

Marked-Up Version

Proposed

Amendments to the following Rules of the Arkansas Securities Commissioner

102.01(9)	General Provisions – Definitions
204.01(c)	Administration – Rules, Forms, and Orders of Securities Commissioner
301.01(c)	Broker-dealer and Investment Adviser - Supervision Requirements
302.02(b)(1)	Registration Procedure - Investment Adviser - Initial Applications
302.02(h)	Registration Procedure - Investment Adviser – Private Fund Adviser
306.02(b)	Records and Reports of Investment Advisers - Business Records
308.02	Fraudulent, Deceptive, Dishonest, or Unethical Practices of Investment Advisers
309.01	Protections of Vulnerable Adults from Financial Exploitation
503.01(c)	Exempted Securities
504.01(a)(12)	Exempted Transactions – Arkansas-only Securities Offering
504.01(a)(13)	Exempted Transactions – Discretionary Exemptions
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603.03	Practice and Procedure – Motions
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607.01	Registration of Individuals – Broker-dealer Agent or Investment Adviser Representative

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

CHAPTER 1 – GENERAL PROVISIONS

102.01 DEFINITIONS

- (9) CLIENT. For purposes of Section 23-42-102(8)(9)(E)(ii) of the Act, the following shall be deemed a single client:

CHAPTER 2 – ADMINISTRATION

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

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

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- (5) NOTICE FILINGS.
 - (A) Uniform Investment Company Notice Filing (Form NF).
 - (B) Uniform Application for Investment Adviser Registration (Form ADV).
 - (C) Uniform Notice of Regulation A – Tier 2 Offering

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CHAPTER 3 - BROKER-DEALERS AND INVESTMENT ADVISERS

RULE 301 REGISTRATION REQUIRED

301.01 GENERAL PROVISIONS

301.01(c) SUPERVISION REQUIREMENTS

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- (2) Written Procedures
 - (J)(i)(a) An office of supervisory jurisdiction of a broker-dealer shall be inspected at least annually. For the purposes of this section, the term “office of supervisory jurisdiction” shall have the same meaning as that term is defined in FINRA Rules 3010(g)(e).
 - (K) ~~A business continuity plan generally providing for, but not limited to, the protection, back up, and recovery of books and records; establishing alternate means of communications with customers, employees, and~~

~~regulators; office relocation in the event of a loss of principal place of business; and a designation of duties to responsible person(s) in the event of the death or disability of a key individual, principal, owner, or other such personnel.~~

Every broker-dealer and investment adviser shall establish, implement, and maintain written procedures relating to a Business Continuity and Succession Plan. The plan shall provide for at least the following:

1. The protection, backup, and recovery of books and records.
2. Alternate means of communications with customers, key personnel, employees, vendors, service providers, including third-party custodians, and regulators, including but not limited to providing notice of a significant business interruption or the death or unavailability of key personnel or other disruptions or cessation of business activities.
3. Office relocation in the event of temporary or permanent loss of a principal place of business.
4. Assignment of duties to qualified responsible persons in the event of the death or unavailability of key personnel.
5. Otherwise minimizing service disruptions and client harm that could result from a sudden significant business interruption.

An investment adviser should periodically test the Business Continuity and Succession Plan to ensure that it is adequate, effective, and current.

RULE 302 REGISTRATION PROCEDURE

302.02 INVESTMENT ADVISER

(b) APPLICATION FOR INVESTMENT ADVISER REGISTRATION.

- (1)(B)(iv) Copies of investment advisory contracts to be used by the investment adviser. All investment advisory contracts entered into by the investment adviser with any client shall be fair and reasonable and indicate the customer's risk tolerance, investment objectives, annual income, net worth, and liquid net worth, and shall be signed and dated by all persons having an interest in the account.

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

- (1) Definitions. For purposes of this regulation, the following definitions shall apply:
- (A) “Value of primary residence” means the fair market value of a person’s primary residence, subtracted by the amount of debt secured by the property up to its fair market value.
 - (B) “Private fund adviser” means an investment adviser who provides advice solely to one or more qualifying private funds.
 - (C) “Qualifying private fund” means a private fund that meets the definition of a qualifying private fund in Rule 203(m)-1 of the Investment Advisers Act of 1940, 17 C.F.R. 275.203(m)-1.
 - (D) “3(c)(1) fund” means a qualifying private fund that is eligible for the exclusion from the definition of an investment company under section 3(c)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c)(1).
 - (E) “Venture capital fund” means a private fund that meets the definition of a venture capital fund in Rule 203(l)-1 of the Investment Advisers Act of 1940, 17 C.F.R. § 275.203(l)-1, and is a private fund ultimately comprised of only investors that are accredited investors as defined in Rule 501 of Regulation D, promulgated under the Securities Act of 1933, 17 C.F.R. § 230.501.
- (2) Exemption for private fund advisers. Subject to the additional requirements of paragraph (3) below, a private fund adviser shall be exempt from the registration requirements of Section 23-42-301 if the private fund adviser satisfies each of the following conditions:
- (A) neither the private fund adviser nor any of its advisory affiliates are subject to an event that would disqualify an issuer under Rule 506(d)(1) of SEC Regulation D, 17 C.F.R. § 230.506(d)(1);
 - (B) the private fund adviser files with the state each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to SEC Rule 204-4, 17 C.F.R. § 275.204-4. These filings are to be made electronically through the Investment Adviser Registration Depository (IARD); and
 - (C) the private fund adviser pays the fees specified in Section 304(a)(6).
- (3) Additional requirements for private fund advisers to certain 3(c)(1) funds. In order to qualify for the exemption described in paragraph (2) of this regulation, a

private fund adviser that advises at least one (3)(c)(1) fund that is not a venture capital fund shall, in addition to satisfying each of the conditions specified in paragraphs (2)(A) through (2)(C), comply with the following requirements:

- (A) The private fund adviser shall advise only those 3(c)(1) funds (other than venture capital funds) whose outstanding securities (other than short-term paper) are beneficially owned entirely by persons who, after deducting the value of the primary residence from the person's net worth, would each meet the definition of a qualified client in Rule 205-3 of the Investment Advisers Act of 1940, 17 C.F.R. § 275.205-3, at the time the securities are purchased from the issuer;
- (B) At the time of purchase, the private fund adviser shall disclose the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund:

 - (i) all services, if any, to be provided to individual beneficial owners;
 - (ii) all duties, if any, the investment adviser owes to the beneficial owners; and
 - (iii) any other material information affecting the rights or responsibilities of the beneficial owners.
- (C) The private fund adviser shall obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund, and shall deliver a copy of such audited financial statements to each beneficial owner of the fund.
- (4) Federal covered investment advisers. If a private fund adviser is registered with the Securities and Exchange Commission, the adviser shall not be eligible for this exemption and shall comply with the state notice filing requirements applicable to federal covered investment advisers in Section 23-42-301(c)(1).
- (5) Investment adviser representatives. A person is exempt from the registration requirements of Section 23-42-301(c) if he or she is employed by or associated with an investment adviser that is exempt from registration in this state pursuant to this regulation and does not otherwise act as an investment adviser representative.
- (6) Electronic filing. The report filings described in paragraph (2)(B) above shall be made electronically through the IARD. A report shall be deemed filed when the report and the fee required by Section 23-42-304(a)(6) are filed and accepted by the IARD on the state's behalf.

- (7) Transition. An investment adviser that becomes ineligible for the exemption provided by this rule must comply with all applicable laws and rules requiring registration or notice filing within ninety (90) days from the date the investment adviser's eligibility for this exemption ceases.
- (8) Waiver Authority with Respect to Statutory Disqualification. Paragraph (2)(A) shall not apply upon a showing of good cause and without prejudice to any other action of the commissioner, if the commissioner determines that it is not necessary under the circumstances that an exemption be denied.
- (9) Grandfathering for investment advisers to 3(c)(1) funds with non-qualified clients. An investment adviser to a 3(c)(1) fund (other than a venture capital fund) that has one or more beneficial owners who are not qualified clients as described in subparagraph (c)(1) is eligible for the exemption contained in paragraph (2) of this regulation if the following conditions are satisfied:
- (A) the subject fund existed prior to the effective date of this regulation;
 - (B) as of the effective date of this regulation, the subject fund ceases to accept beneficial owners who are not qualified clients, as described in subparagraph (3)(A) of this regulation;
 - (C) the investment adviser discloses in writing the information described in paragraph (3)(B) to all beneficial owners of the fund; and
 - (D) as of the effective date of this regulation, the investment adviser delivers audited financial statements as required by paragraph (3)(C).
- (10) Requests for records.
- (A) Upon a written request from the commissioner or the commissioner's authorized representative, an investment adviser relying on an exemption provided by this section shall make available to the commissioner all records subject to the custody or control of the investment adviser related to any private fund to which the investment adviser provides investment advice.
 - (B) Failure to comply with this subsection will result in the loss of the exemption provided by this section.

RULE 306 RECORDS AND REPORTS – EXAMINATIONS.

306.02 RECORDS AND REPORTS OF INVESTMENT ADVISERS.

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

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- (7) Originals or electronic copies of all written communications received and copies of all written communications sent by such investment adviser relating to the following:
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- (10) All investment advisory contracts and other written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of the investment adviser. The contracts shall be fair and reasonable and indicate the customer's risk tolerance, investment objectives, annual income, net worth, and liquid net worth, and shall be signed and dated by all persons having an interest in the account.
- ...
- (13) 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 the Brochure Requirement found in Rule 302.02(g), 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.

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

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

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

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- (p) Entering into, extending, or renewing any investment advisory contract, other than a contract for impersonal advisory services, unless the contract is fair and reasonable, in writing, dated, and discloses in substance the following:
- (1) The services to be provided;
 - (2) The term of the contract;

- (3) The investment objectives, risk tolerance levels, annual income, net worth, and liquid net worth for the client;
- (4) The advisory fee or the formula for computing the fee;
- (5) The amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or non-performance;
- (6) Whether the contract grants discretionary power to the adviser; and
- (7) That no assignment of the contract shall be made by the investment adviser without the consent of the other party to the contract.

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- (u) Indicating, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of the Act or of the Investment Advisers Act of 1940, waive rights to seek remedies under state or federal securities laws, or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940.

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309.01 Protections of Vulnerable Adults from Financial Exploitation.

The term “individual” used in section 23-42-309 of the Act means any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.

**CHAPTER 5
REGULATION OF TRANSACTIONS**

RULE 503 EXEMPTED SECURITIES.

503.01 CLASSES OF EXEMPT SECURITIES.

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- (c) **SECURITIES EXEMPTED UNDER SECTION 23-42-503(c) ~~OF THE ACT.~~**

The proof of exemption required to be filed pursuant to Section 23-42-503(d) of the Act, and that may be filed by ~~farm~~ cooperatives pursuant to Section 23-42-503(c) of the Act, shall contain the following unless waived by the Commissioner:

- (1) The filing fee as set forth in Section 23-42-503(d)(5)(B) of the Act;

- (2) A declaration that the Section 23-42-503(c) exemption will be utilized;
- (3) A copy of the Articles of Incorporation and Bylaws of the issuer;
- (4) A description of the method by which full disclosure of material facts will be made to each offeree. A copy of the prospectus, pamphlet, offering circular, or similar literature should be provided, if one is to be used;
- (5) Current financial statements of the issuer;
- (6) A copy of the subscription agreement or other similar agreement;
- (7) A representation that no commissions or other remuneration will be paid in connection with the offer or sale of the securities; and
- (8) Any additional information or documentation that the Commissioner may require.

RULE 504 EXEMPTED TRANSACTIONS.

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

(a) SPECIFIC TYPES OF EXEMPT TRANSACTIONS.

(12) Arkansas-only Crowdfunding Offering. In addition to complying with provisions found in section 23-42-504(a)(12) of the Act, transactions must also comply with the following:

(A) Escrow. The issuer shall provide the Commissioner with a copy of the an escrow agreement with a bank, or depository institution authorized to do business in Arkansas where all funds received from investors shall be deposited until the aggregate capital raised from all purchasers is equal to or greater than the minimum target offering amount specified in the disclosure statement as necessary to implement the business plan. Investors shall receive a return of all their subscription funds if the target offering amount is not raised by the time stated in the disclosure statement. All the funds received from investors shall be used in accordance with all representations made to investors.

(B) The issuer shall file the following with the Commissioner at least ten (10) days before securities are offered or sold:

(i) A written notice of proof of exemption from registration, declaring that an exemption under this subsection is applicable;

- (ii) Any general solicitation, advertising, or other sales literature used in connection with the offering;

- (iii) A copy of the offering documents to be provided to each prospective purchaser in connection with the offering, containing the following:
 - (a) The name, legal status, physical address, and website address of the issuer;

 - (b) The names of the directors, officers, and control person;

 - (c) A description of the business of the issuer and the anticipated business plan of the issuer;

 - (d) A description of the stated purpose and intended use of the proceeds of the offering sought by the issuer, including compensation paid to any officer, director, or control person;

 - (e) The target offering amount, the deadline to reach the target offering amount;

 - (f) A copy of the escrow agreement required in (A);

 - (g) Financial information about the issuer including:
 - 1. The income tax returns filed by the issuer for the most recently completed year;

 - 2. Financial statements of the issuer, which shall be certified by the principal executive officer of the issuer to be true and complete in all material respects; and

 - 3. Audited financial statements, if the issuer has had them prepared within the last three (3) years;

state securities administrator or the SEC within the last five (5) years;

- (b) Has been convicted within the last ten (10) years of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;
- (c) Is subject to any current state or federal administrative enforcement order or judgment, entered within the last five (5) years, finding fraud or deceit in connection with the purchase or sale of any security; or
- (d) Is subject to any current order, judgment, or decree of any court of competent jurisdiction, entered within the last five (5) years, temporarily, preliminarily, or permanently retraining or enjoining the party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security.
- (e) Is subject to an order of any state securities, banking, credit union, and insurance regulators, federal banking regulators, SEC, FINRA, Commodity Futures Trading Commission, United States Postal Service, and the National Credit Union Administration that either:
 - (i) Bar a person from association with an entity regulated by the regulator issuing the order, or from engaging in the business of securities, insurance, or banking, or from savings association or credit union activities; or
 - (ii) Are based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct within a five-year period.

(E) The issuer shall inform all purchasers that the securities have not been registered under the Act and, therefore, cannot be resold unless the securities are registered or qualify for an exemption from registration under Sections 23-42-501 through 504. In addition, the issuer shall make the disclosures required by subsection (E) or SEC Rule 147. 17 C.F.R. 230.147(e).

- (F) This exemption shall not be used in conjunction with any other exemption under the Act except the exemption to institutional investors at Section 23-42-504(a)(8) and for offers and sales to controlling persons of the issuer. Sales to controlling persons shall not count toward the limitation in Section 23-42-504(a)(12)(C).
- (G) The issuer shall provide free of charge a quarterly report to the shareholders. The issuer may satisfy the reporting requirement by making the information available within forty-five (45) after the end of each fiscal quarter and remains available until the succeeding quarterly report is issued. The issuer shall file each quarterly report with the commissioner. The report shall contain, at a minimum, all compensation received by officers, directors and control persons during the reporting period and an analysis of the business operations and financial condition of the issuer.
- (H) Nothing in this exemption shall be construed to alleviate any person from the anti-fraud provisions at Section 23-42-507,

(13) Discretionary Exemptions. ***

- (K) One Hundred Percent (100%) Sale of a Business. Any transaction pursuant to the one hundred percent (100%) sale of securities of a business entity provided the following:
- (i) There are no more than seven (7) purchasers;
 - (ii) Each person purchases with investment intent and any certificates issued will bear an appropriate restrictive legend.
 - (iii) Each person has access to information concerning the issuer;
 - (iv) In connection with the transaction, no commission or other remuneration is paid or given directly or indirectly to any person, other than a business broker acting as such and meeting the conditions set forth in Rule 102.01(17)(18), for soliciting any prospective purchaser; all parties have had the opportunity to consult with counsel.

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RULE 509 COVERED SECURITIES.

509.01 NOTICE FILINGS.

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

- (c) A notice filing or fee is not required for a covered security under Section 18(b)(3) or (4) of the Securities Act of 1933, except as set forth in Rule 509.01(b). The following provisions apply to offerings made under Tier 2 of federal Regulation A and Section 18(b)(3) of the Securities Act of 1933:

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

(A) A completed Regulation A – Tier 2 notice filing form or copies of all documents filed with the SEC;

(B) A consent to service of process on Form U-2 if not filing on the Regulation A – Tier 2 notice filing form; and

(C) The filing fee as prescribed by Section 23-42-509(e)(2);

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

509.02 AGENT REQUIREMENTS.

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

CHAPTER 6 - PRACTICE AND PROCEDURE

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RULE 603 PLEADINGS AND PRACTICE.

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603.03 MOTIONS.

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- (h) Upon written request from a respondent made no less than ten (10) days prior to a scheduled hearing, the following information shall be provided:
- (1) The names and addresses of persons whom the Staff intends to call as witnesses at any hearing;
 - (2) Any written or recorded statements and the substance of any oral statements made by the license holder, or a copy of the same;
 - (3) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments, or comparisons, or copies of the same;
 - (4) Any books, papers, documents, photographs, or tangible objects which the Staff intends to use in any hearing or which were obtained from or belong to the license holder, or copies of the same; and
 - (5) Disclosure shall not be required of research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the Staff or members of the legal Staff or other state agents of the Staff.

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604.13 ORDERS.

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- (b) **SUMMARY ORDER.** In addition to the procedures set forth in Rules 602.02, 604.01, 604.10, 605.01, 606.01, and 604.13(a), the Commissioner may issue a summary order for the following:
- (1) Whether a person is an applicant, registrant, issuer, or other person, to cease and desist from an act or practice or apply directly to a court of competent jurisdiction for such relief as the Commissioner deems appropriate pursuant to Section 23-42-209 of the Act, if the following occurs:

- (A) If it is in the public interest; and
 - (B) The Commissioner deems it necessary.
- (2) To retroactively deny or suspend effectiveness of a registration statement filed pursuant to Section 23-42-402 of the Act if the required notification and pricing amendment is not received.
- (A) If a summary order is entered, the Commissioner must promptly notify the registrant by electronic mail (e-mail), facsimile, or telephone call followed by a letter.
 - (B) If the registrant proves compliance, the summary order is void as of the time of its entry.
 - (C) The summary order remains in effect pending final determination of a proceeding to deny or revoke the effectiveness.
 - (D) The date for a hearing on a summary order shall be set no more than fifteen (15) days after receipt of a written request to hold such a hearing; if no hearing is requested, the summary order will remain in effect until modified or vacated by the Commissioner.
- (3) To suspend or postpone registration of an applicant or registration filed pursuant to Section 23-42-301 of the Act if the Staff learns of an applicant's or registrant's failure to comply with the Act or Rules or when it is determined that the applicant or registrant might be subject to one of the provisions set forth in Section 23-42-308(a) of the Act or a cancellation of registration pursuant to Section 23-42-308(d) of the Act.
- (A) If such a summary order is entered, the Commissioner must promptly notify the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an agent or an investment adviser representative). ~~Notification or service shall be by certified or registered United States Mail.~~ (See Rule 603.08)
 - (B) ~~The summary order remains in effect pending final determination of a proceeding to deny or revoke the application or registration as a result of a hearing.~~
 - (C) ~~The date for a hearing on a summary order shall be set no more than fifteen (15) days after receipt of a written request to hold such a hearing; if no hearing is requested, the summary order will remain in effect until modified or vacated by the Commissioner.~~
 - (D) ~~A summary order entered prior to a hearing can be used to postpone or suspend registration or withdrawal. Revocation can occur only after the filing of a pleading and notice of hearing.~~

- (B) An affected applicant or registrant may request a hearing of the matter by making a written request to the commissioner within thirty (30) days of receipt of a summary order. A requested hearing shall be held within fifteen (15) days of receipt of a written request, but if no hearing is requested and none is ordered by the commissioner, the order will remain in effect as a final order.
- (C) If a hearing is requested or ordered, the summary order remains in effect pending final determination of a proceeding to deny or revoke the application or registration as a result of the hearing.

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RULE 607 REGISTRATION OF INDIVIDUALS.

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

- (a) An applicant for registration, ~~or~~ a registrant, or an applicant seeking withdrawal from registration may agree in writing to allow the Commissioner or the Staff additional time to investigate or examine facts or transactions prior to the registration or the termination becoming effective, thus extending the thirty (30) day time limitation for the review by the Commissioner or the Staff.

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