

**TITLE 12      TRADE, COMMERCE AND BANKING**  
**CHAPTER 11    SECURITIES**  
**PART 5        INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES AND**  
**FEDERAL COVERED ADVISERS**

**12.11.5.1      ISSUING AGENCY:** Regulation and Licensing Department - New Mexico Securities Division.  
[12.11.5.1 NMAC - Rp, 12.11.5.1 NMAC, 1-1-2010]

**12.11.5.2      SCOPE:** All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives.  
[12.11.5.2 NMAC - Rp, 12.11.5.2 NMAC, 1-1-2010]

**12.11.5.3      STATUTORY AUTHORITY:** Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the “New Mexico Uniform Securities Act”.  
[12.11.5.3 NMAC - Rp, 12.11.5.3 NMAC, 1-1-2010]

**12.11.5.4      DURATION:** Permanent.  
[12.11.5.4 NMAC - Rp, 12.11.5.4 NMAC, 1-1-2010]

**12.11.5.5      EFFECTIVE DATE:** January 1, 2010, unless a later date is cited at the end of a section.  
[12.11.5.5 NMAC - Rp, 12.11.5.5 NMAC, 1-1-2010]

**12.11.5.6      OBJECTIVE:** To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.  
[12.11.5.6 NMAC - Rp, 12.11.5.6 NMAC, 1-1-2010]

**12.11.5.7      DEFINITIONS:** The following definitions apply throughout this part.

**A.** “Custody” means holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them or having the ability to appropriate them.

**(1)** Custody includes:

**(a)** possession of client funds or securities, unless received inadvertently and returned to the sender promptly, but in any case within three business days of receiving them;

**(b)** any arrangement (including a general power of attorney) under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the adviser’s instruction to the custodian; and

**(c)** any capacity (such as a general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives the investment adviser, an owner of the investment adviser, or a supervised person of the investment adviser legal ownership of or access to client funds or securities.

**(2)** Receipt of checks drawn by clients and made payable to unrelated third parties will not meet the definition of custody if forwarded to the third party within 24 hours of receipt and the adviser maintains the records required.

**B.** For purposes of 12.11.5 NMAC, an investment adviser shall not be deemed to be exercising “discretion” or “discretionary authority” when it places trade orders with a broker-dealer pursuant to a third party trading agreement if:

**(1)** the investment adviser has executed a separate investment adviser contract exclusively with its client which acknowledges that a third party trading agreement will be executed to allow the investment adviser to effect securities transactions for the client in the client’s broker-dealer account;

**(2)** the investment adviser contract specifically states that the client does not grant discretionary authority to the investment adviser and the investment adviser in fact does not exercise discretion with respect to the account; and

**(3)** a third party trading agreement is executed between the client and a broker-dealer which specifically limits the investment adviser’s authority in the client’s broker-dealer account to the placement of trade orders and deduction of investment adviser fees.

[12.11.5.7 NMAC - N, 1-1-2010]

**12.11.5.8 ELECTRONIC FILING WITH DESIGNATED ENTITY:**

**A. Designation.** Pursuant to Section 58-13C-406A, the director designates the IARD and the CRD to receive and store filings and collect related fees from investment advisers and investment adviser representatives on behalf of the director.

**B. Use of the IARD and the CRD.** Unless otherwise provided, all investment adviser and investment adviser representative applications, amendments, reports, notices, related filings and fees required to be filed with the director shall be filed electronically with and transmitted to the IARD or the CRD.

**C. Electronic signature.** When a signature or signatures are required by the particular instructions of any filing made through the IARD or the CRD, the applicant or a duly authorized officer of the applicant, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to the IARD or the CRD. Submission of a filing in this manner shall constitute evidence of legal signature by any individuals whose names are typed on the filing.

**D. Non-IARD and non-CRD filings.** Notwithstanding Subsection B of this section, any documents or fees required to be filed with the director that are not permitted to be filed with or cannot be accepted by the IARD or the CRD shall be filed directly with the director.

**E. Hardship exemptions.** This subsection provides two “hardship exemptions” from the requirements to make electronic filings.

**(1) Temporary hardship exemption.**

**(a)** Investment advisers registered or required to be registered under the New Mexico Uniform Securities Act that experience unanticipated technical difficulties that prevent submission of an electronic filing to the IARD may request a temporary hardship exemption from the requirements to file electronically.

**(b)** To request a temporary hardship exemption, the investment adviser must:

**(i)** file the form ADV-H in paper format with the director no later than one business day after the filing that is the subject of the form ADV-H was due; and

**(ii)** submit the filing that is the subject of the form ADV-H in electronic format to the IARD no later than seven business days after the filing was due.

**(c)** The temporary hardship exemption will be deemed effective upon receipt by the director of the complete form ADV-H. Multiple temporary hardship exemption requests within the same calendar year may be disallowed by the director.

**(2) Continuing hardship exemption.** The director may exclude, by order, an investment adviser from the requirement to make electronic filings with the IARD. Such order will be granted only if the director determines that such an exemption is consistent with the public interest and the protection of investors.

[12.11.5.8 NMAC - N, 1-1-2010]

**12.11.5.9 APPLICATION FOR INVESTMENT ADVISER REGISTRATION:**

**A. Initial application.** The application for initial registration as an investment adviser pursuant to Section 58-13C-406A shall be made by completing the form ADV in accordance with the form instructions and by filing the form with the IARD. The application for initial registration shall also include the following:

**(1)** a financial statement demonstrating compliance with the requirements of 12.11.5.23 NMAC, if necessary;

**(2)** the fee required by Section 58-13C-410C;

**(3)** for sole proprietors, proof of compliance by the applicant with the examination requirements of 12.11.5.14 NMAC unless such proof is available to the director through the CRD; and

**(4)** any other information required by the director.

**B. Annual renewal.** Pursuant to Section 58-13C-406D, a registration is effective until midnight on December 31st of the year for which the application for registration was filed. An investment adviser may renew a registration through the IARD and shall pay the fee required by Section 58-13C-410C.

**C. Amendments.**

**(1)** Pursuant to Section 58-13C-406B, if the information or record contained in an application filed under this section is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment in accordance with the instructions in the form ADV.

**(2)** An amendment will be considered to be filed promptly if it is filed within 30 days of the event that requires the filing.

**D. Completion of filing.** An application for initial registration or renewal is not considered filed for purposes of Section 58-13C-406 until the required fee and all additional information requested by the director has been received by the director.  
[12.11.5.9 NMAC - Rp, 12.11.5.8 NMAC, 1-1-2010]

**12.11.5.10 APPLICATION FOR INVESTMENT ADVISER REPRESENTATIVE REGISTRATION:**

**A. Initial application.** The application for initial registration pursuant to Section 59-13C-406A shall be made by completing form U-4 in accordance with the form instructions and by filing the form U-4 with the CRD. The application for initial registration shall also include the following:

- (1) proof of compliance by the investment adviser representative applicant with the examination requirements set out in 12.11.5.14 NMAC unless such proof is available to the director through the CRD; and
- (2) the fee required by Section 58-13C-410D.

**B. Annual renewal.** Pursuant to Section 58-13C-406D, a registration is effective until midnight on December 31st of the year for which the application for registration was filed. An investment adviser representative registration may be renewed through the CRD with payment of the fee required by Section 58-13C-410D.

**C. Amendments.**

(1) Pursuant to Section 58-13C-406B, if the information or record contained in an application filed under this section is or becomes inaccurate or incomplete in a material respect, the investment adviser or investment adviser representative shall promptly file a correcting amendment in accordance with the instructions in the form U-4. The investment adviser and the investment adviser representative are under a continuing obligation to update information required by the form U-4 as changes occur.

(2) An amendment will be considered to be filed promptly if the amendment is filed within 30 days of the event that requires the filing.

**D. Completion of filing.** An application for initial registration or a renewal is not considered filed for purposes of Section 58-13C-406 until the required fee and all additional information and records requested by the director pursuant to Section 58-13C-410D have been received.  
[12.11.5.10 NMAC - Rp, 12.11.5.8 NMAC, 1-1-2010]

**12.11.5.11 NOTICE FILING REQUIREMENTS FOR FEDERAL COVERED INVESTMENT ADVISERS:**

**A. Notice Filing.** The notice filing for a federal covered investment adviser under Section 58-13C-405C of the New Mexico Uniform Securities Act shall be filed with the IARD on an executed form ADV. A notice filing shall be deemed filed when the fee required by Section 58-13C-410E and the complete form ADV are filed with and accepted by the IARD on behalf of the state.

**B. Annual renewal.** The annual renewal of the notice filing for a federal covered investment adviser pursuant to Section 58-13C-405C shall be filed with the IARD. The renewal of the notice filing for a federal covered investment adviser shall be deemed filed when the fee required by Section 58-13C-410E is filed with and accepted by the IARD on behalf of the state.

**C. Updates and amendments.**

(1) A federal covered investment adviser shall file with the IARD, in accordance with the instructions in the form ADV, any amendments to the federal covered investment adviser's form ADV by filing an annual updating amendment within 90 days after the end of its fiscal year.

(2) In addition to filing its annual updating amendment, the federal covered investment adviser shall amend its form ADV by filing additional amendments promptly with the IARD if:

(a) information provided in response to items 1, 3, 9, or 11 of part 1A or items 1, 2.A through 2.F, or 2.I or part 1.B of form ADV become inaccurate in any way;

(b) information provided in response to items 4, 8, 10 of part 1.A or item 2.G of part 1.B of form ADV become materially inaccurate; or

(c) information provided in its brochure becomes materially inaccurate.

(3) An amendment shall be considered to be filed promptly if filed within 30 days of the event that requires the filing of the amendment.

[12.11.5.11 NMAC - Rp, 12.11.5.16 NMAC, 1-1-2010]

**12.11.5.12 INVESTMENT ADVISER BROCHURE RULE:**

**A. DEFINITIONS.** For the purpose of this section:

(1) “contract for impersonal advisory services” means any contract relating solely to the provision of investment advisory services:

(a) by means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts;

(b) through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or

(c) any combination of the foregoing services;

(2) “entering into,” in reference to an investment advisory contract, does not include an extension or renewal without material change of any such contract which is in effect immediately prior to such extension or renewal; and

(3) “investment company contract” means a contract with an investment company registered under the Investment Company Act of 1940 which meets the requirements of Section 15(c) of that act.

**B. General Requirements.** Unless otherwise provided in this section, an investment adviser, registered or required to be registered pursuant to Section 403 of the New Mexico Uniform Securities Act shall, in accordance with the provisions of this section, furnish each advisory client and prospective advisory client with a written disclosure statement which may be a copy of part II of its form ADV or written documents containing at least the information then so required by part II of form ADV, or such other information as the director may require.

**C. Delivery.**

(1) An investment adviser, except as provided in Paragraph (2) of this subsection, shall deliver the statement required by this section to an advisory client or prospective advisory client:

(a) not less than 48 hours prior to entering into any investment advisory contract with such client or prospective client; or

(b) at the time of entering into any such contract, if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract.

(2) The delivery of the statement required by Paragraph (1) of this subsection need not be made in connection with entering into:

(a) an investment company contract; or

(b) a contract for impersonal advisory services requiring a payment of less than \$200.00.

**D. Offer to deliver.**

(1) An investment adviser, except as provided in Paragraph (2) of this subsection, annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the statement required by this section.

(2) The delivery or offer required by Paragraph (1) of this subsection need not be made to advisory clients receiving advisory services solely pursuant to:

(a) an investment company contract; or

(b) a contract for impersonal advisory services requiring a payment of less than \$200.00.

(3) With respect to an advisory client entering into a contract or receiving advisory services pursuant to a contract for impersonal advisory services which requires a payment of \$200.00 or more, an offer of the type specified in Paragraph (1) of this subsection shall also be made at the time of entering into an advisory contract.

(4) Any statement requested in writing by an advisory client pursuant to an offer required by this section must be mailed or delivered within seven days of the receipt of the request.

**E. Omission of inapplicable information.** If an investment adviser renders substantially different types of investment advisory services to different advisory clients, any information required by part II of form ADV may be omitted from the statement furnished to an advisory client or prospective advisory client if such information is applicable only to a type of investment advisory service or fee which is not rendered or charged, or proposed to be rendered or charged, to that client or prospective client.

**F. Other disclosures.** Nothing in this section shall relieve any investment adviser from any obligation pursuant to any provision of the New Mexico Uniform Securities Act or the rules and regulations thereunder or other federal or state law to disclose any information to its advisory clients or prospective advisory clients not specifically required by this section.

[12.11.5.12 NMAC - N, 1-1-2010]

**12.11.5.13 TERMINATION, TRANSFER AND WITHDRAWAL:**

**A. Termination of investment adviser representative’s employment or association.** Pursuant to Section 58-13C-408A, if an investment adviser representative registered under the New Mexico Uniform Securities Act terminates employment by or association with an investment adviser or a federal covered investment adviser or

terminates activities that require registration as an investment adviser representative, the investment adviser or federal covered investment adviser shall complete the form U-5 in accordance with the form instructions and promptly file the form with CRD. If the investment adviser representative learns that the investment adviser or federal covered investment adviser has not filed the form, then the investment adviser representative shall promptly file it. The form will be considered to be filed promptly if it is filed within 30 days of the termination.

**B. Transfer of investment adviser representative's employment or association.** Pursuant to Section 58-13C-408B, if an investment adviser representative registered under the New Mexico Uniform Securities Act terminates employment by or association with an investment adviser or federal covered investment adviser and begins employment by or association with another investment adviser or federal covered investment adviser, an initial application for registration must be filed in compliance with Section 58-13C-406 and 12.11.5.10 NMAC.

**C. Withdrawal.**

(1) The application for withdrawal of a registration by an investment adviser pursuant to Section 58-13C-409 shall be made by following the instructions on form ADV-W and filing the form ADV-W with the IARD.

(2) The application for withdrawal of registration as an investment adviser representative pursuant to Section 58-13C-409 shall be made by following the instructions on form U-5 and filing the form U-5 with the CRD. [12.11.5.13 NMAC - N, 1-1-2010]

**12.11.5.14 EXAMINATION REQUIREMENTS:** An individual applying to be registered as an investment adviser or investment adviser representative under the New Mexico Uniform Securities Act shall provide the director with proof of obtaining a passing score on either:

**A.** the uniform investment adviser law examination (series 65 - post 1999 version); or,

**B.** the general securities representative examination (series 7) and the uniform combined state law examination (series 66 - post 1999 version).

[12.11.5.14 NMAC - Rp, 12.11.5.9 NMAC, 1-1-2010]

**12.11.5.15 LIMITED REGISTRATION:** Any individual whose proposed advisory activities will be restricted shall provide the director with proof of obtaining a passing score on the uniform combined state law examination (series 66 - post 1999 version) and each examination in the following paragraphs that relates to the applicant's proposed activities:

**A.** the investment company products/variable contracts representative examination (series 6);

**B.** the limited registered representative examination (series 17);

**C.** the direct participation programs representative examination (series 22);

**D.** the municipal securities representative examination (series 52);

**E.** the corporate securities representative examination (series 62);

**F.** the government securities limited representative examination (series 72);

**G.** the Canada modules of the series 7 examination (series 37 and 38);

**H.** the Japan module of the series 7 examination (series 47).

[12.11.5.15 NMAC - Rp, 12.11.5.10 NMAC, 1-1-2010]

**12.11.5.16 EXAMINATION REQUIREMENTS WAIVER:** The examination requirement in 12.11.5.14 NMAC is waived for any applicant who meets the criteria set forth in any one of the paragraphs in this section:

**A.** the applicant has been licensed or registered within two years prior to the date the application is filed as an investment adviser or investment adviser representative under the securities law of another state requiring examinations equivalent to the examinations designated in 12.11.5.14 NMAC;

**B.** the applicant has been licensed or registered within two years prior to the date the application is filed as an investment adviser or investment adviser representative under the securities law of another state requiring examinations equivalent to:

(1) either the uniform investment adviser law examination (series 65 - pre 2000 version) or the uniform combined state law examination (series 66 - pre 2000 version); and

(2) either the national association of securities dealers non-member general securities examination (series 2) or the general securities registered representative examination (series 7);

**C.** the applicant has been registered or licensed as an investment adviser or an investment adviser representative under the New Mexico Uniform Securities Act or its predecessor act within two years prior to the date the application is filed.

[12.11.5.16 NMAC - Rp, 12.11.5.11 NMAC, 1-1-2010]

**12.11.5.17 PROFESSIONAL DESIGNATION WAIVERS:** The examination requirements of sections 12.11.5.14 NMAC and 12.11.5.18 NMAC shall not apply to an individual who currently holds at least one of the following professional designations:

- A. chartered financial analyst certification (CFA);
- B. chartered investment counselor certification (CIC);
- C. certified financial planner designation (CFP);
- D. chartered financial consultant certification (ChFC); or
- E. certified public accountant with a personal financial specialist designation (PFS).

[12.11.5.17 NMAC - Rp, 12.11.5.12 NMAC, 1-1-2010]

**12.11.5.18 EXAMINATION REQUIREMENTS - PRINCIPAL:** Prior to initial registration as an investment adviser, and at all times thereafter, the applicant is required to have at least one designated supervisor who, in addition to passing the examinations required in 12.11.5.14 NMAC, has passed, within two years prior to the date the application for registration is filed in this state, the general securities principal examination (series 24) or the general securities sales supervisor qualification examination (series 9/10), unless waived under 12.11.5.17 NMAC. An investment adviser which does not have more than one person associated with the firm who is registered pursuant to the New Mexico Uniform Securities Act is not required to have a designated supervisor and is not required pass examinations in addition to those required in 12.11.5.14 NMAC.

[12.11.5.18 NMAC - Rp, 12.11.5.13 NMAC, 1-1-2010]

**12.11.5.19 LIMITED REGISTRATION:** An applicant may apply for a limited registration to engage in activities limited to one or more of the categories set forth in 12.11.5.15 NMAC, provided the applicant has passed the examination in the category for which the applicant is applying and the applicant has submitted a written statement to the director setting forth how the applicant's activities will be limited in this state and, in the case of an investment adviser representative seeking a limited registration, how the representative will be adequately supervised.

[12.11.5.19 NMAC - Rp, 12.11.5.14 NMAC, 1-1-2010]

**12.11.5.20 SOLICITORS:**

- A. Definitions for purposes of this section:
  - (1) "solicitor" means any individual, person or entity who, directly or indirectly, receives a cash fee or any other economic benefit for soliciting, referring, offering or otherwise negotiating for the sale or selling of investment advisory services to clients on behalf of an investment adviser;
  - (2) "client" includes any prospective client.
- B. It shall be unlawful for any investment adviser, registered or required to be registered, to pay a cash fee or any other economic benefit, directly or indirectly, in connection with solicitation activities unless:
  - (1) the solicitor is registered as an investment adviser representative or is exempt from registration as provided for in Subsection E of this section;
  - (2) the solicitor to whom a cash fee or any other economic benefit is paid for such referral is not a person described in Paragraphs (2) through (6), (8) or (11) through (13) of Section 58-13C-412C of NMSA 1978;
  - (3) the cash fee or any other economic benefit is paid by the investment adviser with respect to solicitation activities that are impersonal in nature in that they are provided solely by means of:
    - (a) written material or oral statements which do not purport to meet the objectives or needs of the specific client;
    - (b) statistical information containing no expressions of opinions as to the merits of particular securities; or
    - (c) any combination of the foregoing services,
  - (4) the cash fee or any other economic benefit is paid pursuant to a written agreement to which the investment adviser is a party and all of the following conditions are met:
    - (a) the written agreement:
      - (i) describes the solicitation or referral activities to be engaged in by the solicitor on behalf of the investment adviser and the cash fee or any other economic benefit to be received for such activities;
      - (ii) contains an undertaking by the solicitor to perform its duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the New Mexico Uniform Securities Act and rules thereunder; and

(iii) requires that the solicitor, at the time of any solicitation or referral activities for which a cash fee or any other economic benefit is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser's disclosure document required under rule 203(b)-1 and a separate disclosure statement as described in Subsection C of this section;

(b) the investment adviser receives from the client, prior to or at the time of entering into any written investment advisory contract, a signed and dated acknowledgement of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document;

(c) the investment adviser makes a bona fide effort and has a reasonable basis for believing that the solicitor has complied with the agreement; and

(d) the foregoing requirements in Subparagraphs (a), (b) and (c) of Paragraph (4) of this subsection shall not apply where the solicitor is:

(i) a partner, officer, director or employee of such investment adviser; or

(ii) a partner, officer, director or employee of a person that controls, is controlled by, or is under common control with such investment adviser, provided the status of the solicitor is disclosed to the client at the time of the solicitation or referral.

C. The separate written disclosure document required to be furnished by the solicitor to the client pursuant to Item (iii) of Subparagraph (a) of Paragraph (4) of Subsection B of this section shall contain the following information:

(1) the name of the solicitor;

(2) the name of the investment adviser;

(3) the nature of the relationship, including any affiliation, between the solicitor and the investment adviser;

(4) a statement that the solicitor will be compensated for solicitation or referral services by the investment adviser;

(5) the terms of the compensation arrangement including a description of the cash fee or any other economic benefit paid or to be paid to the solicitor; and

(6) the amount of compensation the client will pay, if any, in addition to the advisory fees, and whether the cash fee or any other economic benefit paid to the solicitor will be added to the advisory fee, creating a differential with respect to the amount charged to other advisory clients who are not subject to the solicitor compensation arrangement.

D. Nothing in this rule shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law.

E. A solicitor is not required to be registered as an investment adviser or as an investment adviser representative if the solicitor is in compliance with all requirements of Subsections B and C in this section, and the solicitor either:

(1) receives compensation that consists of a one-time payment only; or

(2) receives an order of the director waiving the registration requirement.

[12.11.5.20 NMAC - N, 1-1-2010]

**12.11.5.21 NOT COMPLETED AND WITHDRAWN APPLICATIONS:** Any application for registration that is not completed or withdrawn within six months from the date it is initially received may be deemed materially incomplete and the director may issue an order denying the application.

[12.11.5.21 NMAC - Rp, 12.11.5.15 NMAC, 1-1-2010]

**12.11.5.22 CUSTODY OF CLIENT FUNDS OR SECURITIES BY INVESTMENT ADVISERS:**

A. **Section definitions.** For purposes of this section:

(1) "independent representative" means a person who:

(a) acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle, and by law or contract is obligated to act in the best interest of the advisory client or the limited partners, members or other beneficial owners;

(b) does not control, is not controlled by, and is not under common control with the adviser; and

(c) does not have, and has not had within the past two years, a material business relationship with the adviser;

(2) "qualified custodian" means:

(a) a bank or savings association that has deposits insured by the FDIC under the Federal Deposit Insurance Act;

(b) a registered broker-dealer holding the client assets in customer accounts;

(c) a registered futures commission merchant under Section 4f(a) of the Commodity Exchange Act, holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(d) a foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets; and

(3) "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.

**B. General provision.** It shall be unlawful and a fraudulent or deceptive act, practice, or course of business for any investment adviser registered or required to be registered in New Mexico to take or have custody of any securities or funds of any client unless the investment adviser complies with the provisions of this section.

**C. Notice to director.** The investment adviser shall promptly notify the director in writing that the investment adviser has or may have custody. Such notification is required to be given on form ADV.

**D. Qualified custodian.** The funds and securities shall be maintained by a qualified custodian:

(1) in a separate account for each client under that client's name; or

(2) in accounts that contain only the funds and securities of the adviser's clients, under the adviser's name as agent or trustee for the clients.

**E. Notice to clients.** When the investment adviser opens an account with a qualified custodian for maintaining a client's funds or securities, the adviser shall notify the client promptly in writing of the qualified custodian's name and address and of the manner in which the funds and securities are maintained. The adviser shall notify the client promptly in writing of any changes to this information.

**F. Account statements.**

(1) Account statements must be sent to clients, either by:

(a) a qualified custodian; the investment adviser must have a reasonable basis for believing that the qualified custodian sends an account statement, at least quarterly, to each client for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions during that period; or

(b) the investment adviser.

(2) If the investment adviser sends account statements to its clients, the adviser must comply with the following requirements:

(a) the investment adviser shall send an account statement, at least quarterly, to each client for whom the investment adviser has custody of funds or securities, identifying the amount of funds and of each security of which the investment adviser has custody at the end of the period and setting forth all transactions during that period;

(b) the investment adviser shall engage an independent certified public accountant who shall verify all of those funds and securities by actual examination at least once during each calendar year at a time chosen by the accountant without prior notice or announcement to the adviser and that is irregular from year to year, and shall file a certificate on form ADV-E, 17 C.F.R. Section 279.8, with the director within 30 days after the completion of the examination, stating that it has examined the funds and securities and describing the nature and the extent of the examination; and

(c) the terms of engagement of the independent certified public accountant shall require that, upon finding any material discrepancies during the course of the examination, such accountant shall notify the director within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the director.

(3) Limited partnerships and limited liability companies. If the investment adviser is a general partner of a limited partnership (or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle), the account statements required under this subsection must be sent to each limited partner (or member or other beneficial owner or their independent representative).

(4) Revocable trusts. If an investment adviser, owner of an investment adviser, or supervised person of an investment adviser is serving as trustee of a revocable trust and the investment adviser acts as the investment



adviser to that trust, the account statements required under this subsection must be sent to the grantor of the trust. If the trust assets are being maintained by a qualified custodian, the adviser shall instruct the custodian to send the statements directly to the grantor and must have a reasonable basis for believing the statements are being sent.

**(5) Irrevocable trusts.**

**(a)** If an investment adviser, owner of an investment adviser, or supervised person of an investment adviser is serving as trustee of an irrevocable trust and the investment adviser acts as the investment adviser to that trust, the investment adviser shall send a notice annually to every beneficiary entitled to receive the annual report of the trustee pursuant to Section 46A-8-813C, NMSA 1978. The investment adviser is not required to send this notice to beneficiaries for whom the trustee is also the legal guardian.

**(b)** The notice must state that:

**(i)** the investment adviser or one of its owners or supervised persons is serving as the trustee for the trust;

**(ii)** the investment adviser is providing advisory services to the trust; and

**(iii)** the beneficiary may receive, upon request, a copy of the account statements required by this subsection.

**(c)** The notice required by Subparagraph (a) of this paragraph may be sent with the annual report of the trustee required by Section 46A-8-813C, NMSA 1978.

**(d)** The investment adviser shall arrange for the account statements to be sent to each beneficiary requesting statements. If the trust assets are being maintained by a qualified custodian, the adviser shall instruct the custodian to send the statements directly to the requesting beneficiaries and must have a reasonable basis for believing the statements are being sent. If more than three beneficiaries request statements, the custodian may charge a fee, reflecting its actual costs of copying and mailing the statements, to each beneficiary receiving them.

**(6) Co-trustees.** Compliance with Paragraphs (4) and (5) of this subsection is not required if the trust has at least one co-trustee who is neither a relative of, nor within the past three years has had a material business relationship with, the investment adviser or any of its owners or supervised persons, and the trust's assets are maintained by a qualified custodian who is sending a copy of the account statements required by Paragraph (1) of this subsection directly to the co-trustee.

**G. Independent representatives.** A client may designate an independent representative to receive, on his behalf, notices and account statements as required under Subsections E and F of this section.

**H. Direct fee deduction.**

**(1)** An adviser who has custody by virtue of having fees directly deducted from client advisory accounts must also provide the following safeguards:

**(a)** the investment adviser must have written authorization from the client to deduct advisory fees from the account with the qualified custodian; and

**(b)** each time a fee is directly deducted from a client account, the investment adviser must concurrently:

**(i)** send the qualified custodian an invoice of the amount of the fee to be deducted from the client's account; and

**(ii)** send the client an invoice itemizing the fee; itemization includes the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee; invoices need not be sent more frequently than every quarter, provided that the invoice must show the calculation of each fee deducted during the quarter.

**(2)** An investment adviser is not required to comply with Item (ii) of Subparagraph (b) of Paragraph (1) of this subsection) for any client who waives in writing the right to receive an itemized invoice. The waiver must describe the right being waived and must be on a document that does not address any other matter.

**(3)** Whenever account statements are required to be sent to a grantor or beneficiary of a trust pursuant to Paragraphs 4 or 5 of Subsection F of this section, the adviser shall send to that person the itemized invoice required by Item (ii) of Subparagraph (b) of Paragraph (1) of this subsection unless the person has executed a waiver in accordance with this subsection.

**(4)** The investment adviser must notify the director in writing that the investment adviser intends to use the safeguards provided in Paragraph (1) of this subsection. Such notification is required to be given on the form ADV.

**(5)** An investment adviser having custody solely by virtue of having fees directly deducted from client advisory accounts and who complies with this subsection and with Subsections D through G of this section is not required to:

(a) meet the financial requirements for custodial advisers set forth in Subsection B of 12.11.5.24 NMAC; and

(b) file an audited balance sheet on form ADV, part II, Schedule G, unless required for some reason other than having custody of client assets.

**I. Mutual fund shares.** With respect to shares of an open-end investment company as defined in Section 5(a)(1) of the Investment Company Act of 1940, 15 U.S.C. Section 80a-5(a)(1), an investment adviser may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with this section.

**J. Certain privately offered securities.**

(1) An investment adviser is not required to comply with this section with respect to securities that are:

(a) acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(b) uncertificated, and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(c) transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(2) This subsection applies to securities held for the account of a limited partnership (or limited liability company or other type of pooled investment vehicle) only if the limited partnership is audited and the audited financial statements are distributed as required by Subsection K of this section.

**K. Limited partnerships subject to annual audit.** An investment adviser is not required to comply with Paragraph (3) of Subsection F of this section with respect to the account of a limited partnership (or limited liability company or another type of pooled investment vehicle) that is subject to audit at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of the fiscal year, or in the case of a fund of funds within 180 days of the end of the fiscal year.

**L. Registered investment companies.** An investment adviser is not required to comply with this section with respect to the account of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 to -64).

**M. Client funds or securities not maintained with qualified custodian.** An investment adviser who intends to have custody of client funds or securities but is not able to utilize a qualified custodian, as defined in this section, must:

(1) first obtain the written approval of the director, and

(2) comply with Subsections C through G of this section, to the extent applicable, including performing those functions that would otherwise be performed by the qualified custodian.

**N. Beneficial trusts.** An investment adviser who has custody of client assets solely because the investment adviser, an owner of the investment adviser, or a supervised person of the investment adviser is a trustee for a beneficial trust and the beneficial owner of the trust is a parent, grandparent, spouse, sibling, child or grandchild of the trustee is not required to file an audited balance sheet on form ADV, part II, schedule G if the investment adviser complies with this section. These relationships include "step" relationships.

[12.11.5.22 NMAC - N, 1-1-2010]

#### **12.11.5.23 MINIMUM FINANCIAL REQUIREMENTS FOR INVESTMENT ADVISERS:**

**A. All investment advisers.** An investment adviser registered or required to be registered under the New Mexico Uniform Securities Act that shall maintain at all times a minimum net worth of \$5,000 or such amount as may be required by any other applicable subsection of this rule, whichever requirement is higher.

**B. Investment advisers with custody.** An investment adviser registered or required to be registered under the Act that has custody of client funds or securities shall maintain at all times a minimum net worth of \$2,000,000, or post a surety bond in the amount set by order of the director up to a maximum of \$2,000,000.

**C. Investment advisers with discretionary authority.** An investment adviser registered or required to be registered under the New Mexico Uniform Securities Act that has discretionary authority over client funds or securities but does not have custody of client funds or securities shall maintain at all times a minimum net worth of \$10,000, unless the director by order approves a lesser minimum net worth.

**D. Net worth less than minimum requirement.** Unless otherwise exempted, as a condition of the right to transact business in this state, every investment adviser registered or required to be registered under the New Mexico Uniform Securities Act shall by the close of business on the next business day notify the director if that investment adviser's net worth is less than the minimum required. After transmitting such notice, each investment

adviser shall file by the close of business on the next business day a report with the director of its financial condition, including the following:

- (1) a trial balance of all ledger accounts;
- (2) a statement of all client funds or securities which are not segregated;
- (3) a computation of the aggregate amount of client ledger debit balances; and
- (4) a statement as to the number of client accounts.

**E. Section definition of net worth.** For purposes of 12.11.5.23 NMAC, the term “net worth” shall mean an excess of assets over liabilities, as determined by generally accepted accounting principles.

- (1) Net worth shall not include the following assets:
  - (a) prepaid expenses, except as to items properly classified as assets under generally accepted accounting principles;
  - (b) deferred charges;
  - (c) goodwill;
  - (d) franchise rights;
  - (e) organizational expenses;
  - (f) patents;
  - (g) copyrights;
  - (h) marketing rights;
  - (i) debt discount and expense; and
  - (j) all other assets of intangible nature.
- (2) In addition, for individuals, net worth shall not include home, home furnishings, automobile(s) and any other personal items not readily marketable.
- (3) In addition, for corporations and limited liability companies, net worth shall not include advances or loans to stockholders, officers or members.
- (4) In addition, for partnerships, net worth shall not include advances or loans to partners.

**F. Appraisal.** The director may require that a current appraisal be submitted in order to establish the worth of any asset.

**G. Minimum capital requirement for investment advisers with principal place of business out of state.** Every registered investment adviser that has its principal place of business in a state other than New Mexico shall maintain only such minimum capital as required by such state, provided the investment adviser is licensed or registered in such state and is in compliance with such state’s minimum capital requirement. [12.11.5.23 NMAC - Rp, 12.11.5.17 NMAC and 12.11.5.18 NMAC, 1-1-2010]

#### **12.11.5.24 USE OF THE INTERNET FOR GENERAL DISSEMINATION OF INFORMATION ON PRODUCTS AND SERVICES:**

**A.** Investment advisers and investment adviser representatives who use the internet to distribute information on available products and services through communications made on the internet directed generally to anyone having access to the internet and transmitted through internet communications shall not be considered to be “transacting business” in this state for purposes of Section 58-13C-403A based solely on that fact, provided that:

- (1) the internet communication contains a legend in which it is clearly stated that:
  - (a) the investment adviser or investment adviser representative in question may only transact business in this state if first registered, excluded, or exempted from state investment adviser or investment adviser representative registration requirements; and
  - (b) follow-up, individualized responses to persons in this state by the investment adviser or investment adviser representative that involve either effecting or attempting to effect transactions in securities, or rendering of personalized investment advice for compensation, will not be made without compliance with state investment adviser or investment adviser representative registration requirements or an applicable exemption or exclusion;
- (2) the internet communication contains a mechanism, which includes but is not limited to, technical “firewalls” or other implemented policies and procedures, designed reasonably to ensure that before any subsequent, direct communication with prospective customers or clients in this state, the investment adviser and investment adviser representative are first registered in this state or qualify for an exemption or exclusion from the registration requirement; nothing in this paragraph shall be construed to relieve a state registered investment adviser or investment adviser representative from any applicable securities registration requirement in this state;

(3) the internet communication is limited to the dissemination of general information on products and services and does not involve either effecting or attempting to effect transactions in securities or rendering personalized investment advice for compensation in this state over the internet; and

(4) in the case of an investment adviser representative:

(a) the affiliation of the investment adviser representative with the investment adviser is prominently disclosed within the internet communication;

(b) the investment adviser with whom the investment adviser representative is associated retains responsibility for reviewing and approving the content of any internet communication by an investment adviser representative;

(c) the investment adviser with whom the investment adviser representative is associated first authorizes the distribution of information on the particular products and services through the internet communication; and

(d) in disseminating information through the internet communication, the investment adviser representative acts within the scope of the authority granted by the investment adviser.

**B.** This rule extends to state investment adviser and investment adviser representative registration requirements only, and does not excuse compliance with applicable securities registration, antifraud or related provisions.

**C.** Nothing in this rule shall be construed to affect the activities of any investment adviser or investment adviser representative engaged in business in this state that is not subject to the jurisdiction of the director as a result of the National Securities Markets Improvements Act of 1996, as amended.

[12.11.5.24 NMAC - Rp, 12.11.5.20 NMAC, 1-1-2010]

#### **12.11.5.25 REPORTING REQUIREMENTS:**

**A.** Each investment adviser shall file annually with the director at the time when the renewal report and fee are due, a completed form ADV-E and a financial statement, prepared in accordance with generally accepted accounting principles and certified by an independent certified public accountant, showing the financial condition of such investment adviser as of the most recent practicable date. Investment advisers who do not retain custody of clients' funds or securities may file unaudited financial statements and need not file form ADV-E.

**B.** Each investment adviser shall file with the director a copy of any complaint related to its business, transactions, or operations naming the investment adviser or any of its partners, officers or investment adviser representatives as defendants in any civil or criminal proceeding, or in any administrative or disciplinary proceeding by any public or private regulatory agency, within 20 days of the date the complaint is served on the investment adviser; a copy of any answer or reply to the complaint filed by the investment adviser within ten days of the date the answer or reply is filed; and a copy of any decision, order or sanction made with respect to any such proceeding within 20 days of the date the decision, order or sanction is rendered.

**C.** Each investment adviser, using the appropriate schedule to form ADV, shall file with the director a notice of transfer of control or change of name not less than 30 days prior to the date on which the transfer of control or change of name is to become effective, or such shorter period as the director may permit.

[12.11.5.25 NMAC - Rp, 12.11.5.21 NMAC, 1-1-2010]

**12.11.5.26 DENIAL, SUSPENSION AND REVOCATION:** Any order denying, suspending, revoking, canceling or limiting the registration of, and any order barring, an investment adviser or investment adviser representative may include such other sanctions as the director finds appropriate.

[12.11.5.26 NMAC - Rp, 12.11.5.22 NMAC, 1-1-2010]

#### **12.11.5.27 WITHDRAWAL OF REGISTRATION:**

**A.** An application for withdrawal of the registration of an investment adviser, registered under the New Mexico Uniform Securities Act, shall be filed by the registrant on form ADV-W and shall include a report on the status of all customer accounts of the registrant in this state and any additional information the director may require.

**B.** An application for withdrawal of the registration of an investment adviser representative, registered under the New Mexico Uniform Securities Act, shall be filed with the director on form U-5 by the investment adviser within 15 days of the termination of the representative's employment.

[12.11.5.27 NMAC - Rp, 12.11.5.23 NMAC, 1-1-2010]

**12.11.5.28 BRANCH OFFICE SUPERVISORY REQUIREMENTS:** Every registered investment adviser must employ at its principal office and at each branch office in this state at least one person designated to act in a supervisory capacity who is qualified as an investment adviser representative in this state and has satisfied the principal's examination requirement in 12.11.5.18 NMAC. The designated supervisor must meet the requirements of this section at the time that the principal or branch office located in this state opens for business. The designated supervisor must be physically located in the office that he or she supervises. After a principal or branch office located in this state opens for business, if the designated supervisor no longer meets the requirements of this section, the investment adviser shall have 90 days from the first date of noncompliance to meet the requirements of this section, provided that the investment adviser provides the director with written notice of the event of noncompliance within five days of such event and further sets forth the method of supervision pending the replacement of the designated supervisor.

**A.** For single-representative offices, this section shall be satisfied if at least one person who meets the requirements of 12.11.5.18 NMAC is employed on a full-time basis by the investment adviser, and the investment adviser shall:

(1) conduct annual on-site field audits, by a person who meets the requirements of 12.11.5.18 NMAC, of each single-representative office, including but not limited to an examination for compliance with books and records requirements, and for compliance with the rules of conduct of 12.11.7 NMAC.

(2) maintain in its principal office the results of all field audits conducted pursuant to Paragraph (1) of Subsection A of this section; and

(3) comply with any additional conditions that the director may by order impose, if the director finds the issuance of such order is necessary or appropriate in the public interest or for the protection of investors.

**B.** Branch office supervisors who have no supervisory or compliance responsibility for net worth or investment banking functions may substitute the general securities sales supervisor examination (Series 8) for the examination, programs or certifications required in 12.11.5.18 NMAC.

[12.11.5.28 NMAC - Rp, 12.11.5.24 NMAC, 1-1-2010]

#### **HISTORY OF 12.11.5 NMAC:**

##### **Pre-NMAC History:**

Material in this part was derived from that previously filed with the commission of public records - state records center and archives:

FID 67-1, Regulation 67-62, General Requirements, filed 5-18-67;

FID 76-1, Order 76-64, Regulation 76-1, Relating to Options Clearing Corporations, filed 3-26-76;

SB Rule 84-1, New Mexico Blue Sky Regulations, filed 9-5-84;

SD Rule 86-4.01, Licensing Procedure, filed 7-1-86;

SD Rule 95-4.01, Licensing Procedure, filed 10-14-95;

SD Rule 86-4.02, Net Worth and Bonding Requirement, filed 7-1-86;

SD Rule 86-4.03, Custody of Clients Securities and Funds, filed 7-1-86;

SD Rule 86-4.04, Investment Advisors' Records, filed 7-1-86;

SD Rule 86-4.05, Reporting Requirements, filed 7-1-86;

SD Rule 86-4.06, Rules of Conduct, filed 7-1-86;

SD Rule 86-4.07, Prohibited Business Practices, filed 7-1-86;

SD Rule 86-4.08, Withdrawal of Licenses, filed 7-1-86;

SD Rule 86-4.09, Denial, Suspension and Revocation, filed 7-1-86.

**History of Repealed Material:** 12.11.5 NMAC, Investment Advisors and Investment Advisor Representatives and Federal Covered Advisors (filed 1-18-2002) repealed 1-1-2010.

##### **Other History:**

SD Rule 95-4.01, Licensing Procedure (filed 10-14-95); SD Rule 86-4.02, Net Worth and Bonding Requirement (filed 7-1-86); SD Rule 86-4.03, Custody of Clients Securities and Funds (filed 7-1-86); SD Rule 86-4.04, Investment Advisors' Records (filed 7-1-86); SD Rule 86-4.05, Reporting Requirements (7-1-86); SD Rule 86-4.06, Rules of Conduct (filed 7-1-86); SD Rule 86-4.07, Prohibited Business Practices (filed 7-1-86); SD Rule 86-4.08, Withdrawal of Licenses (filed 7-1-86); and SD Rule 86-4.09, Denial, Suspension and Revocation (filed 7-1-86) were **renumbered, reformatted, and amended** into the first version of the New Mexico Administrative Code as 12 NMAC 11.3, Investment Advisors, Investment Advisor Representatives and Federal Covered Advisors, effective 5-1-1999.

Those relevant portions of 12 NMAC 11.3 numbered Subpart 2, Licensing Procedure (filed 4-19-99); Subpart 3, Notice Filing Requirements for Federal Covered Advisors (filed 4-19-99); Subpart 4, Net Worth and Bonding Requirements (filed 4-19-99); Subpart 5, Custody of Clients Securities and Funds (filed 4-19-99); Subpart 7, Use of the Internet for General Dissemination of Information on Products and Services (filed 4-19-99); Subpart 8, Reporting Requirements (filed 4-19-99); Subpart 9, Rules of Conduct (filed 4-19-99); Subpart 11, Denial, Suspension and Revocation (filed 4-19-99); Subpart 12, Withdrawal of Licenses (filed 4-19-99) were **renumbered, reformatted, amended and replaced by** 12.11.5 NMAC, Investment Advisors and Investment Advisor Representatives and Federal Covered Advisors, effective 1-31-2002.

12.11.5 NMAC, Investment Advisors and Investment Advisor Representatives and Federal Covered Advisors (filed 1-16-2002) was replaced by 12.11.5 NMAC, Investment Advisors and Investment Advisor Representatives and Federal Covered Advisors, effective 1-1-2010.