, costs, and expenses that a client

or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio.

- (I) Except as to such circumstances as may be excluded by operation of subsection (o)(5)(J), “hypothetical performance” means performance results that were not actually achieved by any portfolio of the investment adviser, including but not limited to:
 - (i) Performance derived from model portfolios;
 - (ii) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and
 - (iii) Targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement.
- (J) “Hypothetical performance” does not include:
 - (i) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser:
 - (a) Provides a description of the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;
 - (b) Explains that the results may vary with each use and over time;
 - (c) If applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and

- (d) Discloses that the tool generates outcomes that are hypothetical in nature.
 - (ii) Predecessor performance that is displayed in compliance with subsection (o)(4)(G) of this rule.
- (K) “Ineligible person” means a person who is subject to a disqualifying event and the following persons with respect to such ineligible person:
 - (i) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person; and
 - (ii) If the ineligible person is a partnership, all general partners, or if the ineligible person is a limited liability company managed by elected managers, all elected managers.
- (L) “Net performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:
 - (i) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and
 - (ii) If using a model fee, must reflect one of the following:
 - (a) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or
 - (b) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.
- (M) “Portfolio” means a group of investments managed by an investment adviser. A portfolio may be an account or a private fund and includes,

but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliated (as defined in the Form ADV Glossary of Terms).

- (N) “Predecessor performance” means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.
 - (O) “Private fund” has the same meaning as in section 202(a)(29) of the Investment Advisers Act of 1940.
 - (P) “Related performance” means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.
 - (Q) “Related portfolio” means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.
 - (R) “Supervised person” has the same meaning as in section 202(a)(25) of the Investment Advisers Act of 1940.
 - (S) “Testimonial” means any statement by a current client or investor in a private fund advised by the investment adviser:
 - (i) About the client or investor’s experience with the investment adviser or its supervised persons;
 - (ii) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
 - (iii) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
 - (T) “Third-party rating” means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of business.
- (p) Making, in the solicitation of clients, any untrue statement of a material fact, or

omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading.⁶

- (q) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940.
- (r) Disclosing the identity, investments, or other financial information of any client or former client unless required by law to do so, or unless consented to by the client.
- (s) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds when the action of the investment adviser or investment adviser representative is subject to and does not comply with the requirements of Rule 411(f)-1.
- (t) Engaging in any act, practice, or course of business which is fraudulent, deceptive, manipulative or unethical.
- (u) 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.
- (v) Accessing a client's account by using the client's own unique identifying information (such as username and password).*
- (w) Failing to establish, maintain, and enforce a required policy or procedure.

* This rule amendment is not intended to apply to data aggregation software where: (a) the investment adviser does not know, or have access to, the client's password(s); (b) there is an agreement between the data aggregation software company and the custodian(s)/online account platform which permits this "back-door" access; and (c) the data is read-only (*i.e.*, the investment adviser can only view the information and cannot effectuate any changes to the client's underlying account(s)).

⁶ Note: 1956 Act § 102(b).

**NASAA Prohibited Conduct of Investment Advisers, Investment Adviser
Representatives and Federal Covered Investment Advisers**
(Model Rule ~~USA 2002-502(b)~~)

(Adopted September 17, 2008; Amended November 6, 2017, May 19, 2019, _____)

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 2002. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

~~Rule USA 2002-502(b)~~ Prohibited Conduct in Providing Investment Advice

A person who is an investment adviser, an investment adviser representative or a federal covered investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this ~~subsection~~-rule apply to federal covered investment advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser, an investment adviser representative or a federal covered investment adviser and its clients and the circumstances of each case, an investment adviser, an investment adviser representative or a federal covered investment adviser shall not engage in prohibited fraudulent, deceptive, or manipulative conduct, including but not limited to the following:

- (a) Recommending to a client to whom investment advisory 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 by the investment adviser, investment adviser representative or federal covered investment adviser.
- (b) Exercising any discretionary authority in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary authority relates solely to the price at which, or the time when, an order involving a definite amount of a specified security

shall be executed, or both.

- (c) Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account.¹
- (d) Placing an order to purchase or sell a security for the account of a client without authority to do so.
- (e) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.
- (f) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser or a financial institution engaged in the business of loaning funds.
- (g) Loaning money or securities to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.
- (h) Misrepresenting to any client, or prospective client, the qualifications of the investment adviser, investment adviser representative, federal covered investment adviser, or any employee, or person affiliated with the investment adviser, investment adviser representative or federal covered investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.
- (i) Providing a report or recommendation to any client prepared by someone other than the investment adviser, investment adviser representative or federal covered investment adviser without disclosing that fact. This prohibition does not apply to a situation where the investment adviser, investment adviser representative or federal covered investment adviser uses published research reports or statistical analyses to render advice or where an investment adviser, investment adviser representative or federal covered investment adviser orders such a report in the normal course of providing service.

¹ The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a "customer's account" in light of the fact that an investment adviser or an investment adviser representative in such situations can directly benefit from the number of securities transactions effected in a client's account.

- (j) Charging a client an unreasonable fee.
- (k) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser, investment adviser representative or federal covered investment adviser, or any of its employees, or affiliated persons which could reasonably be expected to impair the rendering of unbiased and objective advice including but not limited to:
 - (1) Compensation arrangements connected with investment advisory services to clients which are in addition to compensation from such clients for such services; and
 - (2) Charging a client an investment advisory fee for rendering investment advice when compensation for effecting securities transactions pursuant to such advice will be received by the investment adviser, investment adviser representative or federal covered investment adviser or its employees, or affiliated persons.
- (l) While acting as principal for its own advisory account, to knowingly sell any security to or purchase any security from a client, or while acting as broker-dealer for a person other than the client, to knowingly effect any sale or purchase of any security for the account of the client, without disclosing to the client in writing before the completion of the transaction the capacity in which it is acting and obtaining the consent of the client to the transaction.
 - (1) The prohibitions of this subsection shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction.²
 - (2) The prohibitions of this subsection shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer acts as an investment adviser solely:
 - (A) by means of publicly distributed written materials or publicly made oral statements;
 - (B) by means of written materials or oral statements not purporting to meet the objectives or needs of specific individuals or accounts;
 - (C) through the issuance of statistical information containing no expressions

² Note: 1956 Act § 102(a)(3) not included in 2002 Act.

of opinion as to the investment merits of a particular security; or

(D) any combination of the foregoing services.³

(3) Publicly distributed written materials or publicly made oral statements shall disclose that, if the purchaser of the advisory communication uses the investment adviser's services in connection with the sale or purchase of a security which is a subject of the communication, the investment adviser may act as principal for its own account or as agent for another person. Compliance by the investment adviser with the foregoing disclosure requirement shall not relieve it of any other disclosure obligations under the Act.⁴

(4) Definitions for purposes of this Rule,

(A) "Publicly distributed written materials" means written materials which are distributed to 35 or more persons who pay for those materials.

(B) "Publicly made oral statements" means oral statements made simultaneously to 35 or more persons who pay for access to those statements.

(m) The prohibitions of this Rule shall not apply to an investment adviser effecting an agency cross transaction for an advisory client provided the following conditions are met:⁵

- (1) The advisory client executes a written consent prospectively authorizing the investment adviser to effect agency cross transactions for such client;
- (2) Before obtaining such written consent from the client, the investment adviser makes full written disclosure to the client that, with respect to agency cross transactions, the investment adviser will act as broker-dealer for, receive commissions from and have a potentially conflicting division of loyalties and responsibilities regarding both parties to the transactions;
- (3) At or before the completion of each agency cross transaction, the investment adviser or any other person relying on this rule sends the client a written

³ Note: 1956 Rule 102(f)-2(b) not included in 2002 Act.

⁴ Note: 1956 Rule 102(f)-2(c).

⁵ Note: 1956 Rule 102(f)-1.

confirmation. The written confirmation shall include:

- (A) A statement of the nature of the transaction;
 - (B) The date the transaction took place;
 - (C) An offer to furnish, upon request, the time when the transaction took place; and
 - (D) The source and amount of any other remuneration the investment adviser received or will receive in connection with the transaction. In the case of a purchase, if the investment adviser was not participating in a distribution, or, in the case of a sale, if the investment adviser was not participating in a tender offer, the written confirmation may state whether the investment adviser has been receiving or will receive any other remuneration and that the investment adviser will furnish the source and amount of such remuneration to the client upon the client's written request;
- (4) At least annually, and with or as part of any written statement or summary of the account from the investment adviser, the investment adviser or any other person relying on this rule sends each client a written disclosure statement identifying:
- (A) The total number of agency cross transactions during the period for the client since the date of the last such statement or summary; and
 - (B) The total amount of all commissions or other remuneration the investment adviser received or will receive in connection with agency cross transactions for the client during the period.
- (5) Each written disclosure and confirmation required by this rule must include a conspicuous statement that the client may revoke the written consent required under subsection (m)(1) of this rule at any time by providing written notice to the investment adviser.
- (6) No agency cross transaction may be effected in which the same investment adviser recommended the transaction to both any seller and any purchaser.
- (7) For purposes of this rule, “agency cross transaction for an advisory client” means a transaction in which a person acts as an investment adviser in relation to a transaction in which the investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, including an investment adviser representative, acts as a broker-dealer for both the advisory

client and another person on the other side of the transaction. When acting in such capacity such person is required to be registered [licensed] as a broker-dealer in this state unless excluded from the definition.

- (8) Nothing in this rule shall be construed to relieve an investment adviser or investment adviser representative from acting in the best interests of the client, including fulfilling his duty with respect to the best price and execution for the particular transaction for the client nor shall it relieve any investment adviser or investment adviser representative of any other disclosure obligations imposed by the Act.
- (n) Guaranteeing a client that a specific result will be achieved with advice rendered.
- (o) **[Alternative 1]** Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.

~~(o) **[Alternative 2]** Publishing, circulating or distributing any advertisement which directly or indirectly does any one of the following:~~

- ~~(1) Refers to any testimonial of any kind concerning the investment adviser, investment adviser representative or federal covered investment adviser, or concerning any advice, analysis, report, or other service rendered by such investment adviser or investment adviser representative.~~
- ~~(2) Refers to past specific recommendations of the investment adviser, investment adviser representative or federal covered investment adviser that were or would have been profitable to any person; except that an investment adviser or investment adviser representative may furnish or offer to furnish a list of all recommendations made by the investment adviser, investment adviser representative or federal covered investment adviser within the immediately preceding period of not less than one year if the advertisement or list also includes both of the following:
 - ~~(A) The name of each security recommended, the date and nature of each recommendation, the market price at that time, the price at which the recommendation was to be acted upon, and the most recently available market price of each such security.~~
 - ~~(B) A legend on the first page in prominent print or type that states that the reader should not assume that recommendations made in the future will be profitable or will equal the performance of the securities in the list.~~~~
- ~~(3) Represents 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 that person's own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use.~~

~~(4) Represents that any report, analysis, or other service will be furnished for free or without charge, unless such report, analysis, or other service actually is or will be furnished entirely free and without any direct or indirect condition or obligation.~~

~~(5) Represents that the [Administrator] has approved any advertisement.~~

~~(6) Contains any untrue statement of a material fact, or that is otherwise false or misleading.~~

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

~~(A) Any analysis, report, or publication concerning securities.~~

~~(B) Any analysis, report, or publication that is to be used in making any determination as to when to buy or sell any security or which security to buy or sell.~~

~~(C) 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.~~

~~(D) Any other investment advisory service with regard to securities.~~

(o) [Alternative 2] Publishing, circulating, or distributing any advertisement which directly or indirectly is in violation of any of the following:

(1) An advertisement may not:

(A) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading;

- (B) Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Administrator;
 - (C) Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
 - (D) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser’s services or methods of operation without also providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
 - (E) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;
 - (F) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
 - (G) Otherwise be materially misleading.
- (2) An advertisement may not include any testimonial or endorsement, and an investment adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the following:
- (A) The investment adviser clearly and prominently discloses, or reasonably believes that the person giving the testimonial or endorsement discloses, the following at the time the testimonial or endorsement is disseminated:
 - (i) That the testimonial was given by a current client or investor, and that the endorsement was given by a person other than a current client or investor, as applicable;
 - (ii) That cash or non-cash compensation was provided for the testimonial or endorsement, as applicable;
 - (iii) A brief statement and description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser’s relationship with such person; and

- (B) The investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement discloses the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement.
- (C) The investment adviser must have all of the following:
 - (i) A reasonable basis for believing that the testimonial or endorsement complies with the requirements of this rule; and
 - (ii) A written agreement with any person giving a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of the compensation for those activities.
- (D) An investment adviser may not compensate a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is an ineligible person at the time the testimonial or endorsement is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under 17 CFR 275.206(4)-3(a)(1)(ii) under the Investment Advisers Act of 1940, as in effect prior to the effective date of this rule.
- (E) A testimonial or endorsement disseminated for no compensation is not required to comply with subsections (o)(2)(B)(ii) or (o)(2)(C) of this rule;
- (F) A testimonial or endorsement by the investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person is not required to comply with subsections (o)(2)(A) and (o)(2)(B)(ii), provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and the investment adviser documents such person's status at the time the testimonial or endorsement is disseminated;
- (G) A testimonial or endorsement by a broker-dealer registered under the Act is not required to comply with the following:

- (i) Subsection (o)(2)(A) of this rule if the testimonial or endorsement is a recommendation subject to 17 CFR 240.151-1 (Regulation Best Interest) under the Securities Exchange Act of 1934
 - (ii) Subsections (o)(2)(A)(ii) and (iii) of this rule if the testimonial or endorsement is provided to a person that is not a retail customer as that term is defined by 17 CFR 240.151-1 under the Securities Exchange Act of 1934;
 - (iii) Subsection (o)(2)(C) of this rule if the broker-dealer is not subject to statutory disqualification as defined under section 3(a)(39) of the Securities Exchange Act of 1934; and
 - (iv) A testimonial or endorsement by a person that is covered under 17 CFR 230.506(d) under the Securities Act of 1933 with respect to an offering under that 17 CFR 230.506 and whose involvement would not disqualify the offering under that rule is not required to comply with subsection (o)(2)(C) of this rule.
- (3) An advertisement may not include any third-party rating unless the investment adviser complies with the following:
 - (A) The investment adviser has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and
 - (B) The investment adviser clearly and prominently discloses or reasonably believes that the third-party rating clearly and prominently discloses all of the following:
 - (i) The date on which the rating was given and the period of time upon which the rating was based;
 - (ii) The identity of the third party that created and tabulated the rating; and
 - (iii) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.
- (4) An investment adviser may not include in any advertisement:

- (A) Any presentation of gross performance, unless the advertisement also presents net performance and complies with both of following:
 - (i) Net performance presentation is given at least equal prominence and is formatted to facilitate comparison with gross performance; and
 - (ii) Net performance is calculated over the same time period and using the same type of return and methodology as gross performance.
- (B) Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the advertisement includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.
- (C) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Administrator.
- (D) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios if both of the following are true:
 - (i) The advertised performance results are not materially higher than if all related portfolios had been included; and
 - (ii) The exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by subsection (o)(4)(B) of this rule.
- (E) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
- (F) Any hypothetical performance unless the investment adviser complies with all of the following:
 - (i) Adopts and implements policies and procedures reasonably

designed to ensure that the hypothetical performance is relevant to the likely financial situation and objectives of the intended audience of the investment;

(ii) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and

(iii) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in subsections (o)(4)(B), (D), and (E) of this rule.

(G) Any predecessor performance unless the investment adviser complies with all of the following:

(i) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising investment adviser;

(ii) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;

(iii) All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods prescribed in subsection (o)(4)(B) of this rule; and

(iv) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

(5) As used in this rule, the following terms mean:

(A) “Advertisement” means any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that

offers the investment adviser’s investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, but does not include:

- (i) Extemporaneous, live, oral communications;
 - (ii) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or
 - (iii) A communication that includes hypothetical performance that is provided:
 - (a) In response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser, or
 - (b) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and
 - (iv) Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.
- (B) “De minimis compensation” means compensation paid to a person for providing a testimonial or endorsement of a total of \$1,000 or less [or such other dollar amount the jurisdiction believes is “de minimis” for its geographic region] (or the equivalent in non-cash compensation) during the preceding 12 months.
- (C) “Disqualifying action” means an order of the Administrator, the securities administrator of any other state, the U.S. Securities and Exchange Commission, or any self-regulatory organization barring, denying, suspending, or revoking registration as a broker-dealer, agent

investment adviser, or investment adviser representative barring the person from the securities or advisory industry or associating or affiliating with the securities or advisory industry, entered after notice and opportunity for hearing;

- (D) Except as to such circumstances as may be excluded by operation of subsection (o)(5)(E), a “disqualifying event” is any of the following events that has occurred within the ten years prior to the person disseminating an endorsement or testimonial:
- (i) A conviction by a court of competent jurisdiction within the United States of any felony, or any misdemeanor involving conduct described in paragraphs (2)(A) through (D) of Section 203(e) of the Investment Advisers Act of 1940;
 - (ii) A conviction within the previous ten years of any felony, or any misdemeanor involving conduct described in section 204(a)(2)(C) of the Investment Advisers Act of 1940;
 - (iii) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of Section 203(e) of the Investment Advisers Act of 1940;
 - (iv) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in sections 204(a)(2)(A), (B) or (F) of the Investment Advisers Act of 1940;
 - (v) The entry of any final order by any entity described in paragraph (9) of Section 203(e) of the Investment Advisers Act of 1940, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms)), of the type described in paragraph (9) of section 203(e) of the Investment Advisers Act of 1940;
 - (vi) The entry of an order, judgment or decree described in paragraph (4) of Section 203(e) of the Investment Advisers Act of 1940, and still in effect, by any court of competent jurisdiction within the United States;
 - (vii) The entry of an order, judgment or decree described in section

204(a)(2)(D) of the Investment Advisers Act of 1940; or

(viii) An order by the Securities and Exchange Commission or the securities or other financial services regulator of any state that a person cease and desist from committing or causing a violation or future violation of:

(a) Any scienter-based anti-fraud provision of Federal or state 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 § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder;

(b) [Section 101 of the 1956 Uniform Securities Act or section 501 of the 2002 Uniform Securities Act, as applicable];

(c) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e);
or

(d) [Section 301 of the 1956 Uniform Securities Act or Section 301 of the 2002 Uniform Securities Act, as applicable].

(E) “Disqualifying event” under subsections (o)(5)(D)(i) through (v) does not include an event, if at the same time, either (a) the person is subject to an order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-9) with respect to such event or (b) the opinion or order that would otherwise constitute the disqualifying event is not a disqualifying action and, as to such opinion or order set forth in clause (a) or (b):

(i) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and

(ii) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the

testimonial or endorsement is subject to an order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission’s or regulator’s website.

(F) “Endorsement” means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that:

(i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person’s experience with the investment adviser or its supervised persons;

(ii) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or

(iii) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.

(G) “Extracted performance” means the performance results of a subset or investments extracted from a portfolio.

(H) “Gross performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of fees, costs, and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio.

(I) Except as to such circumstances as may be excluded by operation of subsection (o)(5)(J), “hypothetical performance” means performance results that were not actually achieved by any portfolio of the investment adviser, including but not limited to:

(i) Performance derived from model portfolios;

(ii) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and

(iii) Targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement.

(J) “Hypothetical performance” does not include:

- (i) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser:
 - (a) Provides a description of the criteria and methodology used, including the investment analysis tool’s limitations and key assumptions;
 - (b) Explains that the results may vary with each use and over time;
 - (c) If applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and
 - (d) Discloses that the tool generates outcomes that are hypothetical in nature.
- (ii) Predecessor performance that is displayed in compliance with subsection (o)(4)(G) of this rule.

(K) “Ineligible person” means a person who is subject to a disqualifying event and the following persons with respect to such ineligible person:

- (i) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person; and
- (ii) If the ineligible person is a partnership, all general partners, or if the ineligible person is a limited liability company managed by elected managers, all elected managers.

- (L) “Net performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:
- (i) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and
 - (ii) If using a model fee, must reflect one of the following:
 - (a) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or
 - (b) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.
- (M) “Portfolio” means a group of investments managed by an investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliated (as defined in the Form ADV Glossary of Terms).
- (N) “Predecessor performance” means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.
- (O) “Private fund” has the same meaning as in section 202(a)(29) of the Investment Advisers Act of 1940.
- (P) “Related performance” means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.
- (Q) “Related portfolio” means a portfolio with substantially similar

investment policies, objectives, and strategies as those of the services being offered in the advertisement.

(R) “Supervised person” has the same meaning as in section 202(a)(25) of the Investment Advisers Act of 1940.

(S) “Testimonial” means any statement by a current client or investor in a private fund advised by the investment adviser:

(i) About the client or investor’s experience with the investment adviser or its supervised persons;

(ii) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or

(iii) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.

(T) “Third-party rating” means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of business.

(p) Making, in the solicitation of clients, any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading.⁶

(q) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940.

(r) Disclosing the identity, investments, or other financial information of any client or former client unless required by law to do so, or unless consented to by the client.

(s) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds when the action of the investment adviser or investment adviser representative is subject to and does not comply with the

⁶ Note: 1956 Act § 102(b).

requirements of Rule 411(f)-1.

- (t) Engaging in any act, practice, or course of business which is fraudulent, deceptive, manipulative or unethical.
- (u) 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.
- (v) Accessing a client's account by using the client's own unique identifying information (such as username and password).*
- (w) Failing to establish, maintain, and enforce a required policy or procedure.

* This rule amendment is not intended to apply to data aggregation software where: (a) the investment adviser does not know, or have access to, the client's password(s); (b) there is an agreement between the data aggregation software company and the custodian(s)/online account platform which permits this "back-door" access; and (c) the data is read-only (*i.e.*, the investment adviser can only view the information and cannot effectuate any changes to the client's underlying account(s)).

~~56 Act cross reference 102(a)(4)-1~~

Appendix 3

**NASAA Recordkeeping Requirements For Investment Advisers
(Model Rule 203(a)-2)**

(Adopted September 3, 1987; Amended May 3, 1998, April 18, 2004, September 11, 2005, September 11, 2011, May 15, 2013, May 19, 2019, _____)

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 1956. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

[ALTERNATIVE 1:]

- (a) 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:
 - (1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.
 - (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
 - (3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser 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. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank, broker-dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.
 - (4) All check books, bank statements, canceled checks and cash reconciliations of the investment adviser.
 - (5) All bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business as an investment adviser.

- (6) All trial balances, financial statements, and internal audit working papers relating to the investment adviser's business as an investment adviser. 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 worth computation, if applicable, as required by Rule 202(d)-1 of this Act.
- (7) Originals of all written communications received and copies of all written communications sent by the investment adviser relating to
 - (A) any recommendation made or proposed to be made and any advice given or proposed to be given,
 - (B) any receipt, disbursement or delivery of funds or securities,
 - (C) the placing or execution of any order to purchase or sell any security, or
 - (D) predecessor performance (as defined in Rule 102(a)(4)-1(m)(5)(xiv)) and the performance or rate of return of any or all managed accounts, portfolios (as defined in Rule 102(a)(4)-1(m)(5)(xiii)), or securities recommendations, provided, however,
 - (i) that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and
 - (ii) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular or advertisement a memorandum describing the list and its source.
- (8) A list or other record of all accounts which list 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.
- (9) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser.
- (10) A copy in writing of each agreement entered into by the investment adviser with any

client, and all other written agreements otherwise relating to the investment adviser's business as an investment adviser.

- (11) (A) A file containing a copy of each:
- (i) advertisement (as defined in Rule 102(a)(4)-1(m)(5)(i)) that the investment adviser disseminates, directly or indirectly, except:
 - (a) For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement, and
 - (b) For compensated oral testimonials and endorsements (as defined in Rule 102(a)(4)-1(m)(5)(xix) and (vi), respectively), the adviser may instead make and keep a record of the disclosures provided to clients or investors pursuant to Rule 102(a)(4)-1(m)(2)(i);
 - (ii) notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to ten or more persons (other than persons connected with the investment adviser); and
 - (iii) if the 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.
- (B) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement in the event the adviser obtains a copy of the questionnaire or survey.
- .
- (12) (A) A record of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except
- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and

- (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) For purposes of this subsection (12) the following definitions will apply. The term “advisory representative” shall mean any partner, officer or director of the investment adviser; any employee who participates in any way in the determination of which recommendations shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations:

- (i) any person in a control relationship to the investment adviser,
- (ii) any affiliated person of a controlling person and
- (iii) any affiliated person of an affiliated person.

“Control” shall 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 25% of the voting securities of a company shall be presumed to control such company.

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

- (13) (A) Notwithstanding the provisions of subsection (12) above, where 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 advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except

- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
- (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) 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 lesser, the investment adviser derived, on an unconsolidated basis, more than 50% of
 - (i) its total sales and revenues, and
 - (ii) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.
- (C) For purposes of this subsection (13) the following definitions will apply. The term "advisory representative", when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, shall mean any partner, officer, director or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the

effective dissemination of the recommendations and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of the information concerning the recommendations:

- (i) any person in a control relationship to the investment adviser,
- (ii) any affiliated person of a controlling person, and
- (iii) any affiliated person of an affiliated person.

“Control” shall 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 25 percent of the voting securities of a company shall be presumed to control such company.

- (D) An investment adviser shall not be deemed to have violated the provisions of this subsection (13) because of the failure to record securities transactions of any advisory representative if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.
- (14) A copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 203(b)1 of this Act, 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.
- (15) For each client that was obtained by the adviser by means of a promotor to whom cash or non-cash compensation was provided by the adviser:
- (A) If not included in the advertisement, a record of the disclosures provided to clients or investors pursuant to Rule 102(a)(4)-1(m)(2)(i) and Rule 102(a)(4)-1(m)(3)(ii);
 - (B) Documentation substantiating the adviser’s reasonable basis for believing that a testimonial or endorsement (as defined in Rule 102(a)(4)-1(m)(5)(xix) and (vi), respectively) complies with Rule 102(a)(4)-1(m) and that the third-party rating (as defined in Rule 102(a)(4)-1(m)(5)(xx)) complies with Rule 102(a)(4)-1(m)(3)(i);
 - (C) A record of the names of all persons who are an investment adviser’s partners, officers, directors, or employees, or a person that controls, is controlled by, or

is under common control with the investment adviser, or is a partner, officer, director or employee of such a person pursuant to Rule 102(a)(4)-1(m) (2)(v);

- (D) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement complies with Rule 102(a)(4)-1(m)(2) and that a third-party rating complies with Rule 102(a)(4)-1(m)(3); and
 - (E) A record of the names of all persons who are the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director, or employee of such a person.
- (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 all managed accounts, portfolios (as defined in Rule 102(a)(4)-1(m)(5)(xiii)), or securities recommendations in any notice, circular, advertisement (as defined in Rule 102(a)(4)-1(m)(5)(i)), newspaper article, investment letter, bulletin, or other communication including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser), including copies of all information provided or offered pursuant to Rule 102(a)(4)-1(m)(4)(iv); provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.
- (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.
- (18) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (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.
- (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 investment

adviser representatives as that term is defined in subsection (a)(12)(B) of this Rule, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

- (21) Where the adviser inadvertently held or obtained a client's securities or funds and returned them to the client within three business days of receiving them or has forwarded checks drawn by clients and made payable to third parties within three business days of receipt the adviser but shall keep the following records:

A ledger or other listing of all securities or funds held or obtained, including 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, sender, or third party;
 - (I) Form of delivery to client, sender, or third party, or a copy of the form of delivery to client, ~~or~~ sender, or third party;
 - (J) Mail confirmation number, if applicable, or confirmation by client, sender, or third party of the funds' or securities' return; and
 - (K) Date each check was received by the adviser.
- (22) 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 NASAA Model Rule 102(e)(1)-1(b)(2), the adviser shall keep the following records:
- (A) A record showing the issuer or current transfer agent's name address, phone number and other applicable contract information pertaining to the party responsible for recording client interests in the securities; and
 - (B) 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.

- (23) (A) A copy of the investment adviser’s Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser’s recordkeeping requirements pursuant to sections (e) and (g) of this rule, the investment adviser must maintain a current copy of these policies and procedures 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 *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any action taken as a result of the violation.
- (24) A record of who the “intended audience” is for an advertisement under Rule 102(a)(4)-1(m)(4)(vi).
- (b) (1) If an investment adviser has custody, as that term is defined in NASAA Model Rule 102(e)(1)-1(d)(2) of the NASAA Custody Rules, the records required to be made and kept under paragraph (a) above shall include:
- (A) 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.
 - (B) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts.
 - (C) A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.
 - (D) Copies of confirmations of all transactions effected by or for the account of any client.
 - (E) A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.

- (F) A copy of each of the client’s quarterly account statements, as generated and delivered by the qualified custodian. If the adviser also generates a statement that is delivered to the client, the adviser shall also maintain copies of such statements along with the date such statements were sent to the clients.
 - (G) If applicable to the 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.
 - (H) A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.
 - (I) If applicable, evidence of the client’s designation of an independent representative.
- (2) If an investment adviser has custody because it advises a pooled investment vehicle, as defined in Rule 102(e)(1)-1(d)(2)(A)(iii), the adviser shall also keep the following records:
- (A) True, accurate and current account statements;
 - (B) Where the adviser complies with Rule 102(e)(1)-1(b)(4) the records required to be made and kept shall include:
 - (i) the date(s) of the audit;
 - (ii) a copy of the audited financial statements; and
 - (iii) evidence of the mailing of the audited financial statements to all limited partners, members or other beneficial owners within 120 days of the end of its fiscal year.
 - (C) Where the adviser complies with rule 102(e)(1)-1(a)(5) the records required to be made and kept shall include:
 - (i) A copy of the written agreement with the independent party reviewing all fees and expenses, indicating the responsibilities of the independent third party.
 - (ii) Copies of all invoices and receipts showing approval by the independent party for payment through the qualified custodian.
- (c) Every investment adviser subject to subsection (a) of this rule who renders any investment supervisory or management service to any client shall, with respect to the

portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

- (1) Records showing separately for each 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.
- (d) 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 the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.
- (e) Every investment adviser subject to subsection (a) of this rule shall preserve the following records in the manner prescribed:
- (1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this rule (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years in the principal office of the investment adviser.
 - (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.
 - (3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in 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.
 - (4) Books and records required to be made under the provisions of paragraphs (a)(17) to (a)(22), inclusive, of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.

- (5) 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) records required to be preserved under paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (a)(17)-(19), (b) and (c) inclusive, of this rule, and (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in subsection (e) of this rule.
- (f) 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 [Administrator] in writing of the exact address where the books and records will be maintained during the period.
- (g) (1) Pursuant to Rule 203(a)-2(e) the records required to be maintained and preserved may be immediately produced or reproduced, and maintained and preserved for the required time, by an investment adviser on:
 - (A) Paper or hard copy form, as those records are kept in their original form; or
 - (B) Micrographic media, including microfilm, microfiche, or any similar medium; or
 - (C) Electronic storage media, including any digital storage medium or system that meets the terms of this section.
- (2) The investment adviser must:
 - (A) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;
 - (B) Provide promptly any of the following that the [Administrator] (by its examiners or other representatives) may request:
 - (i) A legible, true, and complete copy of the record in the medium and format in which it is stored;
 - (ii) A legible, true, and complete printout of the record; and

- (iii) Means to access, view, and print the records; and
 - (C) 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.
- (3) In the case of records created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:
 - (A) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;
 - (B) To limit access to the records to properly authorized personnel and the [Administrator] (including its examiners and other representatives); and
 - (C) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.
- (h) For purposes of this rule, "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.
- (i) 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.
- (j) Every investment adviser registered or required to be registered in this state and that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is licensed in such state and is in compliance with such state's recordkeeping requirements.

[ALTERNATIVE 2: Language for states that incorporate by reference Rule 204-2 of the Investment Advisers Act of 1940.]

- (a) Every investment adviser registered or required to be registered under this Act shall make and keep true, accurate and current the following books, ledgers and records:
 - (1) Those books and records required to be maintained and preserved in compliance with Rule 204-2 of the Investment Advisers Act of 1940 [17 C.F.R. § 275.204-2],

notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.

- (2) 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 as an investment adviser. For purposes of this subsection, "financial statements" means balance sheets, income statements, cash flow statements and net worth computations as required by Rule 202(d)-1.
- (3) A list or other record of all accounts with respect to the funds, securities, or transactions of any client.
- (4) A copy in writing of each agreement entered into by the investment adviser with any client.
- (5) A file containing a copy of each record required by Rule 204-2(11) of the Investment Advisers Act of 1940 including any communication by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (6) A copy of each written statement and each amendment or revision given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 203(b)(1) of this Act 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.
- (7) For each client that was obtained by the adviser by means of a solicitor to whom a cash fee was paid by the adviser, records required by Rule 206(4)- 3 of the Investment Advisers Act of 1940, notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
- (8) All records required by Rule 204-2(16) of the Investment Advisers Act of 1940 including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (9) 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.
- (10) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (11) 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.

- (12) 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 investment adviser representatives which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.
 - (13) For investment advisers who have custody, as that term is defined in Rule 102(e)(1)-1(d)(2), of client funds or securities, all records and evidence of compliance required by Rule 206(4)-2 under the Investment Advisers Act of 1940.
 - (14) (A) A copy of the investment adviser's Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser's recordkeeping requirements pursuant to sections (b) of this rule, the investment adviser must maintain a current copy of these policies and procedures in hard copy in a separate location;
 - (B) All records documenting the investment adviser's compliance with *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any action taken as a result of the violation.
- (b) Every investment adviser subject to subsection (a) of this rule shall preserve for the period described in subsection (e) of this rule the following records in the manner prescribed:
- (1) Books and records required to be made under the provisions of paragraph (a)(1) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment adviser.
 - (2) Books and records required to be made under the provisions of paragraphs (a)(2)-(a)(13), inclusive, of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
 - (3) 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) records required to be preserved under
 - (i) paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (b) and (c) inclusive, of SEC Rule 204-2 of the Investment Advisers Act of 1940 [17 C.F.R. § 275.204-2],
 - (ii) paragraphs (a)(9)-(11) of this rule; and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number.
- (c) To the extent that the U.S. Securities and Exchange Commission promulgates changes to the above-referenced rules of the Investment Advisers Act of 1940, investment advisers in compliance with such rules as amended shall not be subject to enforcement action by the [Administrator] for violation of this rule to the extent that the violation results solely from the investment adviser's compliance with the amended rule.
- (d) Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is licensed in such state and is in compliance with the state's recordkeeping requirements.

NASAA Recordkeeping Requirements For Investment Advisers (Model Rule 203(a)-2)

(Adopted September 3, 1987; Amended May 3, 1998, April 18, 2004, September 11, 2005, September 11, 2011, May 15, 2013, May 19, 2019, _____)

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 1956. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption. ~~NOTE: Italicized information is explanatory and not intended for inclusion in the rule text. Language based on the Uniform Securities Act of 1956, as amended.~~

Rule 203(a)-2. Recordkeeping Requirements ~~[ALTERNATIVE 1]:~~

[ALTERNATIVE 1:]

- (a) 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:
 - (1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.
 - (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
 - (3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser 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. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank, broker-dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.
 - (4) All check books, bank statements, canceled checks and cash reconciliations of the investment adviser.

- (5) All bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business as an investment adviser.
- (6) All trial balances, financial statements, and internal audit working papers relating to the investment adviser's business as an investment adviser. 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 worth computation, if applicable, as required by Rule 202(d)-1 of this Act.
- (7) Originals of all written communications received and copies of all written communications sent by the investment adviser relating to
 - (A) any recommendation made or proposed to be made and any advice given or proposed to be given,
 - (B) any receipt, disbursement or delivery of funds or securities, ~~or~~
 - (C) the placing or execution of any order to purchase or sell any security, or
 - (D) predecessor performance (as defined in Rule 102(a)(4)-1(m)(5)(xiv)) and the performance or rate of return of any or all managed accounts, portfolios (as defined in Rule 102(a)(4)-1(m)(5)(xiii)), or securities recommendations, provided, however,
 - (i) that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and
 - (ii) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular or advertisement a memorandum describing the list and its source.
- (8) A list or other record of all accounts which list 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.
- (9) A copy of all powers of attorney and other evidences of the granting of any

discretionary authority by any client to the investment adviser.

- (10) A copy in writing of each agreement entered into by the investment adviser with any client, and all other written agreements otherwise relating to the investment adviser's business as an investment adviser.

- (11) (A) A file containing a copy of each:

(i) advertisement (as defined in Rule 102(a)(4)-1(m)(5)(i)) that the investment adviser disseminates, directly or indirectly, except:

(a) For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement, and

(b) For compensated oral testimonials and endorsements (as defined in Rule 102(a)(4)-1(m)(5)(xix) and (vi), respectively), the adviser may instead make and keep a record of the disclosures provided to clients or investors pursuant to Rule 102(a)(4)-1(m)(2)(i);

(ii) notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to ten or more persons (other than persons connected with the investment adviser); and

(iii) if the 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.

- (B) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement in the event the adviser obtains a copy of the questionnaire or survey.

~~A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser), and if the 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.~~

- (12) (A) A record of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except
- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
 - (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) For purposes of this ~~subdivision~~ subsection (12) the following definitions will apply. The term “advisory representative” shall mean any partner, officer or director of the investment adviser; any employee who participates in any way in the determination of which recommendations shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations:
- (i) any person in a control relationship to the investment adviser,
 - (ii) any affiliated person of a controlling person and
 - (iii) any affiliated person of an affiliated person.

“Control” shall 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 25% of the voting securities of a company shall be presumed to control such company.

(C) An investment adviser shall not be deemed to have violated the provisions of this ~~subdivision~~subsection (12) because of the failure to record securities transactions of any advisory representative if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

(13) (A) Notwithstanding the provisions of ~~subdivision~~subsection (12) above, where 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 advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except

- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
- (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(B) 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 lesser, the investment adviser derived, on an unconsolidated basis, more than

50% of

- (i) its total sales and revenues, and
- (ii) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.

(C) For purposes of this ~~subdivision~~ subsection (13) the following definitions will apply. The term "advisory representative", when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, shall mean any partner, officer, director or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of the information concerning the recommendations:

- (i) any person in a control relationship to the investment adviser,
- (ii) any affiliated person of a controlling person, and
- (iii) any affiliated person of an affiliated person.

“Control” shall 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 25 percent of the voting securities of a company shall be presumed to control such company.

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

(14) A copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 203(b)1 of this Act, 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.

- (15) For each client that was obtained by the adviser by means of a ~~solicitor~~promotor to whom ~~a cash fee cash or non-cash compensation~~ was ~~paid~~provided by the ~~adviser~~adviser:

- (A) ~~evidence of a written agreement to which the adviser is a party related to the payment of such fee~~ If not included in the advertisement, a record of the disclosures provided to clients or investors pursuant to Rule 102(a)(4)-1(m)(2)(i) and Rule 102(a)(4)-1(m)(3)(ii);
- (B) ~~a signed and dated acknowledgement 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,~~ Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement (as defined in Rule 102(a)(4)-1(m)(5)(xix) and (vi), respectively) complies with Rule 102(a)(4)-1(m) and that the third-party rating (as defined in Rule 102(a)(4)-1(m)(5)(xx)) complies with Rule 102(a)(4)-1(m)(3)(i);
- (C) ~~a copy of the solicitor's written disclosure statement. 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~~ A record of the names of all persons who are an investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person pursuant to Rule 102(a)(4)-1(m) (2)(v);
- (D) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement complies with Rule 102(a)(4)-1(m)(2) and that a third-party rating complies with Rule 102(a)(4)-1(m)(3); and
- (E) A record of the names of all persons who are the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director, or employee of such a person.

~~For purposes of this rule, the term "solicitor" shall mean any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients.~~

- (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 all managed accounts, portfolios (as defined in

Rule 102(a)(4)-1(m)(5)(xiii), or securities recommendations in any notice, circular, advertisement (as defined in Rule 102(a)(4)-1(m)(5)(i)), newspaper article, investment letter, bulletin, or other communication including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser), including copies of all information provided or offered pursuant to Rule 102(a)(4)-1(m)(4)(iv); provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.

- (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.
- (18) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (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.
- (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 investment adviser representatives as that term is defined in ~~subdivision~~ subsection (a)(12)(B) of this Rule, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.
- (21) Where the adviser inadvertently held or obtained a client's securities or funds and returned them to the client within three business days of receiving them or has forwarded checks drawn by clients and made payable to third parties within three business days of receipt the adviser but shall keep the following records:

A ledger or other listing of all securities or funds held or obtained, including 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, sender, or third party;
 - (I) Form of delivery to client, sender, or third party, or a copy of the form of delivery to client, ~~or~~ sender, or third party;
 - (J) Mail confirmation number, if applicable, or confirmation by client, sender, or third party of the funds' or securities' return; and
 - (K) Date each check was received by the adviser.
- (22) 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 NASAA Model Rule 102(e)(1)-1(b)(2), the adviser shall keep the following records:
- (A) A record showing the issuer or current transfer agent's name address, phone number and other applicable contract information pertaining to the party responsible for recording client interests in the securities; and
 - (B) 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.
- (23) (A) A copy of the investment adviser's Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser's recordkeeping requirements pursuant to sections (e) and (g) of this rule, the investment adviser must maintain a current copy of these policies and procedures 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 *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any action taken as a result of the violation.

(24) A record of who the “intended audience” is for an advertisement under Rule 102(a)(4)-1(m)(4)(i-vi).

- (b) (1) If an investment adviser has custody, as that term is defined in NASAA Model Rule 102(e)(1)-1(d)(2) of the NASAA Custody Rules, the records required to be made and kept under paragraph (a) above shall include:
- (A) 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.
 - (B) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts.
 - (C) A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.
 - (D) Copies of confirmations of all transactions effected by or for the account of any client.
 - (E) A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.
 - (F) A copy of each of the client’s quarterly account statements, as generated and delivered by the qualified custodian. If the adviser also generates a statement that is delivered to the client, the adviser shall also maintain copies of such statements along with the date such statements were sent to the clients.
 - (G) If applicable to the 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.
 - (H) A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.
 - (I) If applicable, evidence of the client’s designation of an independent representative.
- (2) If an investment adviser has custody because it advises a pooled investment

vehicle, as defined in Rule 102(e)(1)-1(d)(2)(A)(iii), the adviser shall also keep the following records:

- (A) True, accurate and current account statements;
 - (B) Where the adviser complies with Rule 102(e)(1)-1(b)(4) the records required to be made and kept shall include:
 - (i) the date(s) of the audit;
 - (ii) a copy of the audited financial statements; and
 - (iii) evidence of the mailing of the audited financial statements to all limited partners, members or other beneficial owners within 120 days of the end of its fiscal year.
 - (C) Where the adviser complies with rule 102(e)(1)-1(a)(5) the records required to be made and kept shall include:
 - (i) A copy of the written agreement with the independent party reviewing all fees and expenses, indicating the responsibilities of the independent third party.
 - (ii) Copies of all invoices and receipts showing approval by the independent party for payment through the qualified custodian.
- (c) Every investment adviser subject to subsection (a) of this ~~Rule~~ who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:
- (1) Records showing separately for each 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.
- (d) 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 the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.
- (e) Every investment adviser subject to subsection (a) of this rule shall preserve the following records in the manner prescribed:

- (1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this ~~r~~Rule (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this ~~r~~Rule), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years in the principal office of the investment adviser.
- (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.
- (3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this ~~r~~Rule shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in 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.
- (4) Books and records required to be made under the provisions of paragraphs (a)(17) to (a)(22), inclusive, of this ~~r~~Rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
- (5) Notwithstanding other record preservation requirements of this ~~r~~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) records required to be preserved under paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (a)(17)-(19), (b) and (c) inclusive, of this ~~r~~Rule, and (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this ~~r~~Rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in ~~subdivision~~subsection (e) of this ~~r~~Rule.
- (f) An investment adviser subject to subsection (a) of this ~~r~~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 ~~r~~Rule for the remainder of the period specified in this ~~r~~Rule,

and shall notify the *[Administrator]* in writing of the exact address where the books and records will be maintained during the period.

- (g) (1) Pursuant to Rule 203(a)-2(e) the records required to be maintained and preserved may be immediately produced or reproduced, and maintained and preserved for the required time, by an investment adviser on:
 - (A) Paper or hard copy form, as those records are kept in their original form; or
 - (B) Micrographic media, including microfilm, microfiche, or any similar medium; or
 - (C) Electronic storage media, including any digital storage medium or system that meets the terms of this section.
- (2) The investment adviser must:
 - (A) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;
 - (B) Provide promptly any of the following that the *[Administrator]* (by its examiners or other representatives) may request:
 - (i) A legible, true, and complete copy of the record in the medium and format in which it is stored;
 - (ii) A legible, true, and complete printout of the record; and
 - (iii) Means to access, view, and print the records; and
 - (C) 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.
- (3) In the case of records created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:
 - (A) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;
 - (B) To limit access to the records to properly authorized personnel and the *[Administrator]* (including its examiners and other representatives); and
 - (C) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.
- (h) For purposes of this rule, "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.

- (i) 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 ~~r~~Rule, shall be deemed to be made, kept, maintained and preserved in compliance with this ~~r~~Rule.
- (j) Every investment adviser registered or required to be registered in this state and that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is licensed in such state and is in compliance with such state’s recordkeeping requirements.

[ALTERNATIVE 2: Language for states that incorporate by reference Rule 204-2 of the Investment Advisers Act of 1940.]

~~Rule 203(a)-2 Recordkeeping Requirements [ALTERNATIVE 2] (Language for states which incorporate by reference Rule 204-2 of the Investment Advisers Act of 1940)~~

- (a) Every investment adviser registered or required to be registered under this Act shall make and keep true, accurate and current the following books, ledgers and records:
 - (1) Those books and records required to be maintained and preserved in compliance with Rule 204-2 of the Investment Advisers Act of 1940 ~~(17 C.F.R. 275.204-2 (1996))~~ [17 C.F.R. § 275.204-2], notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
 - (2) 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 as an investment adviser. For purposes of this subsection, “financial statements” means balance sheets, income statements, cash flow statements and net worth computations as required by Rule 202(d)-1.
 - (3) A list or other record of all accounts with respect to the funds, securities, or

transactions of any client.

- (4) A copy in writing of each agreement entered into by the investment adviser with any client.
- (5) A file containing a copy of each record required by Rule 204-2(11) of the Investment Advisers Act of 1940 including any communication by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (6) A copy of each written statement and each amendment or revision given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 203(b)(1) of this Act 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.
- (7) For each client that was obtained by the adviser by means of a solicitor to whom a cash fee was paid by the adviser, records required by Rule 206(4)- 3 of the Investment Advisers Act of 1940, notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
- (8) All records required by Rule 204-2(16) of the Investment Advisers Act of 1940 including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (9) 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.
- (10) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (11) 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.
- (12) 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 investment adviser representatives which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.
- (13) For investment advisers who have custody, as that term is defined in Rule 102(e)(1)-

1(d)(2), of client funds or securities, all records and evidence of compliance required by Rule 206(4)-2 under the Investment Advisers Act of 1940.

- (14) (A) A copy of the investment adviser's Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser's recordkeeping requirements pursuant to sections (b) of this rule, the investment adviser must maintain a current copy of these policies and procedures in hard copy in a separate location;
 - (B) All records documenting the investment adviser's compliance with *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any action taken as a result of the violation.
- (b) Every investment adviser subject to subsection (a) of this rule shall preserve for the period described in ~~subdivision~~subsection (e) of this ~~r~~Rule the following records in the manner prescribed:
- (1) Books and records required to be made under the provisions of paragraph (a)(1) of this ~~r~~Rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment adviser.
 - (2) Books and records required to be made under the provisions of paragraphs (a)(2)-(a)(13), inclusive, of this ~~r~~Rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
 - (3) Notwithstanding other record preservation requirements of this ~~r~~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) records required to be preserved under
 - (i) paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (b) and (c) inclusive, of SEC Rule 204-2 of the Investment Advisers Act of 1940 (~~17 C.F.R. 275.204-2 (1996)~~)[17 C.F.R. § 275.204-2],

- (ii) paragraphs (a)(9)-(11) of this ~~r~~Rule; and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this ~~r~~Rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number.
- (c) To the extent that the U.S. Securities and Exchange Commission promulgates changes to the above-referenced rules of the Investment Advisers Act of 1940, investment advisers in compliance with such rules as amended shall not be subject to enforcement action by the [Administrator] for violation of this ~~r~~Rule to the extent that the violation results solely from the investment adviser's compliance with the amended rule.
- (d) Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is licensed in such state and is in compliance with the state's recordkeeping requirements.

Appendix 4

**NASAA Recordkeeping Requirements For Investment Advisers
(Model Rule 411(c)-1)**

**(Adopted September 17, 2008; Amended September 11, 2011, May 15, 2013,
May 19, 2019, _____)**

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 2002. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

[ALTERNATIVE 1:]

- (a) Every investment adviser registered [licensed] or required to be registered [licensed] under the Act shall make and keep true, accurate and current the following books, ledgers and records:
 - (1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.
 - (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
 - (3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser 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. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank, broker-dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.
 - (4) All check books, bank statements, canceled checks and cash reconciliations of the investment adviser.
 - (5) All bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business.

- (6) All trial balances, financial statements, and internal audit working papers relating to the investment adviser's business.
- (7) Originals of all written communications received and copies of all written communications sent by the investment adviser relating to:
 - (A) any recommendation made or proposed to be made and any advice given or proposed to be given;
 - (B) any receipt, disbursement or delivery of funds or securities;
 - (C) the placing or execution of any order to purchase or sell any security, provided, however,
 - (i) that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and
 - (ii) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular or advertisement a memorandum describing the list and its source; and
 - (D) predecessor performance (as defined in Rule 502(b)(o)(5)(N) and the performance or rate of return of any or all managed accounts, portfolios (as defined in Rule 502(b)(o)(5)(xiii), or securities recommendations.
- (8) A list or other record of all accounts which list 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.
- (9) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser.
- (10) A copy in writing of each agreement entered into by the investment adviser with any client, and all other written agreements otherwise relating to the investment adviser's business as an investment adviser.
- (11) (A) A file containing a copy of each:

- (i) advertisement (as defined in Rule 502(b)(o)(5)(A) that the investment adviser disseminates, directly or indirectly, except:
 - (a) For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement; and
 - (b) For compensated oral testimonials and endorsements (as defined in Rule 502(b)(o)(5)(S) and (F), respectively), the adviser may instead make and keep a record of the disclosures provided to clients or investors pursuant to Rule 502(b)(o)(2)(A); and
 - (ii) notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to ten or more persons (other than persons connected with the investment adviser); and
 - (iii) if the 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.
- (B) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement in the event the adviser obtains a copy of the questionnaire or survey;
- (C) If not included in the advertisement, a record of the disclosures provided to clients or investors under Rule 502(b)(o)(2)(A);
- (D) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement complies with Rule 502(b)(o)(2) and that a third-party rating complies with Rule 502(b)(o)(3);
- (E) A record of the names of all persons who are the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director, or employee of such a person.

- (12) (A) A record of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except
- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
 - (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) For purposes of this subsection (12) the following definitions will apply;
- (i) The term “advisory representative” shall mean any partner, officer or director of the investment adviser; any employee who participates in any way in the determination of which recommendations shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations:
 - (a) any person in a control relationship to the investment adviser,
 - (b) any affiliated person of a controlling person and
 - (c) any affiliated person of an affiliated person.

- (ii) “Control” shall 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 25% of the voting securities of a company shall be presumed to control such company.
- (C) An investment adviser shall not be deemed to have violated the provisions of this subsection (12) because of the failure to record securities transactions of any advisory representative if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.
- (13) (A) Notwithstanding the provisions of subsection (12) above, where 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 advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except
 - (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
 - (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) 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 lesser, the investment adviser derived, on an unconsolidated basis, more than 50% of

- (i) its total sales and revenues, and
- (ii) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.

(C) For purposes of this subsection (13) the following definitions will apply:

- (i) The term "advisory representative", when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, shall mean any partner, officer, director or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons, who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of the information concerning the recommendations:
 - (a) any person in a control relationship to the investment adviser,
 - (b) any affiliated person of a controlling person and
 - (c) any affiliated person of an affiliated person.
- (ii) "Control" shall 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 25 percent of the voting securities of a company shall be presumed to control such company.

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

- (14) A copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 411(g) of the Act, 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.
- (15) For each client that was obtained by the adviser by means of a promotor to whom cash or non-cash compensation was provided by the adviser
 - (A) If not included in the advertisement, a record of the disclosures provided to clients or investors pursuant to Rule 502(b)(o)(2)(A) and Rule 502(b)(o)(3)(B);
 - (B) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement (as defined in Rule 502(b)(o)(5)(S) and (F), respectively) complies with Rule 502(b)(o) and that the third-party rating (as defined Rule 502(b)(o)(5)(T)) complies with Rule 502(b)(o)(3)(A);
 - (C) A record of the names of all persons who are an investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person pursuant to Rule 502(b)(o)(2)(E);
 - (D) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement complies with Rule 502(b)(o)(2) and that a third-party rating complies with Rule 502(b)(o)(3); and
 - (E) A record of the names of all persons who are the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director, or employee of such a person.
- (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 all managed accounts, portfolios (as defined in Rule 502(b)(o)(5)(M), or securities recommendations in any notice, circular, advertisement (as defined in Rule 502(b)(o)(5)(A)), newspaper article, investment letter, bulletin, or other communication including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the

investment adviser), including copies of all information provided or offered pursuant to Rule 502(b)(o)(4)(D); provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.

- (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.
- (18) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (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.
- (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 investment adviser representatives as that term is defined in subsection (a)(12)(B) of this rule, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.
- (21) Copies with original signatures of the investment adviser's appropriate signatory and the investment adviser representative, of each initial Form U4 and each amendment to Disclosure Reporting Pages (DRPs Form U4) 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.
- (22) Where the adviser inadvertently held or obtained a client's securities or funds and returned them to the client within three business days of receiving them or has forwarded checks drawn by clients and made payable to third parties within three business days of receipt the adviser shall keep the following records:

A ledger or other listing of all securities or funds held or obtained, including the following information:

- (A) Issuer;

- (B) Type of securities 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, sender, or third party;
 - (I) Form of delivery to client, sender, or third party, or a copy of the form of delivery to client, sender or third party;
 - (J) Mail confirmation number, if applicable, or confirmation by client, sender or third party of the funds' or securities' return; and
 - (K) Date each check was received by the adviser.
- (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 Rule 411(f)-1(b)(2), the adviser shall keep the following records:
- (A) A record showing the issuer or current transfer agent's name address, phone number and other applicable contract information pertaining to the party responsible for recording client interests in the securities; and
 - (B) 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.
- (24) (A) A copy of the investment adviser's Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser's recordkeeping requirements pursuant to sections (e) and (g) of this rule, the investment adviser must maintain a current copy of these policies and procedures in hard copy at an offsite location;
- (B) All records documenting the investment adviser's compliance with *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any

action taken as a result of the violation.

- (25) A record of who the “intended audience” is for an advertisement under Rule 502(b)(o)(4)(F).
- (b) (1) If an investment adviser has custody, as that term is defined in Rule 411(f)-1(d)(2), the records required to be made and kept under paragraph (a) above shall include:
 - (A) 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.
 - (B) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts.
 - (C) A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.
 - (D) Copies of confirmations of all transactions effected by or for the account of any client.
 - (E) A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.
 - (F) A copy of each of the client’s quarterly account statements, as generated and delivered by the qualified custodian. If the adviser also generates a statement that is delivered to the client, the adviser shall also maintain copies of such statements along with the date such statements were sent to the clients.
 - (G) If applicable to the 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.
 - (H) A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.

- (I) If applicable, evidence of the client's designation of an independent representative.
- (2) If an investment adviser has custody because it advises a pooled investment vehicle, the adviser shall also keep the following records:
 - (A) True, accurate and current account statements;
 - (B) Where the adviser complies with Rule 411(f)-1(b)(4) the records required to be made and kept shall include:
 - (i) the date(s) of the audit;
 - (ii) a copy of the audited financial statements; and
 - (iii) evidence of the mailing of the audited financial to all limited partners, members or other beneficial owners within 120 days of the end of its fiscal year.
 - (C) Where the adviser complies with Rule 411(f)-1(a)(5) the records required to be made and kept shall include:
 - (i) A copy of the written agreement with the independent party reviewing all fees and expenses, indicating the responsibilities of the independent third party.
 - (ii) Copies of all invoices and receipts showing approval by the independent party for payment through the qualified custodian.
- (c) Every investment adviser subject to subsection (a) of this rule who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:
 - (1) Records showing separately for each 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.
- (d) 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 the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

- (e) Every investment adviser subject to subsection (a) of this rule shall preserve the following records in the manner prescribed:
- (1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this rule (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years in the principal office of the investment adviser.
 - (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.
 - (3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in 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.
 - (4) Books and records required to be made under the provisions of paragraphs (a)(17) to (a)(22), inclusive, of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
 - (5) 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) records required to be preserved under paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (a)(17)-(19), (b) and (c) inclusive, of this rule, and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in subsection (e) of this rule.

- (f) 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 [Administrator] in writing of the exact address where the books and records will be maintained during the period.
- (g) (1) Pursuant to Rule 411(c)-1(e) the records required to be maintained and preserved may be immediately produced or reproduced, and maintained and preserved for the required time, by an investment adviser on:
 - (A) Paper or hard copy form, as those records are kept in their original form; or
 - (B) Micrographic media, including microfilm, microfiche, or any similar medium; or
 - (C) Electronic storage media, including any digital storage medium or system that meets the terms of this section.
- (2) The investment adviser must:
 - (A) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;
 - (B) Provide promptly any of the following that the [Administrator] (by its examiners or other representatives) may request:
 - (i) A legible, true, and complete copy of the record in the medium and format in which it is stored;
 - (ii) A legible, true, and complete printout of the record; and
 - (iii) Means to access, view, and print the records; and
 - (C) 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.
- (3) In the case of records created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:
 - (A) To maintain and preserve the records, so as to reasonably safeguard them

from loss, alteration, or destruction;

- (B) To limit access to the records to properly authorized personnel and the [Administrator] (including its examiners and other representatives); and
 - (C) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.
- (h) For purposes of this rule, "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.
- (i) Any book or other record made, kept, maintained and preserved in compliance with Rules 17a-3 and 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.
- (j) Every investment adviser registered [licensed] or required to be registered [licensed] in this state and that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is registered or licensed in such state and is in compliance with such state's recordkeeping requirements.

[ALTERNATIVE 2: Language for states that incorporate by reference Rule 204-2 of the Investment Advisers Act of 1940.]

- (a) Every investment adviser registered [licensed] or required to be registered [licensed] under this Act shall make and keep true, accurate and current the following books, ledgers and records:
- (1) Those books and records required to be maintained and preserved in compliance with Rule 204-2 of the Investment Advisers Act of 1940 (17 C.F.R. § 275.204-2 (1996)), notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
 - (2) 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 as an investment adviser. For purposes of this

subsection, “financial statements” means balance sheets, income statements, cash flow statements and net worth computations as required by Rule 202(d)-1.

- (3) A list or other record of all accounts with respect to the funds, securities, or transactions of any client.
- (4) A copy in writing of each agreement entered into by the investment adviser with any client.
- (5) A file containing a copy of each record required by Rule 204-2(11) of the Investment Advisers Act of 1940 including any communication by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (6) A copy of each written statement and each amendment or revision given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 411(g) of this Act 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.
- (7) For each client that was obtained by the adviser by means of a solicitor to whom a cash fee was paid by the adviser, records required by Rule 206(4)- 3 of the Investment Advisers Act of 1940, notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
- (8) All records required by Rule 204-2(16) of the Investment Advisers Act of 1940 including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (9) 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.
- (10) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (11) 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.
- (12) 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 investment adviser representatives which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

- (13) For investment advisers who have custody, as that term is defined in Rule 411(f)-1(d)(2), of client funds or securities, all records and evidence of compliance required by Rule 206(4)-2 under the Investment Advisers Act of 1940.
 - (14) (A) A copy of the investment adviser's Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser's recordkeeping requirements pursuant to sections (b) of this rule, the investment adviser must maintain a current copy of these policies and procedures 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 *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any action taken as a result of the violation.
- (b) Every investment adviser subject to subsection (a) of this rule shall preserve for the period described in subsection (e) of this rule the following records in the manner prescribed:
- (1) Books and records required to be made under the provisions of paragraph (a)(1) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment adviser.
 - (2) Books and records required to be made under the provisions of paragraphs (a)(2)-(a)(13), inclusive, of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
 - (3) 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) records required to be preserved under
 - (i) paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (b) and (c) inclusive, of SEC Rule 204-2 of the Investment Advisers Act of 1940.
 - (ii) paragraphs (a)(9)-(11) of this rule; and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number.
- (c) To the extent that the U.S. Securities and Exchange Commission promulgates changes to the above- referenced rules of the Investment Advisers Act of 1940, investment advisers in compliance with such rules as amended shall not be subject to enforcement action by the [Administrator] for violation of this rule to the extent that the violation results solely from the investment adviser's compliance with the amended rule.
- (d) Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is registered or licensed in such state and is in compliance with the state's recordkeeping requirements.
- (e) Every investment adviser subject to subsection (a) of this rule shall preserve the following records in the manner prescribed:
- (1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this rule (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years in the principal office of the investment adviser.
 - (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.
 - (3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in 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.

- (4) Books and records required to be made under the provisions of paragraphs (a)(17) to (a)(22), inclusive, of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
- (5) 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) records required to be preserved under paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (a)(17) (19), (b) and (c) inclusive, of this rule, and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in subsection (e) of this rule.

**NASAA Recordkeeping Requirements For Investment Advisers
(Model Rule 411(c)-1)**

(Adopted September 17, 2008; Amended September 11, 2011, May 15, 2013,
May 19, 2019, _____)

Notes for Adopting Jurisdictions: This model rule is intended for jurisdictions that have adopted the Uniform Securities Act of 2002. This model rule includes bracketed text that is intended to be used in the alternative or that is italicized and intended to be explanatory for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations. Jurisdictions should consider and resolve all bracketed text prior to adoption.

~~Rule USA 2002 411(c)-1 Recordkeeping Requirements [ALTERNATIVE 1]:~~

[ALTERNATIVE 1:]

- (a) Every investment adviser registered [licensed] or required to be registered [licensed] under the Act shall make and keep true, accurate and current the following books, ledgers and records:
 - (1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.
 - (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.
 - (3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser 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. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank, broker-dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.
 - (4) All check books, bank statements, canceled checks and cash reconciliations of the investment adviser.

- (5) All bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business.
- (6) All trial balances, financial statements, and internal audit working papers relating to the investment adviser's business.
- (7) Originals of all written communications received and copies of all written communications sent by the investment adviser relating to:
 - (A) any recommendation made or proposed to be made and any advice given or proposed to be given~~;~~¹
 - (B) any receipt, disbursement or delivery of funds or securities~~;~~²
 - ~~(B)~~(C) the placing or execution of any order to purchase or sell any security, provided, however,
 - (i) that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and
 - (ii) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular or advertisement a memorandum describing the list and its source~~;~~ and
 - (D) predecessor performance (as defined in Rule 502(b)(o)(5)(~~xiv~~N) and the performance or rate of return of any or all managed accounts, portfolios (as defined in Rule 502(b)(o)(5)(xiii), or securities recommendations.
- (8) A list or other record of all accounts which list 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.
- (9) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser.
- (10) A copy in writing of each agreement entered into by the investment adviser with any client, and all other written agreements otherwise relating to the

investment adviser's business as an investment adviser.

- (11) (A) A file containing a copy of each:
- (i) advertisement (as defined in Rule 502(b)(o)(5)(A~~i~~) that the investment adviser disseminates, directly or indirectly, except:
 - (a) For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement; and
 - (b) For compensated oral testimonials and endorsements (as defined in Rule 502(b)(o)(5)(S~~ix~~) and (F~~vi~~), respectively), the adviser may instead make and keep a record of the disclosures provided to clients or investors pursuant to Rule 502(b)(o)(2)(~~i~~A); and
 - (ii) notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to ten or more persons (other than persons connected with the investment adviser); and
 - (iii) if the 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.
- (B) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement in the event the adviser obtains a copy of the questionnaire or survey;
- (C) If not included in the advertisement, a record of the disclosures provided to clients or investors under Rule 502(b)(o)(2)(A~~i~~);
- (D) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement complies with Rule 502(b)(o)(2) and that a third-party rating complies with Rule 502(b)(o)(3);
- (E) A record of the names of all persons who are the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a

partner, officer, director, or employee of such a person.

~~A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser), and if the 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.~~

- (12) (A) A record of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except
- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
 - (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) For purposes of this subsection (12) the following definitions will apply;
- (i) The term “advisory representative” shall mean any partner, officer or director of the investment adviser; any employee who participates in any way in the determination of which recommendations shall be made; any employee who, in connection with his duties, obtains any information concerning

which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations:

- (a) any person in a control relationship to the investment adviser,
 - (b) any affiliated person of a controlling person and
 - (c) any affiliated person of an affiliated person.
- (ii) “Control” shall 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 25% of the voting securities of a company shall be presumed to control such company.

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

(13) (A) Notwithstanding the provisions of subsection (12) above, where 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 advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except

- (i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and
- (ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date

and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

- (B) 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 lesser, the investment adviser derived, on an unconsolidated basis, more than 50% of
 - (i) its total sales and revenues, and
 - (ii) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.
- (C) For purposes of this subsection (13) the following definitions will~~y~~ apply:
 - (i) The term "advisory representative", when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, shall mean any partner, officer, director or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons, who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of the information concerning the recommendations:
 - (a) any person in a control relationship to the investment adviser,
 - (b) any affiliated person of a controlling person and
 - (c) any affiliated person of an affiliated person.
 - (ii) "Control" shall 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 25 percent of the voting securities of a company shall be presumed to control such company.

- (D) An investment adviser shall not be deemed to have violated the provisions of this subsection (13) because of the failure to record securities transactions of any advisory representative if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.
- (14) A copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 411(g) of the Act, 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.
- (15) For each client that was obtained by the adviser by means of a ~~solicitor~~ promotor to whom ~~a cash fee~~ cash or non-cash compensation was ~~provided~~ paid by the adviser
- (A) ~~evidence of a written agreement to which the adviser is a party related to the payment of such fee~~ If not included in the advertisement, a record of the disclosures provided to clients or investors pursuant to Rule 502(b)(o)(2)(iA) and Rule 502(b)(o)(3)(iB);
- (B) ~~a signed and dated acknowledgement 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,~~ Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement (as defined in Rule 502(b)(o)(5)(xixS) and (Fvi), respectively) complies with Rule 502(b)(o) and that the third-party rating (as defined Rule 502(b)(o)(5)(Txx)) complies with Rule 502(b)(o)(3)(Ai);
- (C) ~~a copy of the solicitor's written disclosure statement. 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.~~ A record of the names of all

persons who are an investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person pursuant to Rule 502(b)(o)(2)(E~~v~~);

(D) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement complies with Rule 502(b)(o)(2) and that a third-party rating complies with Rule 502(b)(o)(3); and

(E) A record of the names of all persons who are the adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director, or employee of such a person.

~~For purposes of this rule, the term "solicitor" shall mean any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients.~~

- (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 all managed accounts, portfolios (as defined in Rule 502(b)(o)(5)(~~xiii~~M), or securities recommendations in any notice, circular, advertisement (as defined in Rule 502(b)(o)(5)(~~i~~A)), newspaper article, investment letter, bulletin, or other communication including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser), including copies of all information provided or offered pursuant to Rule 502(b)(o)(4)(~~iv~~D); provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.
- (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.
- (18) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.

- (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.
- (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 investment adviser representatives as that term is defined in subsection (a)(12)(B) of this ~~Rule~~, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.
- (21) Copies with original signatures of the investment adviser's appropriate signatory and the investment adviser representative, of each initial Form U4 and each amendment to Disclosure Reporting Pages (DRPs Form U4) 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.
- (22) Where the adviser inadvertently held or obtained a client's securities or funds and returned them to the client within three business days of receiving them or has forwarded checks drawn by clients and made payable to third parties within three business days of receipt the adviser shall keep the following records:
- A ledger or other listing of all securities or funds held or obtained, including the following information:
- (A) Issuer;
 - (B) Type of securities 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, sender, or third party;
 - (I) Form of delivery to client, sender, or third party, or a copy of the form of delivery to client, sender or third party;
 - (J) Mail confirmation number, if applicable, or confirmation by client, sender or third party of the funds' or securities' return; and

- (K) Date each check was received by the adviser.
- (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 Rule 411(f)-1(b)(2), the adviser shall keep the following records:
- (A) A record showing the issuer or current transfer agent’s name address, phone number and other applicable contract information pertaining to the party responsible for recording client interests in the securities; and
 - (B) 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.
- (24) (A) A copy of the investment adviser’s Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser’s recordkeeping requirements pursuant to sections (e) and (g) of this rule, the investment adviser must maintain a current copy of these policies and procedures in hard copy at an offsite location;
- (B) All records documenting the investment adviser’s compliance with *[INSERT RULE CITATION]*, including, but not limited to, evidence of the annual review of the policies and procedures;
- (C) A record of any violation of the *[INSERT RULE CITATION]*, and of any action taken as a result of the violation.
- (25) A record of who the “intended audience” is for an advertisement under Rule 502(b)(o)(4)(~~iv~~F).
- (b) (1) If an investment adviser has custody, as that term is defined in Rule 411(f)-1(d)(2), the records required to be made and kept under paragraph (a) above shall include:
- (A) 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.
 - (B) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts.

- (C) A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.
 - (D) Copies of confirmations of all transactions effected by or for the account of any client.
 - (E) A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.
 - (F) A copy of each of the client's quarterly account statements, as generated and delivered by the qualified custodian. If the adviser also generates a statement that is delivered to the client, the adviser shall also maintain copies of such statements along with the date such statements were sent to the clients.
 - (G) If applicable to the 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.
 - (H) A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.
 - (I) If applicable, evidence of the client's designation of an independent representative.
- (2) If an investment adviser has custody because it advises a pooled investment vehicle, the adviser shall also keep the following records:
- (A) True, accurate and current account statements;
 - (B) Where the adviser complies with Rule 411(f)-1(b)(4) the records required to be made and kept shall include:
 - (i) the date(s) of the audit;
 - (ii) a copy of the audited financial statements; and
 - (iii) evidence of the mailing of the audited financial to all limited partners, members or other beneficial owners within 120 days of the end of its fiscal year.

- (C) Where the adviser complies with Rule 411(f)-1(a)(5) the records required to be made and kept shall include:
 - (i) A copy of the written agreement with the independent party reviewing all fees and expenses, indicating the responsibilities of the independent third party.
 - (ii) Copies of all invoices and receipts showing approval by the independent party for payment through the qualified custodian.
- (c) Every investment adviser subject to subsection (a) of this ~~Rule~~ who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:
 - (1) Records showing separately for each 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.
- (d) 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 the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.
- (e) Every investment adviser subject to subsection (a) of this rule shall preserve the following records in the manner prescribed:
 - (1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this ~~Rule~~ (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this ~~Rule~~), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years in the principal office of the investment adviser.
 - (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.
 - (3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this ~~Rule~~ shall be maintained and preserved in an easily

accessible place for a period of not less than five years, the first two years in 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.

- (4) Books and records required to be made under the provisions of paragraphs (a)(17) to (a)(22), inclusive, of this ~~Rule~~ shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
- (5) 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) records required to be preserved under paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (a)(17)-(19), (b) and (c) inclusive, of this ~~Rule~~, and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this ~~Rule~~ 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 locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in subsection (e) of this ~~Rule~~.
- (f) 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 [Administrator] in writing of the exact address where the books and records will be maintained during the period.
- (g) (1) Pursuant to Rule 411(c)-1(e) the records required to be maintained and preserved may be immediately produced or reproduced, and maintained and preserved for the required time, by an investment adviser on:
 - (A) Paper or hard copy form, as those records are kept in their original form; or

- (B) Micrographic media, including microfilm, microfiche, or any similar medium; or
 - (C) Electronic storage media, including any digital storage medium or system that meets the terms of this section.
- (2) The investment adviser must:
- (A) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;
 - (B) Provide promptly any of the following that the [Administrator] (by its examiners or other representatives) may request:
 - (i) A legible, true, and complete copy of the record in the medium and format in which it is stored;
 - (ii) A legible, true, and complete printout of the record; and
 - (iii) Means to access, view, and print the records; and
 - (C) 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.
- (3) In the case of records created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:
- (A) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;
 - (B) To limit access to the records to properly authorized personnel and the [Administrator] (including its examiners and other representatives); and
 - (C) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.
- (h) For purposes of this Rule, "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.
- (i) Any book or other record made, kept, maintained and preserved in compliance with Rules 17a-3 and 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 ~~r~~Rule, shall be deemed to be made, kept, maintained and preserved in compliance with this ~~r~~Rule.

- (j) Every investment adviser registered [licensed] or required to be registered [licensed] in this state and that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is registered or licensed in such state and is in compliance with such state's recordkeeping requirements.

(Language for states which incorporate by reference Rule 204-2 of the Investment Advisers Act of 1940)

~~Rule USA 2002-411(c)-1 Recordkeeping Requirements /ALTERNATIVE 2/~~

[ALTERNATIVE 2: Language for states that incorporate by reference Rule 204-2 of the Investment Advisers Act of 1940.]

- (a) Every investment adviser registered [licensed] or required to be registered [licensed] under this Act shall make and keep true, accurate and current the following books, ledgers and records:
- (1) Those books and records required to be maintained and preserved in compliance with Rule 204-2 of the Investment Advisers Act of 1940 (17 C.F.R. § 275.204-2 (1996)), notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
 - (2) 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 as an investment adviser. For purposes of this subsection, "financial statements" means balance sheets, income statements, cash flow statements and net worth computations as required by Rule 202(d)-1.
 - (3) A list or other record of all accounts with respect to the funds, securities, or transactions of any client.
 - (4) A copy in writing of each agreement entered into by the investment adviser with any client.
 - (5) A file containing a copy of each record required by Rule 204-2(11) of the Investment Advisers Act of 1940 including any communication by electronic media that the investment adviser circulates or distributes, directly or indirectly, to

two or more persons (other than persons connected with the investment adviser).

- (6) A copy of each written statement and each amendment or revision given or sent to any client or prospective client of the investment adviser in accordance with the provisions of Rule 411(g) of this Act 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.
- (7) For each client that was obtained by the adviser by means of a solicitor to whom a cash fee was paid by the adviser, records required by Rule 206(4)- 3 of the Investment Advisers Act of 1940, notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.
- (8) All records required by Rule 204-2(16) of the Investment Advisers Act of 1940 including but not limited to electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser).
- (9) 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.
- (10) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.
- (11) 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.
- (12) 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 investment adviser representatives which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.
- (13) For investment advisers who have custody, as that term is defined in Rule 411(f)-1(d)(2), of client funds or securities, all records and evidence of compliance required by Rule 206(4)-2 under the Investment Advisers Act of 1940.
- (14) (A) A copy of the investment adviser's Physical Security and Cybersecurity Policies and Procedures and Privacy Policy pursuant to *[INSERT RULE CITATION]*. In addition to the investment adviser's recordkeeping

requirements pursuant to sections (b) of this rule, the investment adviser must maintain a current copy of these policies and procedures 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 [INSERT RULE CITATION], including, but not limited to, evidence of the annual review of the policies and procedures;
 - (C) A record of any violation of the [INSERT RULE CITATION], and of any action taken as a result of the violation.
- (b) Every investment adviser subject to subsection (a) of this rule shall preserve for the period described in subsection (e) of this ~~r~~Rule the following records in the manner prescribed:
- (1) Books and records required to be made under the provisions of paragraph (a)(1) of this ~~r~~Rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment adviser.
 - (2) Books and records required to be made under the provisions of paragraphs (a)(2)-(a)(13), inclusive, of this ~~r~~Rule shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.
 - (3) Notwithstanding other record preservation requirements of this ~~r~~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) records required to be preserved under
 - (i) paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (b) and (c) inclusive, of SEC Rule 204-2 of the Investment Advisers Act of 1940.
 - (ii) paragraphs (a)(9)-(11) of this ~~r~~Rule; and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this ~~r~~Rule 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 locations' physical address, mailing address, electronic mailing address, or telephone number.

- (c) To the extent that the U.S. Securities and Exchange Commission promulgates changes to the above- referenced rules of the Investment Advisers Act of 1940, investment advisers in compliance with such rules as amended shall not be subject to enforcement action by the [Administrator] for violation of this ~~Rule~~ to the extent that the violation results solely from the investment adviser's compliance with the amended rule.
- (d) Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of this section, provided the investment adviser is registered or licensed in such state and is in compliance with the state's recordkeeping requirements.
- (e) Every investment adviser subject to subsection (a) of this rule shall preserve the following records in the manner prescribed:
 - (1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1), inclusive, of this ~~Rule~~ (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this ~~Rule~~), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years in the principal office of the investment adviser.
 - (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise.
 - (3) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this ~~Rule~~ shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in 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.
 - (4) Books and records required to be made under the provisions of paragraphs (a)(17) to (a)(22), inclusive, of this ~~Rule~~ shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in 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.

- (5) 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) records required to be preserved under paragraphs (a)(3), (a)(7)-(10), (a)(14)-(15), (a)(17) (19), (b) and (c) inclusive, of this ~~Rule~~, and
 - (B) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of this ~~Rule~~ 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 locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in subsection (e) of this ~~Rule~~.