



**NIMRLD**

**NEW MEXICO  
REGULATION &  
LICENSING DEPARTMENT**

# **Securities Division**

## **Investment Adviser Registration Packet**

Regulation and Licensing Department  
Securities Division  
2550 Cerrillos Drive  
Santa Fe, NM 87505

## New Mexico Investment Adviser Registration Requirements

Contact:

Richard Dominguez  
(505) 379-5295  
[Richard.Dominguez@state.nm.us](mailto:Richard.Dominguez@state.nm.us)

### **GENERAL INSTRUCTIONS & FILING REQUIREMENTS:**

An initial application for registration as an investment adviser in New Mexico must be filed through the Investment Adviser Registration Depository (IARD), through FINRA's webCRD/IARD platform. If the applicant is not already a participant in the IARD, participation must be initiated before applying for New Mexico registration. For detailed information, forms and instructions on IARD participation see [www.iard.com](http://www.iard.com). If already an IARD participant, skip to step 2.

1. The first step in getting started on the IARD is setting up an IARD User Account. This is accomplished via the "Entitlement" process see [www.iard.com](http://www.iard.com). Applicant must file (by USPS regular mail or overnight service) an "Entitlement Package" (which consists of one form) with the IARD Entitlement Group at FINRA.
2. Once IARD receives your Entitlement Package, they will set-up the IARD User Account, assign a Firm CRD Number, create a Flex-Funding IARD billing account and send the investment adviser a confirmation email. The "Entitlement Package" is available for download at [www.iard.com](http://www.iard.com).

Upon receipt of the confirmation email, details described at [www.iard.com](http://www.iard.com) it will be necessary to login to the IARD to activate and set-up your firm IARD account.

NOTE: Please note, financial remittances to the IARD are not submitted to the regular IARD addresses. The E-Bill system that enables entitled users to view accounting details, fund the accounts and view and pay invoices is handled by the Super Account Administrator of the Firm. To set up E-Bill system and user rights to access this area directly go to [www.iard.com/accounting](http://www.iard.com/accounting).

3. File FORM ADV, Parts 1A, 1B, and appropriate schedules electronically through the IARD. "NM" must be identified under Part 1B, Item 1.
4. FORM ADV, Parts 2.A. and 2.B. must be uploaded as an attachment to the firm's IARD record in a searchable PDF format.
5. The \$300.00 New Mexico Investment Adviser Filing Fee will be deducted from your IARD account.

**When applying for registration in New Mexico through the IARD, the following additional items must be filed directly with this division. These items should be sent to:**

If sending overnight:  
**Regulation & Licensing Department**  
**ATTN: Securities Division**  
**2550 Cerrillos Road**  
**Santa Fe, NM 87505**

If sending by standard mail (USPS):  
**Regulation & Licensing Department**  
**ATTN: Securities Division**  
**PO Box 25101**  
**Santa Fe, NM 87504**

6. For an Applicant that maintains discretionary authority over client funds or securities, provide the following:
  - A. Statement of Financial Condition, which meets the requirements of the Department's Rule 12.11.5.23(C) if the New Mexico Administrative Code ("NMAC") (copy enclosed). Also, see Rule 12.11.5.23(D) & (E) (copy enclosed).
  - B. Most recent financial statements. Investment advisers, who will not have custody of customers' funds or securities, may submit unaudited statements (dated no more than ninety (90) days prior to filing date). The filing date is the date the registration package is received by the Division.
7. Every investment adviser shall maintain a net worth of not less than \$5,000 dollars, but if you have discretionary authority the net worth requirement is \$10,000. Investment Advisers who have custody of customers' funds or securities are required to maintain a net worth as described in Rule 12.11.5.25(C) NMAC or maintain a bond. A Securities Licensee's Blanket Bond, New Mexico Form BF-2 (Rev 11/98), if applicable.
8. List, if applicable, all branch offices in New Mexico with the name, CRD number and qualifications of the designated principal.

9. Reference Item 8, Form ADV-Part 1A. If Applicant has provided an affirmative response to Item 8H, provide specimen copies of the solicitor's agreement and disclosure statement.

10. The investment adviser must have written procedures addressing a privacy policy. Provide a copy of that statement. Reference potential violation of Rule 12.11.7.13(U) (copy enclosed).

11. Provide specimen copies of all forms of contracts and/or agreements to be used by the Applicant for its investment advisory clients. Rule 12.11.7.10 NMAC (copy enclosed).

12. It is unlawful for any investment adviser to employ an "Investment Adviser Representative" (IAR) to represent him in New Mexico unless registered. Failure to properly register an IAR may result in administrative action by the Department and civil liability for unregistered investment advisory activity. See § 58-13C-102(Q) of the New Mexico Securities Act for the definition of Investment Adviser Representative (copy enclosed).

13. An initial application for registration as an Investment Advisor Representative ("IAR", "RA" designation) must be filed through the IARD. NOTE: The investment adviser (entity) must be an IARD participant and have an IARD entitlement before the IARD will accept IAR applications.

A. Once entitled, the firm can now begin the process of filing an electronic Form U-4 for the designated principal in New Mexico in IARD and **provide the Division with the name and CRD number of the individual**. It should be noted that the firm does not have to complete the entire Form U-4 at one time. The firm can enter and save the data and then return at a later time to complete and electronically submit the Form U-4.

1. The designated principal of a New Mexico Registered Investment Adviser with **more than one IAR** must have one of the following
  - a. professional designations:
    - CFA** Certified Financial Analyst;
    - CIC** Chartered Investment Counselor Certification;
    - CFP** Certified Financial Planner;
    - ChFC** Chartered Financial Consultant Certification; or
    - PFS** Certified Public Accountant with a Personal Financial Specialist designation, OR

- b. passed the Series 24 qualification examination (which requires the Division's request to FINRA to bypass the Series 7 examination prerequisite)
- B. List all investment adviser representatives to be registered in New Mexico. Submit a completed Form U-4 for each individual to IARD.
- C. The \$50.00 New Mexico IAR filing fee will be deducted from your IARD account. In addition, they will charge each IAR a one-time initial set-up fee of \$10.00 with an annual maintenance fee of \$10.00.
- D. New Mexico does **not** require the filing of fingerprint cards on behalf of the IAR applicant.
- E. The IAR must meet one of the following qualifications
  - 1. Passing results:
    - a. Received, on or after January 1, 2000 and within 2 years immediately prior to the date of filing an application with the Division, a passing grade on The Uniform Investment Adviser Law Examination (Series 65), OR
    - b. Received, on or after January 1, 2000, and within 2 years immediately prior to the date of filing an application with the Division, a passing grade on the General Securities Representative Examination (Series 7) administered by FINRA and the Uniform Combined State Law Examination (Series 66) , OR
    - c. Received, on or after January 1, 2000, a passing grade on either the Series 65 examination or passing grades on both the Series 7 and Series 66 examinations and has not had a lapse in registration as an investment adviser or investment adviser representative in any state other than New Mexico for a period not exceeding 2 years immediately prior to the date of filing an application.

NOTE: Examination and professional designation waivers are set forth in Division Rules 12.11.5.14 and 12.11.5.15 NMAC, respectively.

Registration for solicitors are set forth in Division Rule 12.11.5.20 NMAC (copy enclosed).

## **SUPPLEMENTAL REQUIREMENTS:**

1. In the event your filing contains deficiencies, you will receive a letter identifying such deficiencies with a request that appropriate information be filed with this division within 60 days from the date of the letter. An application that has not been approved or withdrawn may be denied after 6 months.
2. FORM ADV-Parts 1A; 1B; 2A or 2B amendments must be filed electronically through the IARD for any material change in its application no later than 30 days after the occurrence of the event.
3. Rule 12.11.5.23(D) requires **immediate notification** if net worth falls below minimum requirements.
4. When requesting a waiver of an examination requirements, the following must be provided:
  - a. A letter requesting a waiver of the examination requirement setting forth your basis for the request;
  - b. A detailed biographical sketch which substantiates the individual's previous experience (to include duties, responsibilities and accomplishments) in securities, banking, finance or other related business that forms the basis for your request;
  - c. Verification of the PROFESSIONAL DESIGNATION (if any) awarded to such individual.
5. Registrant must notify the Division in writing within 15 days after the termination of or withdrawal from employment of any "Investment Adviser Representative" furnishing investment advice in New Mexico. In accordance with Division Rule 12.11.5.27(B) NMAC. Notification shall be filed on Form U-5, "Uniform Termination Notice for Securities Industry Registration" available on IARD.

## **SEND FORMS TO:**

New Mexico Securities Division  
Richard Dominguez  
Compliance Officer  
PO Box 25101  
Santa Fe, NM 87505  
richard.dominguez@state.nm.us

Web site for additional information: <http://www.rld.state.nm.us/securities/default.aspx>

## **ANNUAL REQUIREMENTS:**

1. Complete the annual renewal process and send renewal fees through IARD. It is recommended that this process begin in early November to avoid unintended “Failure to Renew” status. All registrations end on December 31<sup>st</sup> of each year. Renewal fees are the same as initial fees.
2. Complete Form ADV-E through IARD if you have custody of client funds.
3. Send copies of audited financial statements to the Division. *NOTE: Investment Advisers who DO NOT have custody of client’s funds or securities may file unaudited financial statements and the Form ADV-E is not required.* Annual financial statements are due to the division within 90 days of the end of your fiscal year. The deadline for most firms is March 31<sup>st</sup>.
  - a. “financial statements” shall mean a balance sheet prepared in accordance with generally accepted accounting principles, an income statement, a cash flow statement and a net worth computation, if applicable, as required by Rule 12.11.5.23 NMAC. See Rule 12.11.6.8(A)(6) NMAC (copy enclosed).
4. Update ADV Part 2 online through IARD.

## **MISCELLANEOUS:**

Forms, study outlines and information regarding qualifying examinations may be obtained from either:

FINRA

P. O. Box 9401

Gaithersburg, MD 20898

(301) 590-6500

<https://www.finra.org/registration-exams-ce/qualification-exams/securities-industry-essentials-exam/practice-test>

North American Securities Administrators Association (“NASAA”)

<https://www.nasaa.org/exams/study-guides/>

Additional IARD information and help may be obtained from the Gateway Call Center, (240) 386-4848, or from their website, [www.IARD.com](http://www.IARD.com).

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**58-13C-102(P) NMSA. "investment adviser"** means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. "Investment adviser" does not include:

- (1) an investment adviser representative;
- (2) a lawyer, accountant, engineer or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;
- (3) a broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;
- (4) a publisher, employee or columnist of a bona fide newspaper, news magazine or business or financial publication of general and regular circulation or an owner operator, producer or employee of a cable, radio or television network, station or production facility, if, in either case:
  - (a) the financial or business news or advice is contained in a publication or broadcast disseminated to the general public; and
  - (b) the content does not consist of rendering advice on the basis of the specific investment situation of each client;
- (5) a federal covered investment adviser;
- (6) a bank or a savings institution described in Paragraph (2) of Subsection D of this section; or
- (7) any other person excluded by rule adopted or order issued pursuant to the New Mexico Uniform Securities Act;

**58-13(C)-102(Q) NMSA. "investment adviser representative"** means an individual employed by or associated with an investment adviser or federal covered investment adviser and who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer or negotiate for the sale of or for selling investment advice or supervises employees who perform any of the foregoing. "Investment adviser representative" does not include an individual who:

- (1) performs only clerical or ministerial acts;
- (2) is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;
- (3) is employed by or associated with a federal covered investment adviser, unless the individual has a place of business in New Mexico, as "place of business" is defined by rule adopted pursuant to Section 203A of the federal Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a) and is:
  - (a) an investment adviser representative, as "investment adviser representative" is defined by rule adopted pursuant to Section 203A of the federal Investment Advisers Act of 1940 (15 U.S.C. Section 80b-3a); or
  - (b) not a supervised person as "supervised person" is defined in Section 202(a)(25) of the federal Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(25)); or
- (4) is excluded by rule adopted or order issued pursuant to the New Mexico Uniform Securities Act;

**58-13C-403. Investment adviser registration requirement and exemptions. (2009)**

A. It is unlawful for a person to transact business in New Mexico as an investment adviser unless the person is registered pursuant to the New Mexico Uniform Securities Act as an investment adviser or is exempt from registration as an investment adviser pursuant to Subsection B of this section.

B. The following persons are exempt from the registration requirement of Subsection A of this section:

(1) a person without a place of business in New Mexico that is registered pursuant to the securities act of the state in which the person has its principal place of business if its only clients in New Mexico are:

(a) federal covered investment advisers, investment advisers registered pursuant to the New Mexico Uniform Securities Act or broker-dealers registered pursuant to that act;

(b) institutional investors;

(c) bona fide preexisting clients whose principal places of residence are not in New Mexico if the investment adviser is registered pursuant to the securities act of the state in which the clients maintain principal places of residence; or

(d) any other client exempted by rule adopted or order issued pursuant to the New Mexico Uniform Securities Act;

(2) a person without a place of business in New Mexico if the person has had, during the preceding twelve months, not more than five clients that are residents in New Mexico in addition to those specified pursuant to Paragraph (1) of this subsection; or

(3) any other person exempted by rule adopted or order issued pursuant to the New Mexico Uniform Securities Act.

**58-13C-404. Investment adviser representative registration requirement and exemptions. (2009)**

A. It is unlawful for an individual to transact business in New Mexico as an investment adviser representative unless the individual is registered pursuant to the New Mexico Uniform Securities Act [58-13C-101 NMSA 1978] as an investment adviser representative or is exempt from registration as an investment adviser.

B. The following individuals are exempt from the registration requirement of Subsection A of this section:

(1) an individual who is employed by or associated with an investment adviser that is exempt from registration pursuant to Subsection B of Section 403 [58-13C-403 NMSA 1978] of the New Mexico Uniform Securities Act or a federal covered investment adviser that is excluded from the notice filing requirements of Section 405 [58-13C-405 NMSA 1978] of that act; and

(2) any other individual exempted by rule adopted or order issued pursuant to the New Mexico Uniform Securities Act.

**58-13C-410. Filing fees. (2009)**

C. A person shall pay a fee of three hundred dollars (\$300) when filing an application for registration as an investment adviser and when filing a renewal of registration as an investment adviser.

D. The fee for an individual shall be fifty dollars (\$50.00) when filing an application for registration as an investment adviser representative, when filing a renewal of registration as an investment adviser representative and when filing a change of registration as an investment adviser representative.

E. A federal covered investment adviser required to file a notice pursuant to Section 405 [58-13C-405 NMSA 1978] of the New Mexico Uniform Securities Act [58-13C-101 NMSA 1978] shall pay an initial fee of three hundred dollars (\$300) and an annual fee of three hundred dollars (\$300).

F. A person required to pay a filing or notice fee pursuant to this section may transmit the fee through or to a designee as a rule or order provides pursuant to the New Mexico Uniform Securities Act .

G. An investment adviser representative who is registered as an agent pursuant to Section 402 [58-13C-402 NMSA 1978] of the New Mexico Uniform Securities Act and who represents a person that is both registered as a broker-dealer pursuant to Section 401 [58-13C-401 NMSA 1978] of that act and registered as an investment adviser pursuant to Section 403 [58-13C-403 NMSA 1978] of that act or required as a federal covered investment adviser to make a notice filing pursuant to Section 405 [58-13C-405 NMSA 1978] of that act is not required to pay an initial or annual registration fee for registration as an investment adviser representative.

H. If an application made pursuant to Subsection A, B, C, D or E of this section is denied or withdrawn, the director shall retain any fees paid.

**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.

**TITLE 12            TRADE, COMMERCE AND BANKING**  
**CHAPTER 11        SECURITIES**  
**PART 6             INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES**  
**RECORDS**

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

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

**12.11.6.3            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, hereinafter referred to in this Chapter 11 as the “New Mexico Uniform Securities Act”.  
[12.11.6.3 NMAC - N, 1-1-2010]

**12.11.6.4            DURATION:** Permanent.  
[12.11.6.4 NMAC - N, 1-1-2010]

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

**12.11.6.6            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.  
[12.11.6.6 NMAC - N, 1-1-2010]

**12.11.6.7            DEFINITIONS:** For purposes of 12.11.6 NMAC:

**A.            “discretionary power”** shall not include discretion as to the price at which or the time when a transaction is or is to be effected if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security; and

**B.            “investment supervisory services”** means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.

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

**12.11.6.8            RECORDKEEPING REQUIREMENTS FOR INVESTMENT ADVISERS:**

**A.            Recordkeeping requirements for all investment advisers.** Every investment adviser registered or required to be registered under the New Mexico Uniform Securities Act shall make and keep true, accurate and current the following books, ledgers and records:

(1) a journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger;

(2) general and auxiliary ledgers, or other comparable records, reflecting asset, liability, reserve, capital, income and expense accounts;

(3) a record of the investment adviser’s securities transactions in accordance with the requirements of Subsection A of 12.11.6.9 NMAC;

(4) all checkbooks, bank statements, canceled checks and cash reconciliations of the investment adviser;

(5) all bills or statements, or copies of bills or statements, paid or unpaid, relating to the investment adviser’s business as an investment adviser;

(6) all trial balances, financial statements prepared in accordance with generally accepted accounting principles and internal audit working papers relating to the investment adviser’s business as an investment adviser; for purposes of this paragraph, “financial statements” shall mean a balance sheet prepared in accordance with generally accepted accounting principles, an income statement, a cash flow statement and a net worth computation, if applicable, as required by 12.11.5.23 NMAC;

(7) records of the investment adviser's written communications in accordance with the requirements of Subsection B of 12.11.6.9 NMAC;

(8) a list or other record of all accounts which identifies the accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client;

(9) a copy of all powers of attorney and other evidence of the granting of any discretionary authority by any client to the investment adviser;

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

(11) a file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons connected with the investment adviser; if the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, the investment adviser shall retain a memorandum documenting its reasons for the recommendation;

(12) records of transactions in securities in which the investment adviser or an affiliated person has a beneficial ownership interest in accordance with the requirements of Subsection C of 12.11.6.9 NMAC;

(13) a copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of 12.11.5.12 NMAC, and a record of the dates that each written statement and each amendment or revision was given or offered to be given to any client or prospective client who subsequently becomes a client;

(14) all accounts, books, internal working papers and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including but not limited to distribution by print and electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons employed by or contracted with the investment adviser; however, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits and other transactions in a client's account for the period of the statement and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts, shall be deemed to satisfy the requirements of this paragraph;

(15) a file containing a copy of all written communications received or sent regarding any litigation involving the investment adviser or any investment adviser representative or employee and regarding any written customer or client complaint;

(16) written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client;

(17) written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations;

(18) a file containing a copy of each document, other than any notices of general dissemination, that was filed with or received from any state or federal agency or self-regulatory organization and that pertains to the registrant or its investment adviser representatives; the file shall at a minimum contain applications, amendments, renewal filings, correspondence and any other applicable state, federal agency or self-regulatory organization documents issued or received by the registrant or its investment adviser representatives; and

(19) a record of the investment adviser's privacy policies, all privacy notices sent to consumers or customers and the date such notices were sent.

**B. Additional recordkeeping requirements for investment advisers that have custody of client securities or funds.** If an investment adviser subject to Subsection A of 12.11.6.8 NMAC has custody or possession of securities or funds of any client, the records required to be made and retained pursuant to Subsection A of this section shall include:

(1) a journal or other record showing all purchases, sales, receipts and deliveries of securities, including certificate numbers, for all accounts and all other debits and credits to the accounts;

(2) a separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits;

(3) copies of confirmations of all transactions effected by or for the account of any client; and

(4) a record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client and the location of each security.

**C. Additional recordkeeping requirements for investment advisers that render investment management services.** Every investment adviser subject to Subsection A of this section that renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

(1) records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase and sale; and

(2) information from which the investment adviser can promptly furnish the name of each client and the current amount or interest of the client for each security in which any client has a current position.

**D. Client codes or designations.** Any books or records required by this section may be maintained by the investment adviser in such manner that the identity of any client to whom the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

**E. Manner of record preservation.** Every investment adviser subject to Subsection A of this section shall preserve the following records in the manner prescribed:

(1) all books and records required to be made under the provisions of Subsections A and B and Paragraph (1) of Subsection C of this section, except for books and records required to be made under the provisions of Paragraphs (11) and (14) of Subsection A of this section, shall be maintained and preserved in an easily accessible place for a period of not less than six years from the end of the fiscal year during which the last entry was made on record, the first two years of which shall be in the principal office of the investment adviser;

(2) partnership articles and any amendments, articles of incorporation, charters, minute books and stock certificate books of the investment adviser and of any predecessor shall be maintained in the principal office of the investment adviser and preserved until at least six years after termination of the enterprise;

(3) books and records required to be made under the provisions of Paragraphs (11) and (14) of Subsection A of this section shall be maintained and preserved in an easily accessible place for a period of not less than six years, the first two years of which shall be in the principal office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by print and electronic media;

**F.** Notwithstanding other recordkeeping requirements of this section, the following records or copies shall be required to be maintained at the business location of the investment adviser from which the customer or client is being provided or has been provided with investment advisory services:

(1) records required to be preserved under Paragraphs (3), (7) through (10), (13), and (15) through (17) of Subsection A and Subsections B and C of this section inclusive; and

(2) records or copies required under the provision of Paragraphs (11) and (14) of Subsection A of this section which records or related records identify the name of the investment adviser representative providing investment advice from that business location, its business locations' physical address, mailing address, electronic mailing address and telephone number.

**G.** The records shall be maintained for the period described in Paragraphs (1), (2) and (3) of Subsection E of this section.

**H. Preservation of records upon cessation.** An investment adviser subject to Subsection A of this section, before ceasing to conduct or discontinuing business as an investment adviser, shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section and shall notify the administrator in writing of the exact address where the books and records will be maintained during the period.

**I. Preservation of records by alternative media.**

(1) The records required to be maintained and preserved pursuant to this subsection may be immediately produced by any form of data storage, as provided below, and maintained and preserved for the required time by an investment adviser on:

(a) micrographic media, including microfilm, microfiche or any similar medium; or

(b) electronic storage media, including any digital storage medium or system that meets the terms of this subsection.

(2) The investment adviser must:

(a) arrange and index the records in a way that permits easy location, access and retrieval of any particular record;

(b) provide promptly any of the following that the administrator may request:

is stored;

- (i) a legible, true and complete copy of the record in the medium and format in which it
- (ii) a legible, true and complete printout of the record; and
- (iii) means to access, view and print the records.

(c) store separately, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this subsection.

(3) In the case of records on electronic storage media, the investment adviser may maintain and preserve records which, in the ordinary course of the investment adviser's business, are created by the investment adviser on electronic media or are received by the investment adviser solely on electronic media or by electronic data transmission. The investment adviser must establish and maintain procedures to:

- (a) maintain and preserve the records so as to reasonably safeguard them from loss, alteration or destruction;
- (b) limit access to the records to properly authorized personnel and the administrator, including examiners and other representatives; and
- (c) reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true and legible when retrieved.

[12.11.6.8 NMAC - Rp, 12 NMAC 11.3.6.1-10, 1-1-2010]

### **12.11.6.9 RECORDKEEPING REQUIREMENTS CONTINUED:**

#### **A. Record of the investment adviser's securities transactions required pursuant to Paragraph (3) of Subsection A of 12.11.6.8 NMAC.**

- (1) The investment adviser shall prepare a memorandum setting forth:
  - (a) each order given by the investment adviser for the purchase or sale of any security;
  - (b) any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security; and
  - (c) any modification or cancellation of any such order or instruction.
- (2) The memorandum shall:
  - (a) show the terms and conditions of the order, instruction, modification or cancellation;
  - (b) identify the person connected with the investment adviser who recommended the transaction to the client and who placed the order;
  - (c) show the account for which entered, the date of entry and the bank or broker-dealer by or through which executed where appropriate; and
  - (d) identify orders entered pursuant to the exercise of discretionary power.

#### **B. Records of the investment adviser's written communications required pursuant to Paragraph (7) of Subsection A of 12.11.6.8 NMAC.**

- (1) The investment adviser shall keep originals of all written communications received and copies of all written communications sent by the investment adviser relating to:
  - (a) any recommendation made or proposed to be made and any advice given or proposed to be given;
  - (b) any receipt, disbursement or delivery of funds or securities; and
  - (c) the placing or execution of any order to purchase or sell any security.

(2) The investment adviser shall not be required to keep any unsolicited market letters and other similar communications or general public distribution not prepared by or for the investment adviser.

(3) If the investment adviser sends any notice, circular, or other advertisement offering any report, analysis, publication or other investment advisory service to more than ten persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent. However, if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain, with a copy of the notice, circular or advertisement, a memorandum describing the list and its source.

#### **C. Records of transactions in securities in which the investment adviser or an affiliated person has a beneficial ownership interest required pursuant to Paragraph (12) of Subsection A of 12.11.6.8 NMAC.**

- (1) For the purposes of this subsection, the following definitions apply:
  - (a) "affiliated person" with respect to another person means any person directly or indirectly controlling, controlled by, or under common control with the other person; any officer, director or partner of the other person; or any spouse or relative, by blood or marriage, of the other person;

(b) “**control**” means the power to direct or influence the management or policies of a company through the ownership of voting securities by contract or otherwise; any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of a company shall be presumed to control such company; and

(c) “**primarily engaged in a business or businesses other than advising investment advisory clients**” means an investment adviser that, for each of its most recent three fiscal years or for the period of time since organization, whichever is less, derived, on an unconsolidated basis, more than fifty percent of its total sales and revenues and its income or loss before income taxes and extraordinary items from such other business or businesses.

(2) The investment adviser shall keep a record of every transaction in a security in which the investment adviser, and any person described in Paragraphs (3) or (4) of this subsection, whichever is applicable, has, or by reason of any transaction acquires, any direct or indirect beneficial ownership of such security.

(3) For all investment advisers except those that are primarily engaged in a business or businesses other than advising investment advisory clients, records of transactions shall include records of the transactions of:

(a) any partner, officer or director of the investment adviser;

(b) any employee who participates in any way in the determination of which recommendations are made;

(c) any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and

(d) any person in a control relationship to the investment adviser, any affiliated person of a controlling person and any affiliated person of any affiliated person, who obtains information concerning securities recommendation being made by the investment advisor prior to the effective dissemination of the recommendations.

(4) For all investment advisers that are primarily engaged in a business or businesses other than advising investment advisory clients, records of transactions shall include records of the transactions of:

(a) any partner, officer, and director or employee of the investment advisor who participates in any way in the determination of which recommendations are made, or who, in connection with his functions or duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and

(b) any person in a control relationship to the investment adviser, any affiliated person of a controlling person and any affiliated person of any affiliated person who obtains information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of information concerning the recommendations.

(5) The investment adviser shall record each transaction no later than ten days after the end of the calendar quarter in which the transaction was effected.

(6) The investment adviser is not required to keep records of transactions:

(a) effected in any account over which neither the investment adviser nor any person described in Paragraphs (3) or (4) of this subsection has any direct or indirect influence or control; and

(b) in securities which are direct obligations of the United States.

(7) The record shall state:

(a) the title and amount of the security involved;

(b) the date and nature of the transaction, such as purchase, sale or other disposition; and

(c) the name of the broker-dealer or bank with or through which the transaction was effected.

(8) An investment adviser shall not be deemed to have violated the provisions of this subsection because of the failure to record securities transactions of any person described in Paragraphs (3) and (4) of this subsection if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

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

**12.11.6.10 DIRECTOR MAY ORDER EXEMPTION:** The director may by order exempt any investment adviser from all or part of the requirements of this section, either unconditionally or upon specified conditions, if by reason of the special nature of its business, the director finds that issuance of the order is necessary or appropriate in the public interest or for the protection of investors.

[12.11.6.10 NMAC - Rp, 12 NMAC 11.3.6.11, 1-1-2010]

**12.11.6.11 EXEMPTION FOR PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE:** Every investment adviser that has its principal place of business in a state other than New Mexico shall be exempt from the



requirements of this section, provided the investment adviser is licensed or registered in such state and is in compliance with such state's recordkeeping requirements.  
[12.11.6.11 NMAC - Rp, 12 NMAC 11.3.6.12, 1-1-2010]

**HISTORY OF 12.11.6 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 86-4.04, Investment Advisors' Records, filed 7-11-86.

**History of Repealed Material:**

12 NMAC 11.3 Subpart 6, Investment Advisors' Records (filed 4-19-99) repealed 1-1-2010.

**Other History:**

SD Rule 86-4.04, Investment Advisors' Records, filed 7-1-86 was **renumbered** into first version of the New Mexico Administrative Code as 12 NMAC 11.3, Investment Advisors, Investment Advisor Representatives and Federal Covered Advisors, effective 5-1-99.

That relevant portion of 12 NMAC 11.3 Subpart 6, Investment Advisors' Records (filed 4-19-99) was **renumbered, reformatted, and replaced by** 12.11.6 NMAC, Investment Advisors and Investment Advisor Representatives Records, effective 1-1-2010.

**TITLE 12        TRADE, COMMERCE AND BANKING**  
**CHAPTER 11    SECURITIES**  
**PART 7         INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES**  
**RULES OF CONDUCT AND PROHIBITED BUSINESS PRACTICES**

**12.11.7.1        ISSUING AGENCY:** Regulation and Licensing Department - New Mexico Securities Division.  
[12.11.7.1 NMAC - Rp, 12.11.7.1 NMAC, 1-1-2010]

**12.11.7.2        SCOPE:** All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives. To the extent that the conduct alleged constitutes fraud or deceit, the provisions of this section also apply to all other persons, in addition to investment advisers and investment adviser representatives, who advise others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or who, for compensation and as part of a regular business, issue or promulgate analyses or reports relating to securities.  
[12.11.7.2 NMAC - Rp, 12.11.7.2 NMAC, 1-1-2010]

**12.11.7.3        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”.  
[12.11.7.3 NMAC - Rp, 12.11.7.3 NMAC, 1-1-2010]

**12.11.7.4        DURATION:** Permanent.  
[12.11.7.4 NMAC - Rp, 12.11.7.4 NMAC, 1-1-2010]

**12.11.7.5        EFFECTIVE DATE:** January 1, 2010, unless a later date is cited at the end of a section.  
[12.11.7.5 NMAC - Rp, 12.11.7.5 NMAC, 1-1-2010]

**12.11.7.6        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.  
[12.11.7.6 NMAC - Rp, 12.11.7.6 NMAC, 1-1-2010]

**12.11.7.7        DEFINITIONS:** [RESERVED]

**12.11.7.8        [RESERVED]**

**12.11.7.9        CONTRACT WAIVING RIGHTS PROHIBITED:** An investment adviser shall not enter into any contract with a customer if the contract contains any condition, stipulation or provision binding the customer to waive any rights under the New Mexico Uniform Securities Act, or any rule or order thereunder, or of the Investment Advisers Act of 1940. Any such condition, stipulation or provision is void.  
[12.11.7.9 NMAC - Rp, 12 NMAC 11.3.9.2, 1-1-2010]

**12.11.7.10       WRITTEN CONTRACT REQUIRED:**

**A.** No registered investment adviser may enter into, extend or renew any investment advisory contract with a customer in this state unless the contract is in writing and a copy of the contract is given to the customer within 15 days after the execution of the contract. Such contract shall disclose, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.

**B.** It is unlawful to enter into, extend or renew any investment advisory contract if the investment advisory contract:

**(1)** provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client unless such contract complies with rule 205-3 under the Investment Advisors Act of 1940;

(2) fails to provide in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

C. Paragraph (1) of Subsection B of this section shall not:

(1) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; and

(2) apply to an investment advisory contract with a person who is not a resident of the United States.

D. The director, by rule, upon the director's own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from Paragraph (1) of Subsection B of this section, if and to the extent that the exemption relates to an investment advisory contract with any person that the director determines does not need the protections of Paragraph (1) of Subsection B, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser or investment adviser representative, and such other factors as the director determines are consistent with this section. [12.11.7.10 NMAC - Rp, 12.11.7.10 NMAC, 1-1-2010]

#### **12.11.7.11 [RESERVED]**

**12.11.7.12 PROHIBITED BUSINESS PRACTICES BY FEDERAL COVERED ADVISERS:** The provisions of 12.11.7.13 and 12.11.7.14 NMAC apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). An investment adviser or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser or a federal covered adviser shall not engage in any unlawful, unethical or dishonest conduct or practices. [12.11.7.12 NMAC - Rp, 12.11.7.12 NMAC, 1-1-2010]

**12.11.7.13 PROHIBITED BUSINESS PRACTICES BY INVESTMENT ADVISERS:** The following are deemed to be unlawful, unethical, or dishonest conduct or practice by an investment adviser or investment adviser representative without limiting those terms to the practices specified herein:

A. recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser;

B. exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specific security shall be executed, or both;

C. inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account;

D. placing an order to purchase or sell a security for the account of a client without authority to do so;

E. placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client;

F. borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a depository institution engaged in the business of loaning funds;

G. loaning money to a client unless the investment adviser is a depository institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser;

H. misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or to misrepresent the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the

statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading;

**I.** providing a report or recommendation to any advisory client prepared by someone other than the investment adviser without disclosing that fact; this prohibition does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service;

**J.** charging a client an unreasonable advisory fee;

**K.** failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(1) compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

(2) charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the investment adviser or its employees;

**L.** guaranteeing a client that a specific result will be achieved (e.g. gain or no loss), with advice which will be rendered;

**M.** publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940;

**N.** disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client;

**O.** taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds and the adviser's action does not comply with the requirements of Rule 206(4)-2 under the Investment Advisers Act of 1940;

**P.** failing to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940 or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940;

**Q.** engaging in any act, practice or course of business which is fraudulent, deceptive or manipulative, contrary to the provisions of or in violation of the New Mexico Uniform Securities Act or any other rule of the director;

**R.** engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the New Mexico Uniform Securities Act or any rule or regulation thereunder;

**S.** using in a misleading manner any term or abbreviation that states or implies that a person has special expertise, certification, or training in financial planning, including, but not limited to, the misleading use of a senior-specific certification or designation as set forth in 12.11.17 NMAC;

**T.** having custody of client funds or securities unless the investment adviser or investment adviser representative complies with the provisions of 12.11.5.22 NMAC;

**U.** failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the investment adviser, or any investment adviser representative or employee, taking into consideration the nature of the investment adviser's business;

**V.** entering into, extending, or renewing any investment advisory contract that violates the provisions of this subsection;

(1) it is unlawful to enter into, extend or renew any investment advisory contract if the investment advisory contract:

(a) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client unless such contract complies with rule 205-3 under the Investment Advisers Act of 1940;

(b) fails to provide in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(c) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change;

(2) Subparagraph (a) of Paragraph (1) of this subsection shall not:

(a) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; and

(b) apply to an investment advisory contract with a person who is not a resident of the United States;

(3) the director, by rule, upon the director's own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from Subparagraph (a) of Paragraph (1) of this subsection, if and to the extent that the exemption relates to an investment advisory contract with any person that the director determines does not need the protections of Subparagraph (a) of Paragraph (1) of this subsection, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser or investment adviser representative, and such other factors as the director determines are consistent with this section;

W. failing or refusing to furnish a client, upon reasonable request, information to which the client is entitled, or to respond to a formal written demand or complaint;

X. in connection with the offer, purchase or sale of a security, leading a client to believe that the investment adviser or investment adviser representative is in possession of material, non-public information that would affect the value of the security;

Y. failing to comply with any securities-related arbitration award, unless a proceeding to vacate or modify such award is pending or unless the time limit to commence such a proceeding has not yet expired; and

Z. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for an investment adviser or investment adviser representative to do directly under the provisions of the New Mexico Uniform Securities Act, this chapter or any other rule of the director.

[12.11.7.13 NMAC - Rp, 12.11.7.13 NMAC, 1-1-2010]

**12.11.7.14 PROHIBITED BUSINESS PRACTICES LISTED ARE NOT EXCLUSIVE:** The conduct set forth in 12.11.7.13 NMAC is not exclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers and federal covered advisers, to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

[12.11.7.14 NMAC - Rp, 12.11.7.14 NMAC, 1-1-2010]

#### **HISTORY OF 12.11.7 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, 5-18-67

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

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

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

SD Rule 95-4.06, Rules of Conduct, 10-14-95

SD Rule 86-4.07, Prohibited Business Practices, 7-1-86.

#### **History of Repealed Material:**

12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices (filed 12/9/2008) repealed 1-1-2010.

#### **Other History:**

SD Rule 86-4.07, Prohibited Business Practices (filed 7-1-86) and SD Rule 95-4.06, Rules of Conduct (filed 10-14-95) was **renumbered** into first version of the New Mexico Administrative Code as 12 NMAC 11.3, Investment Advisers, Investment Advisor Representatives and Federal Covered Advisors, effective 5/01/1999.

Those relevant portions of 12 NMAC 11.3, Subparts 9, Rules of Conduct and Subpart 10, Prohibited Business Practices (filed 4-19-99), were renumbered, reformatted, amended and replaced by 12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices, effective 12-31-2008.

12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices (filed 12/9/2008) was replaced by 12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices, effective 1-1-2010.