

Marked-Up Version (3/30/2022)

Proposed

Amendments to the following Rules of the Arkansas Securities Commissioner

301.01(c)	Broker-dealer and Investment Adviser - Supervision Requirements
302.01(f)	Registration Procedure – Broker-dealer – Merger and Acquisition Brokers
302.02(j)	Registration Procedure - Investment Adviser – Proxy Voting Policies and Procedures
302.02(k)	Registration Procedure - Investment Adviser – Code of Ethics
302.02(l)	Registration Procedure - Investment Adviser – Material Non-Public Information
302.02(m)	Registration Procedure - Investment Adviser – IAR Continuing Education
306.02(b)	Records and Reports of Investment Advisers - Business Records
308.02(a)	Fraudulent, deceptive, dishonest, or unethical practices of Investment Advisers – Suitability
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503.01(a)(7)	Exempted Securities – Non-Profit Organization Securities
504.01(a)(13)(K)	Exempted Transactions – Discretionary Exemptions – 100% Sale of a Business
509.01(b)	Covered Securities – Notice Filings

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

## CHAPTER 3 - BROKER-DEALERS AND INVESTMENT ADVISERS

### RULE 301 REGISTRATION REQUIRED.

#### 301.01.1 GENERAL PROVISIONS

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#### (c) SUPERVISION REQUIREMENTS

- (1) Supervisor.
  - (A) Broker-dealer. An agent of a broker-dealer appointed to carry out supervisory responsibilities for a broker-dealer, pursuant to Section 23-42-301 of the Act, shall be registered in this state and comply with the examination requirements of Rule 302.01(c)(3) and (4).
  - (B) Investment adviser. A representative of an investment adviser appointed to carry out supervisory responsibilities for an investment adviser, pursuant to Section 23-42-301 of the Act, shall be registered in this state as a representative.
- (2) Written Policies and Procedures. As evidence of compliance with the supervisory obligations imposed by Section 23-42-301 of the Act, every broker-dealer and investment adviser shall implement written policies and procedures, a copy of which shall be kept in each location at which the broker-dealer or investment adviser conducts business, and shall establish, maintain and enforce those written policies and procedures designed to achieve compliance with the Act and to detect and prevent violations. With consideration for the size and number of locations of the broker-dealer or investment adviser, the written policies and procedures, at a minimum, shall address the following:
  - (A) The supervision of every agent or investment adviser representative, by a designated supervisor. This shall include the following: names, titles, registration status, and locations of all supervisors; the names of the agents or investment adviser representatives the supervisor will supervise, and the responsibilities of each supervisor.
  - (B) Methods to be used to determine that all supervisors are qualified by virtue of character, experience and training to carry out their assigned responsibilities.
  - (C) Methods to be used to determine the good character, business repute, qualifications, and experience of any applicant prior to making application for registration of that person with the Commissioner and

hiring that person.

- (D) The review and written approval by a supervisor of the opening of each new customer account.
- (E) The frequent examination of customer accounts to detect and prevent violations, irregularities or abuses.
- (F) The prompt review and documentation of the handling of customer complaints.
- (G) The prompt review and written approval by a supervisor of all securities transactions, investment advice, and correspondence pertaining to the securities business of registrants.
- (H) The review and written approval by a supervisor of the delegation by a customer of discretionary authority with respect to the customer's account and frequent examination of discretionary accounts to prevent violations, irregularities or abuses.
- (I) The participation of each registrant either individually or collectively, no less than annually, in an interview or meeting conducted by a supervisor at which compliance matters relevant to the activities of the registrant are discussed. Written records shall be maintained reflecting the interview or meeting.
- (J) Periodic Inspections.
  - (i) Each place of business shall be periodically inspected to ensure that the written policies and procedures and systems are enforced.
    - (a) An office of supervisory jurisdiction of a broker-dealer shall be inspected at least annually. For the purposes of this section, the term "office of supervisory jurisdiction" shall have the same meaning as that term is defined in FINRA Rule 3110(f).
    - (b) The principal place of business of each investment adviser shall be inspected at least annually.
    - (c) In establishing an inspection cycle, the broker-dealer and investment adviser shall give consideration to:
      - (1) The size of the broker-dealer or investment adviser;
      - (2) The number and location of the offices;

- (3) The volume of business and the number of agents or investment adviser representatives assigned to the location;
    - (4) The nature and complexity of the securities products and services offered from the location; and
    - (5) The disciplinary history of the registered agents and investment adviser representatives working at the location.
  - (ii) The obligation of diligent supervision required by this Rule may require that one (1) or more locations of a broker-dealer or investment adviser in this state receive more inspections or be on a periodic inspection cycle different than other locations of the broker-dealer or investment adviser, and that inspections be unannounced. Unannounced visits may be appropriate when there are indicators of misconduct such as receipt of significant customer complaints, personnel with disciplinary records, or excessive trade corrections.
- (K) Every broker-dealer and investment adviser shall establish, implement, and maintain written policies and procedures relating to a Business Continuity and Succession Plan. The plan shall provide for at least the following:
- (i) The protection, backup, and recovery of books and records.
  - (ii) 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.
  - (iii) Office relocation in the event of temporary or permanent loss of a principal place of business.
  - (iv) Assignment of duties to qualified responsible persons in the event of the death or unavailability of key personnel.
  - (v) 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.

- (3) All written policies and procedures and evidence of compliance with written policies and procedures shall be maintained for three (3) years, the first two (2) years being in an easily accessible place. The retention and preservation of records may be on electronic medium if adequate facilities are maintained for examination.
- (4) To the extent that this Rule imposes any recordkeeping requirement on an investment adviser registered under Section 23-42-301 of the Act, the recordkeeping requirement does not apply if the investment adviser meets the following conditions:
  - (A) Has its principal place of business in a state other than this state;
  - (B) Is licensed as an investment adviser in the state where it has its principal place of business; and
  - (C) Is in compliance with the recordkeeping requirements of the state in which it has its principal place of business.
- (5) Final responsibility for proper supervision shall rest with the broker-dealer or investment adviser. It is the responsibility of the broker-dealer or investment adviser to ensure through inspections of each business location that the written policies and procedures are enforced and the supervisory obligations imposed by this Rule are being honored.

## **RULE 302 REGISTRATION PROCEDURE**

### **302.01(f) REGISTRATION EXEMPTION FOR MERGER AND ACQUISITION BROKERS**

- (1) Except as provided in subsections (2) and (3), a merger and acquisitions broker shall be exempt from registration pursuant to Section 23-42-301 of the Act.
- (2) Excluded Activities. A merger and acquisition broker is not exempt from registration under this section if the merger and acquisition broker:
  - (A) Directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has

custody of the funds or securities to be exchanged by the parties to the transaction;

- (B) Engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the SEC under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under 15 U.S.C. § 78o(d); or
  - (C) Engages on behalf of any party in a transaction involving a public shell company.
- (3) Disqualifications. A merger and acquisition broker is not exempt from registration under this section if the merger and acquisition broker is subject to:
- (A) Suspension or revocation of registration under section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4);
  - (B) A statutory disqualification described in section 3(a)(39) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(39);
  - (C) A disqualification under the rules adopted by the SEC under section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 77d; or
  - (D) A final order described in paragraph (4)(H) of Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4)(H).
- (4) Definitions – for the purposes of this Rule:
- (A) CONTROL – The term “control” means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control for any person who:
    - (i) Is a director, general partner, managing member, or manager of a limited liability company, or officer exercising executive responsibility (or has similar status or functions);

- (ii) Has the right to vote 20 percent (20%) or more of a class of voting securities or the power to sell or direct the sale of 20 percent (20%) or more of a class of voting securities; or
- (iii) In the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, 20 percent (20%) or more of the capital.

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**302.02 INVESTMENT ADVISER.**

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**302.02 (j) PROXY VOTING POLICIES AND PROCEDURES**

- (1) If an investment adviser has the authority to vote client securities:
  - (A) The investment adviser must establish, maintain, and enforce written proxy voting policies and procedures that are reasonably designed to ensure that the investment adviser votes client securities in the best interest of clients. These procedures must include how the investment adviser addresses material conflicts that may arise between its interests and those of the investment adviser's clients;
  - (B) Disclose to clients how they may obtain information from the investment adviser about how it voted with respect to their securities; and
  - (C) Describe to clients the investment adviser's proxy voting policies and procedures and, upon request, furnish a copy of the policies and procedures to the requesting client.
- (2) If the investment adviser does not have the authority to vote client securities then this information must be disclosed to clients.

**(k) CODE OF ETHICS**

- (1) An investment adviser must establish, maintain, and enforce a written code of ethics that, at a minimum, includes:
  - (A) A standard (or standards) of business conduct that the investment adviser requires of its supervised persons, which must reflect the investment adviser's fiduciary obligations and those of its supervised persons;

- (B) Provisions requiring the investment adviser's supervised persons to comply with applicable State and Federal securities laws;
  - (C) Provisions requiring all of the investment adviser's access persons to report, and the investment adviser to review, their personal securities transactions and holdings periodically as provided below;
  - (D) Provisions requiring supervised persons to report any violations of the investment adviser's code of ethics promptly to its chief compliance officer or, provided the investment adviser's chief compliance officer also receives reports of all violations, to other persons designated in the investment adviser's code of ethics; and
- (2) Holdings reports. The code of ethics must require the investment adviser's access persons to submit to its chief compliance officer or other persons designated in the investment adviser's code of ethics a report of the access person's current securities holdings that meets the following requirements:
- (A) Content of holdings reports. Each holdings report must contain, at a minimum:
    - i. The title and type of security, and as applicable the exchange ticker symbol or CUSIP number, number of shares, and principal amount of each reportable security in which the access person has any direct or indirect beneficial ownership;
    - ii. The name of any broker, dealer, or bank with which the access person maintains an account in which any securities are held for the access person's direct or indirect benefit; and
    - iii. The date the access person submits the report.
  - (B) Timing of holdings reports. The investment adviser's access persons must each submit a holdings report:
    - i. No later than 10 days after the person becomes an access person, and the information must be current as of a date no more than 45 days prior to the date the person becomes an access person.
    - ii. At least once each 12-month period thereafter on a date selected by the investment adviser, and the information

must be current as of a date no more than 45 days prior to the date the report was submitted.

- (3) Pre-approval of certain investments. The investment adviser's code of ethics must require its access persons to obtain the investment adviser's approval before they directly or indirectly acquire beneficial ownership in any security in an initial public offering or in a limited offering.
- (4) Small advisers. If the investment adviser has only one access person, it is not required to submit reports to itself or to obtain its own approval for investments in any security in an initial public offering or in a limited offering, if the investment adviser maintains records of all of its holdings and transactions that this section would otherwise require the investment adviser to report.
- (5) Definitions. For purposes of this rule concerning Code of Ethics the following definitions apply:
  - (A) Supervised person means any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the investment adviser. The definition includes investment adviser representatives, employees, independent contractors, or other associated persons and supervised personnel, or other person acting on the behalf of the investment adviser.
  - (B) Chief compliance officer means a supervised person with the authority and resources to develop and enforce the investment adviser's policies and procedures. The individual designated to serve as chief compliance officer must be registered as an investment adviser representative and must have the background and skills appropriate for fulfilling the responsibilities of the position.
  - (C) Access person means:
    - (i) Any of the investment adviser's supervised persons:
      - (a) Who has access to non-public information regarding any client's purchase or sale of securities, or non-public information regarding the portfolio holdings of any reportable fund, or
      - (b) Who is involved in making securities recommendations to clients, or who has access to such recommendations that are non-public.
    - (ii) If providing investment advice is the investment adviser's primary business, all of its directors, officers and partners are presumed to be access

persons.

**(l) MATERIAL NON-PUBLIC INFORMATION**

An investment adviser must establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by the investment adviser or any person associated with the investment adviser.

**(m) INVESTMENT ADVISER REPRESENTATIVE CONTINUING EDUCATION**

(1) Every investment adviser representative registered under Section 301 of the Act must complete the following investment adviser representative (IAR) continuing education requirements each Reporting Period:

(A) IAR Ethics and Professional Responsibility Requirement. An investment adviser representative must complete six (6) Credits of IAR Regulatory and Ethics Content offered by an Authorized Provider, with at least three (3) hours covering the topic of ethics; and

(B) IAR Products and Practice Requirement. An investment adviser representative must complete six (6) Credits of IAR Products and Practice Content offered by an Authorized Provider.

(2) Agent of FINRA-Registered Broker-dealer Compliance. An investment adviser representative who is also registered as an agent of a FINRA member broker-dealer and who complies with FINRA's continuing education requirements is considered to be in compliance with the subrule (1)(B), IAR Products and Practice Requirement, for each applicable Reporting period so long as FINRA continuing education content meets all of the following baseline criteria as determined by NASAA:

(A) The continuing education content focuses on compliance, regulatory, ethical, and sales practices standards.

(B) The continuing education content is derived from state and federal investment advisory statutes, rules and regulations, securities industry rules and regulations, and accepted standards and practices in the financial services industry.

(C) The continuing education content requires that its participants demonstrate proficiency in the subject matter of the educational materials.

- (3) Credentialing Organization Continuing Education Compliance. Credits of continuing education completed by an investment adviser representative who was awarded and currently holds a credential that qualifies for an examination waiver under Rule 302.02(f)(2) comply with subrules (1)(A) and (1)(B) of this rule provided all of the following are true:
- (A) The investment adviser representative completes the credits of continuing education as a condition of maintaining the credential for the relevant Reporting Period.
  - (B) The credits of continuing education completed during the relevant Reporting Period by the investment adviser representative are mandatory to maintain the credential.
  - (D) The continuing education content provided by the credentialing organization during the relevant Reporting Period is Approved IAR Continuing Education Content.
- (4) IAR Continuing Education Reporting. Every investment adviser representative is responsible for ensuring that the Authorized Provider reports the investment adviser representative's completion of the applicable IAR continuing education requirements.
- (5) No Carry-Forward. An investment adviser representative who completes Credits of continuing education in excess of the amount required for the Reporting Period may not carry forward excess credits to a subsequent Reporting Period.
- (6) Failure to Complete or Report. An investment adviser representative who fails to comply with this rule by the end of a Reporting Period will renew as "CE Inactive" at the close of the calendar year in this state until the investment adviser representative completes and reports all required IAR continuing education Credits for all Reporting Periods as required by this rule. An investment adviser who is CE inactive at the close of the next calendar year is not eligible for investment adviser representative registration or renewal of an investment adviser representative registration.
- (7) Discretionary Waiver by the Administrator. The administrator may, in its discretion, waive any requirements of this rule.
- (8) Home State. An investment adviser representative registered or required to be registered in this state who is registered as an investment adviser representative in the individual's Home State is considered to be in compliance with this rule provided that both of the following are true:
- (A) The investment adviser representative's Home State has continuing education requirements that are at least as stringent as the NASAA Model Rule on

Investment Adviser Representative Education.

- (B) The investment adviser representative is in compliance with the Home State’s investment adviser representative continuing education requirements.
- (9) Unregistered Periods. An investment adviser representative who was previously registered under the Act and became unregistered must complete IAR continuing education for all reporting periods that occurred between the time that the investment adviser representative became unregistered and when the person became registered again under the Act unless the investment adviser representative takes and passes the examination or receives an examination waiver as required by Rule 302.02(f) in connection with the subsequent application for registration.
- (10) Definitions. As used in this rule, the following terms mean:
- (A) “Approved IAR Continuing Education Content” means the materials, written, oral, or otherwise that have been approved by NASAA or its designee and which make up the educational program provided to an investment adviser representative under this rule.
- (C) “Authorized Provider” means a person that NASAA or its designee has authorized to provide continuing education content required by this rule.
- (D) “Credit” means a unit that has been designated by NASAA or its designee as at least 50 minutes of educational instruction.
- (E) “Home State” means the state in which the investment adviser representative has its principal office and place of business.
- (G) “IAR Ethics and Professional Responsibility Content” means Approved IAR Continuing Education Content that addresses an investment adviser representative’s ethical and regulatory obligations.
- (H) “IAR Products and Practice Content” means Approved IAR Continuing Education Content that addresses an investment adviser representative’s continuing skills and knowledge regarding financial products, investment features, and practices in the investment advisory industry.
- (I) “Reporting Period” means one twelve-month (12) period as determined by NASAA. An investment adviser representative’s initial Reporting Period with this state commences the first day of the first full Reporting Period after the individual is registered or required to be registered with this state.

**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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(11) A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication ~~recommending the purchase or sale of a specific security,~~ which the investment adviser circulates or distributes directly or indirectly, to two (2) or more persons (other than persons connected with the investment adviser), ~~and if the communication does not state the reasons for the recommendation, a memorandum of the investment adviser indicating the reasons therefore~~ and all documentation necessary to show the investment adviser is not in violation of Rule 308.02(m).

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(26) Physical Security and Cybersecurity Policies and Procedures and Privacy Policy

(A) The investment adviser must maintain a current copy of these policies and procedures pursuant to Rule ~~301.01(e)(2)(L)~~ 302.02(i) either in hard copy in a separate location or stored on electronic storage media that is separate from and not dependent upon access to the investment adviser's computers or a network;

(B) All records documenting the investment adviser's compliance with Rule ~~301.01(e)(2)(L)~~ 302.02(i) including, but not limited to, evidence of the annual review of the policies and procedures;

(C) A record of any violation of the Rule ~~301.01(e)(2)(L)~~ 302.02(i) and of any action taken as a result of the violation.

(27) Proxy Voting Policies and Procedures. If an investment adviser has authority to vote client securities, the written proxy voting policies and procedures required by Rule 302.02(j).

(28) Code of Ethics. The written code of ethics and holdings reports required by Rule 302.02(k).

(29) Material Non-Public Information. Written policies and procedures to prevent misuse of material non-public information required by Rule 302.02(l).

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

**308.02 FRAUDULENT, DECEPTIVE, DISHONEST OR UNETHICAL PRACTICES OF INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES**

Investment advisers and representatives 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 advisers and representatives that ~~is~~ are 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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- (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, risk tolerance, and any other information known or acquired by the investment adviser after reasonable analysis of the client's information and records as may be provided to the investment adviser. ~~It may be presumed that investments~~ Investments in non-traded direct participation programs including non-traded real estate investment trusts by unaccredited investors are deemed to be unsuitable if the aggregate investment in these securities exceeds 10% of the investor's liquid net worth.
  
- ~~(m) Publishing, circulating, or distributing any advertisement which does not comply with Rule 206(4) 1 under the Investment Advisers Act of 1940 or that does the following:~~
  - ~~(1) Refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by the investment adviser;~~
  
  - ~~(2) Refers, directly or indirectly, to past specific recommendations of the investment adviser that were or would have been profitable to any person; provided, however, that this shall not prohibit an advertisement that sets out or offers to furnish a list of all recommendations made by the investment adviser within the immediately preceding period of not less than one (1) year if the advertisement, and the list, if it is furnished separately, does the following:~~

- (A) States the name of each security recommended, the date and nature of each recommendation (for example, whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of the security as of the most recent practicable date; and
  - (B) Contains the following cautionary legend on the first page thereof in print or type used in the body or text thereof: “it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list”;
- ~~(3) — Represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations thereof and the difficulties with respect to its use;~~
  - ~~(4) — Contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless the report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or~~
  - ~~(5) — Contains any untrue statement of a material fact, or which is otherwise false or misleading.~~
  - ~~(6) — Represents, directly or indirectly, that the commissioner has approved any advertisement.~~
  - ~~(7) — For the purposes of this Rule the term “advertisement” shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any electronic publication, by radio or television, or by any medium that offers any of the following:~~
    - ~~(A) Any analysis, report, or publication concerning securities, or that is to be used in making any determination as to when to buy or sell any security, or that security to buy or sell;~~
    - ~~(B) Any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or that security to buy or sell; or~~
    - ~~(C) Any other investment advisory service with regard to securities.~~
- (m) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of the Act, it is unlawful for

any investment adviser registered or required to be registered under the Act, directly or indirectly, to disseminate any advertisement that violates any of paragraphs (a) through (d) of this section.

(a) General prohibitions. An advertisement may not:

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

(2) 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 Commissioner;

(3) 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;

(4) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;

(5) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or

(6) Otherwise be materially misleading.

(b) Testimonials and endorsements. An advertisement may not include any testimonial or endorsement, and an adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the conditions in paragraphs (b)(1) through (3) of this section, subject to the exemptions in paragraph (b)(4) of this section.

(1) *Required disclosures.* The investment adviser 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) Clearly and prominently:

(A) That the testimonial was given by a current client or investor, and the *endorsement* was given by a person other than a current client or investor, as applicable;



- (1) 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
  - (2) Clearly and prominently discloses, or the investment adviser reasonably believes that the third-party rating clearly and prominently discloses:
    - (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.
- (d) Performance. An investment adviser may not include in any advertisement:
- (1) Any presentation of gross performance, unless the advertisement also presents net performance:
    - (i) With at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance; and
    - (ii) Calculated over the same time period, and using the same type of return and methodology, as the gross performance.
  - (2) 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.
  - (3) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Commissioner.
  - (4) Any related performance, unless it includes all related portfolios, provided that related performance may exclude any related portfolios if:
    - (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 paragraph (d)(2) of this section.

(5) 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.

(6) Any hypothetical performance unless the investment adviser:

(i) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement;

(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 paragraphs (d)(2), (4), and (5) of this section.

(7) Any predecessor performance unless:

(i) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising 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 paragraph (d)(2) of this section; and

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

(e) Definitions. For purposes of this section:

(1) Advertisement means:

(i) 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

(ii) 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.

(2) *De minimis compensation* means compensation paid to a person for providing a *testimonial* or *endorsement* of a total of \$50.00 or less (or the equivalent value in non-cash compensation) during the preceding 12 months.

(3) A *disqualifying action* means an opinion or order by a state or federal securities regulator barring, suspending, or prohibiting the person from acting in any capacity under securities laws.

(4) A *disqualifying event* is any of the following events that occurred within 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 a misdemeanor involving conduct described in sub-section (a)(2)(C) of section 23-42-308 of the Act;

(ii) An injunction by a court of competent jurisdiction within the United States from engaging in or continuing any conduct or practice involving any aspect of the securities business;

- (iii) The entry of any final order by the Commissioner or a securities administrator of another state, any national securities, commodities, banking, or insurance agency, jurisdiction, exchange, or self-regulatory organization to include all orders listed within section 23-42-308(a)(2)(F) of the Act;
- (5) *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.
- (6) *Extracted performance* means the performance results of a subset of investments extracted from a portfolio.
- (7) *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 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.
- (8) *Hypothetical performance* means performance results that were not actually achieved by any portfolio of the investment adviser.
  - (i) Hypothetical performance includes, but is 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, however:
  - (ii) 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; or

(B) Predecessor performance that is displayed in compliance with paragraph (d)(7) of this section.

(9) *Ineligible person* means a person who is subject to a disqualifying action or is subject to any disqualifying event, and the following persons with respect to the 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;
- (ii) If the ineligible person is a partnership, all general partners; and
- (iii) If the ineligible person is a limited liability company managed by elected managers, all elected managers.

(10) *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/or
- (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.
- (11) Portfolio means a group of investments managed by the 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 affiliate (as defined in the Form ADV Glossary of Terms).
- (12) 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.
- (13) Private fund has the same meaning as in Rule 302.02(h).
- (14) 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.
- (15) Related portfolio means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.
- (16) Supervised person has the same meaning as in Rule 302.02(k)(5)(A).
- (17) 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.
- (18) 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 its business.

**CHAPTER 5  
REGULATION OF TRANSACTIONS**

**RULE 503 EXEMPTED SECURITIES.**

**503.01 CLASSES OF EXEMPT SECURITIES.**

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

~~(7) Non-Profit Organization Securities. In order to be exempt under Section 23-42-503(a)(7), a security must meet the qualifications as set forth in the appropriate NASAA Statement of Policies on Church Bonds or Church Extension Fund Securities. The proof of exemption required to be filed pursuant to Section 23-42-503(d) shall contain the following unless waived by the Commissioner:~~

- ~~(A) The filing fee as set forth in Section 23-42-503(d)(5) of the Act;~~
- ~~(B) A declaration that Section 23-42-503(a)(7) of the Act is applicable;~~
- ~~(C) A copy of the Articles of Incorporation and Bylaws of the issuer or the equivalent entity governance documents;~~
- ~~(D) 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;~~
- ~~(E) Copies of all advertising or other material to be distributed in connection with the offering;~~
- ~~(F) A copy of the subscription agreement or other similar agreement;~~
- ~~(G) A copy of any proposed agreement or proposed form of agreement with a securities broker-dealer or underwriter;~~
- ~~(H) A copy of the preliminary or definitive Trust Indenture and/or Trust Agreement, if any;~~
- ~~(I) An opinion of counsel attesting to the authority of the issuer to offer and sell the securities and stating that after the sale the securities will be valid, binding obligations of the issuer in accordance with the issuer's governing documents; and~~
- ~~(J) Any additional information or documentation that the Commissioner may require.~~

(7) Non-Profit Organization Securities. For non-profit organization securities to be exempt under Section 23-42-503(a)(7) a proof of exemption shall be filed with the Commissioner at least ten (10) days prior to any sale of such securities.

- (A) The proof of exemption required to be filed pursuant to Section 23-42-503(d) shall contain the following and the applicable additional items set out in subsections (B), (C), or (D) unless waived by the Commissioner:
- (i) The filing fee as set forth in Section 23-42-503(d)(5) of the Act;
  - (ii) A declaration that Section 23-42-503(a)(7) of the Act is applicable;
  - (iii) 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;
  - (iv) Copies of all advertising or other material to be distributed in connection with the offering;
  - (v) A copy of the subscription agreement or other similar agreement; and
  - (vi) Any additional information or documentation that the Commissioner may require.
- (B) For non-profit organization securities that are neither Church Bonds nor Church Extension Fund Securities the proof of exemption required to be filed pursuant to Section 23-42-503(d) shall contain the items listed in subsection (A) and an affirmation that the securities will be sold by a broker-dealer registered in this State.
- (C) Church Bonds as defined in the Statement of Policy Regarding Church Bonds adopted by NASAA, must meet the qualifications as set forth in the appropriate NASAA Statement of Policy on Church Bonds or any successor policy thereto to be exempt under Section 23-42-503(a)(7). In addition to items required for a proof of exemption filing listed in subsection (A), Church Bonds must also provide a disclosure document prepared in accordance with the Statement of Policy Regarding Church Bonds adopted by NASAA or any successor policy thereto.
- (D) Church Extension Fund Securities as defined in the Statement of Policy Regarding Church Extension Fund Securities adopted by NASAA, must meet the qualifications as set forth in the appropriate NASAA Statement of Policy on Church Extension Fund Securities or any successor policy thereto to be exempt under Section 23-42-503(a)(7). In addition to items required for a proof of exemption filing listed in subsection (A), Church Extension Fund Securities must also provide a disclosure document prepared in

accordance with the Statement of Policy Regarding Church Extension Fund Securities adopted by NASAA or any successor policy thereto.

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- (9) Securities Exempted by Rule Pursuant to Section 23-42-503(a)(9) of the Act. The following securities have been determined by the Commissioner to be exempt from the registration requirements of the Act. In addition, any individual who represents an issuer in effecting transactions in securities exempted under subdivisions (A) through ~~(F)~~(H) below shall not be deemed to be an agent if the transaction involves offers or sales to existing security holders of the issuer and no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this state.
- (A) Any security listed or approved for listing upon its issuance on the following exchanges:
    - (i) Chicago Stock Exchange, Inc.
    - (ii) CME Group, Inc.
    - (iii) NYSE Group, Inc.
    - (iv) The Chicago Board Options Exchange, Inc.
    - (v) Any other stock exchange approved by the Commissioner.
  - (B) Securities listed on Tier I of the NASDAQ OMX PHLX.
  - (C) Options traded on the NASDAQ OMX PHLX that are issued by the Options Clearing Corporation.
  - (D) Any security of an issuer which is of senior or substantially equal rank to a security of the same issuer listed in subdivisions (A), (B), or (C) above.
  - (E) Any security called for by subscription rights or warrants that are exempt under subdivisions (A), (B), (C), or (D) above.
  - (F) Any warrant or right to purchase or subscribe to any security that is exempt under subdivisions (A), (B), (C), (D), or (E) above.
  - (G) Any warrant or right to purchase or subscribe to any security that is covered pursuant to Section 18(b)(1) of the Securities Act of 1933.
  - (H) Any security called for by a subscription right or warrant that is covered pursuant to Section 18(b)(1) of the Securities Act of 1933.

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

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## **RULE 504 EXEMPTED TRANSACTIONS.**

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

#### **(a) SPECIFIC TYPES OF EXEMPT TRANSACTIONS.**

##### **(13) Discretionary Exemptions. \*\*\***

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- (K) Registration Exemption for Merger and Acquisition Brokers 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 merger and acquisition broker acting as such and meeting the conditions set forth in Rule 302.01(f), for soliciting any prospective purchaser.

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## **RULE 509 COVERED SECURITIES.**

### **509.01 NOTICE FILINGS.**

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

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(5) Renewal. For each additional twelve-month period in which the same offering is

continued, the issuer shall submit to the Commissioner the forms and documents required to be filed with the Securities and Exchange Commission under the Securities Act of 1933 and pay a fee of \$100 as set out in Ark. Code Ann. § 23-42-509(c)(3)(C).