

**INVESTMENT ADVISER REPRESENTATIVE  
TEXT OF MODEL LANGUAGE, AS ADOPTED BY NASAA ON MAY 3, 1998**

**I. TEXT OF PROPOSED STATUTORY AMENDMENT AND REGULATIONS**

**A. Statutory Amendment**

- (g) (1) “Investment adviser representative” means any partner, officer, director of (or a person occupying a similar status or performing similar functions) or other individual, except clerical or ministerial personnel, who is employed by or associated with:
- (A) an investment adviser that is registered or required to be registered under this act and who does any of the following:
- (i) makes any recommendations or otherwise renders advice regarding securities,
  - (ii) manages accounts or portfolios of clients,
  - (iii) determines which recommendation or advice regarding securities should be given,
  - (iv) solicits, offers or negotiates for the sale of or sells investment advisory services, or
  - (v) supervises employees who perform any of the foregoing; or
- (B) a federal covered adviser, subject to the limitations of Section 203A of the Investment Advisers Act of 1940, as the Administrator may designate by rule or order.<sup>1</sup>
- (2) “Investment adviser representative” does not include such other persons employed by or associated with either an investment adviser or a federal covered adviser not within the intent of this subsection as the Administrator may designate by rule or order.<sup>2</sup>

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<sup>1</sup> The “underlying” regulation would be promulgated pursuant to the authority conferred upon the Administrator in §401(g)(1)(B).

<sup>2</sup> This delegation would permit the Administrator to exclude others from inclusion within the definition. This language is borrowed significantly from §202(a)(11)(F) of the Advisers Act, which permits the Commission to exclude persons from the investment adviser definition.

**B. Model Regulations**

**1. Rule 401g2-1 (*ALTERNATIVE ONE*)**

- (a) Notwithstanding Section 401(g) of this Act the term “investment adviser representative” who is employed by or associated with a federal covered adviser only includes an individual who has a “place of business” in this jurisdiction, as that term is defined in rules or regulation promulgated under Section 203A of the Investment Advisers Act of 1940 by the U.S. Securities and Exchange Commission, and who either:
- (1) is an “investment adviser representative” as that term is defined in rules or regulations promulgated under Section 203A of the Investment Advisers Act of 1940 by the U.S. Securities and Exchange Commission; or
  - (2)
    - (A) is not a “supervised person” as that term is defined in rules or regulations promulgated under the Investment Advisers Act of 1940 by the U.S. Securities and Exchange Commission, and
    - (B) solicits, offers or negotiates for the sale of or sells investment advisory services on behalf of a federal covered adviser.

**2. Rule 401g2-1 (*ALTERNATIVE TWO*)**

- (a) Notwithstanding Section 401(g) of this Act, the term “investment adviser representative” as used in this Act and applied to federal covered advisers only includes a person who has a “place of business”, as that term is defined in paragraph (b)(4) of this rule, and who either:
- (1) is a “supervised person”, as defined in paragraph (b)(3) of this rule, provided the supervised person:
    - (A) has clients more than 10% of whom are natural persons, other than “excepted persons”, as defined in paragraph (b)(1) of this rule,
    - (B) on a regular basis solicits, meets with, or otherwise communicates with clients of a federal covered adviser, and
    - (C) does not provide only “impersonal investment advice”, as defined in paragraph (b)(2) of this rule; or who
  - (2)
    - (A) is not a “supervised person” as that term is defined in paragraph

(b)(3) of this rule, and

(B) solicits, offers or negotiates for the sale of or sells investment advisory services on behalf of a federal covered adviser.

(b) For purposes of this section:

(1) “Excepted person” means a natural person who:

(A) immediately after entering into the investment advisory contract with the investment adviser has at least \$500,000 under management with the investment adviser, or

(B) the investment adviser reasonably believes, immediately prior to entering into the advisory contract, has a net worth (together with assets held jointly with a spouse) at the time the contract is entered into of more than \$1,000,000.

(2) “Impersonal investment advice” means investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts.

(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.<sup>3</sup>

(4) “Place of business” means:

(A) an office at which the “investment adviser representative” regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients, or

(B) any other location that is held out to the general public as a location at which the “investment adviser representative” provides investment advisory services, solicits, meets with, or otherwise communicates with clients.

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<sup>3</sup> This definition is taken from the definition of “supervised person” at §202(a)(25) of the Advisers Act. The term “supervised person” would have to be defined, since one must be a “supervised person” to be an “investment adviser representative” for purposes of SEC Rule 203A-3(a).

- (c) Supervised persons may rely on the definition of “client” in SEC Rule 275.203(b)(3)-1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

## II. COMMITTEE COMMENTARY

Immediately after passage of the National Securities Markets Improvement Act of 1996<sup>4</sup> (“NSMIA”), NASAA convened a “working group” comprised of staff members and Administrators from ten states,<sup>5</sup> and the NASAA Legal Department. This group, which became known as the 3005 Working Group, was charged with drafting significant amendments to the Uniform Securities Act of 1956, as amended (“’56 Act”), to comport with the NSMIA. Five of these individuals<sup>6</sup> focused principally on the investment adviser issues presented by Title III of the NSMIA, the Investment Advisers Supervision Coordination Act (“Coordination Act”).

In December 1996, the Securities and Exchange Commission (“SEC” or “Commission”) proposed several regulations to implement various provisions of the Coordination Act (the “Proposing Release”).<sup>7</sup> The Commission proposed, among other things, a definition of “investment adviser representative” that would apply to representatives of Commission-registered advisers.

On April 27, 1997, the NASAA membership adopted the ‘56 Act revisions, including a revised definition of “investment adviser representative.” At the time the NASAA membership considered the proposed revisions to the definition of “investment adviser representative,” the Commission’s proposal was not yet adopted, and it was not known whether the Commission would adopt their proposed definition.<sup>8</sup> The 3005 Working Group elected to not incorporate the Commission’s proposed definition into its revisions to the ‘56 Act for consideration by the membership. Also, no NASAA Member Representative recommended that the 3005 Working Group incorporate the Commission’s proposed

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<sup>4</sup> Pub. L. No. 104-290, 110 Stat. 3416 (1996) (codified in various sections of the United States Code).

<sup>5</sup> The ten individuals were (in alphabetical order): Cynthia Antanaitis (CT); William Beatty (WA); Richard Cortese (VT); Barry Guthary (MA); Melanie Senter Lubin (MD); G. Phillip Rutledge (PA); Ronald Thomas (VA); Anu Vaitheswaran (IA); Michael Vargon (NM); Roger Walter (KS).

<sup>6</sup> These five individuals (in alphabetical order) are: Cynthia Antanaitis (CT); Richard Cortese (VT); Melanie Senter Lubin (MD); Ronald Thomas (VA); Roger Walter (KS).

<sup>7</sup> Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Rel. No. 1601 (Dec. 20, 1996) [61FR 68480 (Dec. 27, 1996)] (“Proposing Release”).

<sup>8</sup> NASAA recommended that the SEC withdraw its proposed definition.

definition. The Commission adopted this definition and several others in May 1997 (the “Adopting Release” or “IA-1633”).<sup>9</sup>

At a meeting during the summer of 1997, the NASAA Board of Directors instructed the investment adviser portion of the 3005 Working Group to reexamine the definition of “investment adviser representative” in light of the SEC’s recently adopted rules. On October 25, 1997, the 3005 Working Group presented its first draft of amendments to the NASAA Membership, as well as several industry groups, representatives of the bar, and other regulators. This draft continued to be modified in response to comments received from the NASAA membership, and from these other stakeholders.

On November 16, 1997, the NASAA Board of Directors approved for release for public comment a revised definition of “investment adviser representative,” as that term is defined in §401(g) of the ‘56 Act. The comment period remained open from November 16, 1997 to March 20, 1998. The NASAA Board of Directors asked the Investment Adviser Section, which in turned asked the Investment Adviser Forms Committee,<sup>10</sup> to review the comment letters, finalize the relatively minor changes to the 3005 Working Group’s proposal, and present this proposal. It is important to note that currently proposed SEC rule changes likely will affect the text of one of the two versions of the rule and will require additional amendment by NASAA.

#### “Investment Adviser Representative” Definition Proposal

The NASAA membership first adopted a definition of “investment adviser representative” as an amendment to the ‘56 Act in 1986.<sup>11</sup> To date, 39 states have defined, in one form or another, the term “investment adviser representative.” State treatment of solicitors has varied somewhat, with the vast majority of states including solicitors in the definition of “investment adviser representative.”<sup>12</sup> The ‘56 Act definition treats as “investment adviser representatives” those individuals employed by or associated with an investment adviser that, among other things, make

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<sup>9</sup> Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Rel. No. 1633 (May 15, 1997) [62FR 28112 (May 22, 1997)] (“Adopting Release”).

<sup>10</sup> The Investment Adviser Forms Committee members (in alphabetical order) are: Scott P. Borchert (MN); Maurice Cox (CA); Melanie Senter Lubin (MD); Wm. Rhea Shelton (VA); Mark Snyder (UT).

<sup>11</sup> See NASAA Reports ¶4881 (July 1997) (Sec. 401(g), p. 3569).

<sup>12</sup> As of January 1, 1998, the states that include solicitors as “investment adviser representatives” are: Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Idaho, Indiana, Kansas, Maryland, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Washington.

Those states that do not include solicitors as “investment adviser representatives” are Arkansas, Florida, Georgia, Hawaii, Illinois, Minnesota, Missouri, New Mexico, Oklahoma, Pennsylvania.

recommendations or render advice regarding securities; manage accounts or portfolios of clients; determine which recommendation or advice regarding securities should be given; solicit, offer or negotiate for the sale of advisory services; or those that supervise employees who perform the above services.<sup>13</sup> Prior to July 8, 1997, this definition applied to representatives of all investment advisers, regardless of the size or clientele of the adviser.

The definition of “investment adviser representative” now found at SEC Rule 203A-3(a) applies to representatives of advisers permitted to register with the Commission. Staff of the Division of Investment Management has stated that “[t]he Coordination Act did not affect the application of state law to “investment adviser representatives” of state-registered advisers.”<sup>14</sup> State definitions would thus continue to apply to representatives of advisers for which Commission registration is prohibited. NASAA’s proposed definition follows this bifurcation, with one portion of the definition (contained in §401(g)) applying to representatives of state-registered advisers, and the other (contained in the regulation) applying to representatives of Commission-registered advisers.

A statutory revision and a model regulation, in two versions,<sup>15</sup> are proposed. The statutory revision grants general exemptive authority to the Administrator to exclude, by rule or order, certain persons from the definition of “investment adviser representative.” The statutory revision also amends the definition of “investment adviser representative” to comport with the federal definition found at SEC Rule 203A-3(a), as that definition is applied to representatives of Commission-registered advisers.

The proposed model state regulation is presented in two formats -- one for states that possess the ability to incorporate SEC regulations by reference and one for states that cannot. For those states that *cannot* incorporate by reference it is important to note that regulations currently pending before the SEC and expected to be finalized later this year likely will affect the regulation proposed for NASAA adoption. Before adopting the rule portion of this NASAA proposal, states that cannot incorporate by reference may wish to wait until the SEC rule proposal is finalized and NASAA further modifies this rule to incorporate any changes that ensue from the SEC action.

## **Solicitors**

The Commission’s definition of “investment adviser representative,” as applied to solicitors of Commission-registered advisers differs from that of the ‘56 Act and from the analysis suggested by the Commission in its Proposing Release. As adopted, the Commission’s “revised”<sup>16</sup> interpretation notes

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<sup>13</sup> See NASAA Reports ¶4881 (July 1997) (Sec. 401(g), p. 3569).

<sup>14</sup> See <<http://www.sec.gov/rules/extra/grtdiv.htm>>.

<sup>15</sup> When drafting regulations that incorporate federal regulations into a state statute, NASAA Committees recognize that several states are unable to incorporate federal regulations by reference. For this reason, it is often necessary to draft two regulations: one that incorporates by reference and another that reprints substantially the pertinent federal provision.

<sup>16</sup> Adopting Release, *supra* note 9, at 48.

that whether a solicitor will be subject to state registration, licensure, or qualification turns on whether the solicitor is a “supervised person”<sup>17</sup> and, if so, whether the supervised person is an “investment adviser representative” (under the Commission’s definition). If the solicitor is an “investment adviser representative,” the solicitor is subject to state registration in the jurisdiction(s) in which the solicitor has a place of business.<sup>18</sup> If the solicitor is a supervised person but is not an “investment adviser representative,” states are preempted from requiring the registration, licensure or qualification of that solicitor.

If the solicitor is not a “supervised person” the solicitor will not be an “investment adviser representative” under SEC Rule 203A-3(a), but may be a solicitor under state definitions of “investment adviser representative.” A third-party solicitor (i.e., not an employee of the adviser (nor a partner, officer, or director) for whom she is soliciting) for a Commission-registered adviser is not a supervised person “*unless* the solicitor provides investment advice on behalf of the investment adviser and is subject to the supervision and control of the adviser.” (Emphasis in original.) Third-party solicitors that are not supervised persons are subject to state qualification requirements to the extent state investment adviser statutes require registration, licensure, or qualification of solicitors as “investment adviser representatives,” as that term is defined by state law.

The Commission’s interpretation, as expounded in the Adopting Release, clearly left states free to require registration of all third-party solicitors, regardless of the “place of business” of the solicitor. The NASAA Board of Directors considered this issue, and elected to release for public comment a definition of “investment adviser representative” that limited registration as “investment adviser representatives” to those third-party solicitors that have a place of business in a given state. The 3005 Working Group drafted a proposed rule to achieve this end.

For those states that cannot (or choose not to) incorporate SEC Rule 203A-3 by reference, the 3005 Working Group redrafted SEC Rule 203A-3(a) to provide greater clarity to advisers and their supervised persons. The substance of the definition is unchanged: the definitions “within” the definition are unchanged and the threshold for determining when a supervised person is an “investment adviser representative” is also unchanged. The 3005 Working Group considered whether the regulation promulgated under §401(g)(1)(B) should “mirror” SEC Rule 203A-3(a), but decided to modify slightly Rule 203A-3(a), while preserving the definitional scope. As discussed above, it is likely that the model rule will require amendment once the pending SEC rule amendments are adopted.

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<sup>17</sup> The term “supervised person” is defined in section 202(a)(25) of the Advisers Act. §80b-202(a)(25) (1997).

<sup>18</sup> As that term is defined in SEC Rule 203A-3(b).