

# **NASAA PROHIBITED CONDUCT OF INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES AND FEDERAL COVERED INVESTMENT ADVISERS (MODEL RULE 502(b))**

**(Adopted September 17, 2008; Amended November 6, 2017,  
May 19, 2019, May 4, 2026)**

*NOTE: This rule is intended for jurisdictions that have adopted the Uniform Securities Act of 2002. Italicized text is explanatory or intended for adjustment by a jurisdiction to accord with the jurisdiction's existing statute or regulations.*

## **Rule 502(b) Prohibited Conduct in Providing Investment Advice**

A person who is an investment adviser, an investment adviser representative or a federal covered investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this rule apply to federal covered investment advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser, an investment adviser representative or a federal covered investment adviser and its clients and the circumstances of each case, an investment adviser, an investment adviser representative or a federal covered investment adviser shall not engage in prohibited fraudulent, deceptive, or manipulative conduct, including but not limited to the following:

- (a) Recommending to a client to whom investment advisory 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, investment adviser representative or federal covered investment adviser.
- (b) Exercising any discretionary authority in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary authority relates solely to the price at which, or the time when, an order involving a definite amount of a specified 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.<sup>1</sup>

- (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 financial institution engaged in the business of loaning funds.
- (g) Loaning money or securities to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.
- (h) Misrepresenting to any client, or prospective client, the qualifications of the investment adviser, investment adviser representative, federal covered investment adviser, or any employee, or person affiliated with the investment adviser, investment adviser representative or federal covered investment adviser, or misrepresenting 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 client prepared by someone other than the investment adviser, investment adviser representative or federal covered investment adviser without disclosing that fact. This prohibition does not apply to a situation where the investment adviser, investment adviser representative or federal covered investment adviser uses published research reports or statistical analyses to render advice or where an investment adviser, investment adviser representative or federal covered investment adviser orders such a report in the normal course of providing service.
- (j) Charging a client an unreasonable fee.
- (k) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser, investment adviser representative or federal covered investment adviser, or any of its employees, or affiliated persons which

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<sup>1</sup> The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a “customer’s account” in light of the fact that an investment adviser or an investment adviser representative in such situations can directly benefit from the number of securities transactions effected in a client’s account.

could reasonably be expected to impair the rendering of unbiased and objective advice including but not limited to:

- (1) Compensation arrangements connected with investment advisory services to clients which are in addition to compensation from such clients for such services; and
  - (2) Charging a client an investment advisory fee for rendering investment advice when compensation for effecting securities transactions pursuant to such advice will be received by the investment adviser, investment adviser representative or federal covered investment adviser or its employees, or affiliated persons.
- (1) While acting as principal for its own advisory account, to knowingly sell any security to or purchase any security from a client, or while acting as broker-dealer for a person other than the client, to knowingly effect any sale or purchase of any security for the account of the client, without disclosing to the client in writing before the completion of the transaction the capacity in which it is acting and obtaining the consent of the client to the transaction.
- (1) The prohibitions of this subsection shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction.<sup>2</sup>
  - (2) The prohibitions of this subsection shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer acts as an investment adviser solely:
    - (A) by means of publicly distributed written materials or publicly made oral statements;
    - (B) by means of written materials or oral statements not purporting to meet the objectives or needs of specific individuals or accounts;
    - (C) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or
    - (D) any combination of the foregoing services.<sup>3</sup>
  - (3) Publicly distributed written materials or publicly made oral statements shall disclose that, if the purchaser of the advisory communication uses the

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<sup>2</sup> Note: 1956 Act § 102(a)(3) not included in 2002 Act.

<sup>3</sup> Note: 1956 Rule 102(f)-2(b) not included in 2002 Act.

investment adviser's services in connection with the sale or purchase of a security which is a subject of the communication, the investment adviser may act as principal for its own account or as agent for another person. Compliance by the investment adviser with the foregoing disclosure requirement shall not relieve it of any other disclosure obligations under the Act.<sup>4</sup>

- (4) Definitions for purposes of this Rule,
  - (A) "Publicly distributed written materials" means written materials which are distributed to 35 or more persons who pay for those materials.
  - (B) "Publicly made oral statements" means oral statements made simultaneously to 35 or more persons who pay for access to those statements.
- (m) The prohibitions of this Rule shall not apply to an investment adviser effecting an agency cross transaction for an advisory client provided the following conditions are met:<sup>5</sup>
  - (1) The advisory client executes a written consent prospectively authorizing the investment adviser to effect agency cross transactions for such client;
  - (2) Before obtaining such written consent from the client, the investment adviser makes full written disclosure to the client that, with respect to agency cross transactions, the investment adviser will act as broker-dealer for, receive commissions from and have a potentially conflicting division of loyalties and responsibilities regarding both parties to the transactions;
  - (3) At or before the completion of each agency cross transaction, the investment adviser or any other person relying on this rule sends the client a written confirmation. The written confirmation shall include:
    - (A) A statement of the nature of the transaction;
    - (B) The date the transaction took place;
    - (C) An offer to furnish, upon request, the time when the transaction took place; and
    - (D) The source and amount of any other remuneration the investment

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<sup>4</sup> Note: 1956 Rule 102(f)-2(c).

<sup>5</sup> Note: 1956 Rule 102(f)-1.

adviser received or will receive in connection with the transaction. In the case of a purchase, if the investment adviser was not participating in a distribution, or, in the case of a sale, if the investment adviser was not participating in a tender offer, the written confirmation may state whether the investment adviser has been receiving or will receive any other remuneration and that the investment adviser will furnish the source and amount of such remuneration to the client upon the client's written request;

- (4) At least annually, and with or as part of any written statement or summary of the account from the investment adviser, the investment adviser or any other person relying on this rule sends each client a written disclosure statement identifying:
  - (A) The total number of agency cross transactions during the period for the client since the date of the last such statement or summary; and
  - (B) The total amount of all commissions or other remuneration the investment adviser received or will receive in connection with agency cross transactions for the client during the period.
- (5) Each written disclosure and confirmation required by this rule must include a conspicuous statement that the client may revoke the written consent required under subsection (m)(1) of this rule at any time by providing written notice to the investment adviser.
- (6) No agency cross transaction may be effected in which the same investment adviser recommended the transaction to both any seller and any purchaser.
- (7) For purposes of this rule, "agency cross transaction for an advisory client" means a transaction in which a person acts as an investment adviser in relation to a transaction in which the investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, including an investment adviser representative, acts as a broker-dealer for both the advisory client and another person on the other side of the transaction. When acting in such capacity such person is required to be registered [licensed] as a broker-dealer in this state unless excluded from the definition.
- (8) Nothing in this rule shall be construed to relieve an investment adviser or investment adviser representative from acting in the best interests of the client, including fulfilling his duty with respect to the best price and execution for the particular transaction for the client nor shall it relieve any investment adviser or investment adviser representative of any other disclosure obligations imposed by

the Act.

- (n) Guaranteeing a client that a specific result will be achieved with advice rendered.
- (o) **[Alternative 1]** Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.
- (o) **[Alternative 2]** Publishing, circulating, or distributing any advertisement which directly or indirectly is in violation of any of the following:
  - (1) An advertisement may not:
    - (A) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading;
    - (B) Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Administrator;
    - (C) Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;
    - (D) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without also providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;
    - (E) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;
    - (F) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or
    - (G) Otherwise be materially misleading.
  - (2) An advertisement may not include any testimonial or endorsement, and an investment adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the following:
    - (A) The investment adviser clearly and prominently discloses, or reasonably

believes that the person giving the testimonial or endorsement discloses, the following at the time the testimonial or endorsement is disseminated:

- (i) That the testimonial was given by a current client or investor, and that the endorsement was given by a person other than a current client or investor, as applicable;
  - (ii) That cash or non-cash compensation was provided for the testimonial or endorsement, as applicable;
  - (iii) A brief statement and description of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person; and
- (B) The investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement discloses the material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the testimonial or endorsement.
- (C) The investment adviser must have all of the following:
- (i) A reasonable basis for believing that the testimonial or endorsement complies with the requirements of this rule; and
  - (ii) A written agreement with any person giving a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of the compensation for those activities.
- (D) An investment adviser may not compensate a person, directly or indirectly, for a testimonial or endorsement if the adviser knows, or in the exercise of reasonable care should know, that the person giving the testimonial or endorsement is an ineligible person at the time the testimonial or endorsement is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under 17 CFR 275.206(4)-3(a)(1)(ii) under the Investment Advisers Act of 1940, as in effect prior to the effective date of this rule.
- (E) A testimonial or endorsement disseminated for no compensation is not required to comply with subsections (o)(2)(B)(ii) or (o)(2)(C) of this rule;

- (F) A testimonial or endorsement by the investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person is not required to comply with subsections (o)(2)(A) and (o)(2)(B)(ii), provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or investor at the time the testimonial or endorsement is disseminated and the investment adviser documents such person's status at the time the testimonial or endorsement is disseminated;
- (G) A testimonial or endorsement by a broker-dealer registered under the Act is not required to comply with the following:
  - (i) Subsection (o)(2)(A) of this rule if the testimonial or endorsement is a recommendation subject to 17 CFR 240.151-1 (Regulation Best Interest) under the Securities Exchange Act of 1934
  - (ii) Subsections (o)(2)(A)(ii) and (iii) of this rule if the testimonial or endorsement is provided to a person that is not a retail customer as that term is defined by 17 CFR 240.151-1 under the Securities Exchange Act of 1934;
  - (iii) Subsection (o)(2)(C) of this rule if the broker-dealer is not subject to statutory disqualification as defined under section 3(a)(39) of the Securities Exchange Act of 1934; and
  - (iv) A testimonial or endorsement by a person that is covered under 17 CFR 230.506(d) under the Securities Act of 1933 with respect to an offering under that 17 CFR 230.506 and whose involvement would not disqualify the offering under that rule is not required to comply with subsection (o)(2)(C) of this rule.
- (3) An advertisement may not include any third-party rating unless the investment adviser complies with the following:
  - (A) The investment adviser has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and

- (B) The investment adviser clearly and prominently discloses or reasonably believes that the third-party rating clearly and prominently discloses all of the following:
  - (i) The date on which the rating was given and the period of time upon which the rating was based;
  - (ii) The identity of the third party that created and tabulated the rating; and
  - (iii) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.
  
- (4) An investment adviser may not include in any advertisement:
  - (A) Any presentation of gross performance, unless the advertisement also presents net performance and complies with both of following:
    - (i) Net performance presentation is given at least equal prominence and is formatted to facilitate comparison with gross performance; and
    - (ii) Net performance is calculated over the same time period and using the same type of return and methodology as gross performance.
  
  - (B) Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the advertisement includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.
  
  - (C) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Administrator.
  
  - (D) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios if both of the following are true:

- (i) The advertised performance results are not materially higher than if all related portfolios had been included; and
  - (ii) The exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by subsection (o)(4)(B) of this rule.
- (E) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.
- (F) Any hypothetical performance unless the investment adviser complies with all of the following:
  - (i) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and objectives of the intended audience of the investment;
  - (ii) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and
  - (iii) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in subsections (o)(4)(B), (D), and (E) of this rule.
- (G) Any predecessor performance unless the investment adviser complies with all of the following:
  - (i) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising investment adviser;
  - (ii) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;

- (iii) All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods prescribed in subsection (o)(4)(B) of this rule; and
  - (iv) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.
- (5) As used in this rule, the following terms mean:
- (A) “Advertisement” means any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser’s investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, but does not include:
    - (i) Extemporaneous, live, oral communications;
    - (ii) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or
    - (iii) A communication that includes hypothetical performance that is provided:
      - (a) In response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser, or
      - (b) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and
    - (iv) Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such

information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.

- (B) “De minimis compensation” means compensation paid to a person for providing a testimonial or endorsement of a total of \$1,000 or less [or such other dollar amount the jurisdiction believes is “de minimis” for its geographic region] (or the equivalent in non-cash compensation) during the preceding 12 months.
- (C) “Disqualifying action” means an order of the Administrator, the securities administrator of any other state, the U.S. Securities and Exchange Commission, or any self-regulatory organization barring, denying, suspending, or revoking registration as a broker-dealer, agent investment adviser, or investment adviser representative barring the person from the securities or advisory industry or associating or affiliating with the securities or advisory industry, entered after notice and opportunity for hearing;
- (D) Except as to such circumstances as may be excluded by operation of subsection (o)(5)(E), a “disqualifying event” is any of the following events that has occurred within the ten years prior to the person disseminating an endorsement or testimonial:
  - (i) A conviction by a court of competent jurisdiction within the United States of any felony, or any misdemeanor involving conduct described in paragraphs (2)(A) through (D) of Section 203(e) of the Investment Advisers Act of 1940;
  - (ii) A conviction within the previous ten years of any felony, or any misdemeanor involving conduct described in section 204(a)(2)(C) of the Investment Advisers Act of 1940;
  - (iii) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of Section 203(e) of the Investment Advisers Act of 1940;
  - (iv) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in sections 204(a)(2)(A), (B) or (F) of the Investment Advisers Act of 1940;

- (v) The entry of any final order by any entity described in paragraph (9) of Section 203(e) of the Investment Advisers Act of 1940, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms)), of the type described in paragraph (9) of section 203(e) of the Investment Advisers Act of 1940;
  - (vi) The entry of an order, judgment or decree described in paragraph (4) of Section 203(e) of the Investment Advisers Act of 1940, and still in effect, by any court of competent jurisdiction within the United States;
  - (vii) The entry of an order, judgment or decree described in section 204(a)(2)(D) of the Investment Advisers Act of 1940; or
  - (viii) An order by the Securities and Exchange Commission or the securities or other financial services regulator of any state that a person cease and desist from committing or causing a violation or future violation of:
    - (a) Any scienter-based anti-fraud provision of Federal or state securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder;
    - (b) *[Section 101 of the 1956 Uniform Securities Act or section 501 of the 2002 Uniform Securities Act, as applicable]*;
    - (c) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e); or
    - (d) *[Section 301 of the 1956 Uniform Securities Act or Section 301 of the 2002 Uniform Securities Act, as applicable]*.
- (E) “Disqualifying event” under subsections (o)(5)(D)(i) through (v) does not include an event, if at the same time, either (a) the person is subject to an order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a-9) with respect to such event or (b) the opinion or order that

would otherwise constitute the disqualifying event is not a disqualifying action and, as to such opinion or order set forth in clause (a) or (b):

- (i) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and
  - (ii) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to an order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission's or regulator's website.
- (F) "Endorsement" means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that:
- (i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person's experience with the investment adviser or its supervised persons;
  - (ii) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
  - (iii) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
- (G) "Extracted performance" means the performance results of a subset or investments extracted from a portfolio.
- (H) "Gross performance" means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of fees, costs, and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio.
- (I) Except as to such circumstances as may be excluded by operation of subsection (o)(5)(J), "hypothetical performance" means performance results that were not actually achieved by any portfolio of the investment

adviser, including but not limited to:

- (i) Performance derived from model portfolios;
- (ii) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and
- (iii) Targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement.

(J) “Hypothetical performance” does not include:

- (i) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser:
  - (a) Provides a description of the criteria and methodology used, including the investment analysis tool’s limitations and key assumptions;
  - (b) Explains that the results may vary with each use and over time;
  - (c) If applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and
  - (d) Discloses that the tool generates outcomes that are hypothetical in nature.
- (ii) Predecessor performance that is displayed in compliance with subsection (o)(4)(G) of this rule.

- (K) “Ineligible person” means a person who is subject to a disqualifying event and the following persons with respect to such ineligible person:
- (i) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person; and
  - (ii) If the ineligible person is a partnership, all general partners, or if the ineligible person is a limited liability company managed by elected managers, all elected managers.
- (L) “Net performance” means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser’s investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:
- (i) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and
  - (ii) If using a model fee, must reflect one of the following:
    - (a) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or
    - (b) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.
- (M) “Portfolio” means a group of investments managed by an investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliated (as defined in the Form ADV Glossary of Terms).
- (N) “Predecessor performance” means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.

- (O) “Private fund” has the same meaning as in section 202(a)(29) of the Investment Advisers Act of 1940.
- (P) “Related performance” means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.
- (Q) “Related portfolio” means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.
- (R) “Supervised person” has the same meaning as in section 202(a)(25) of the Investment Advisers Act of 1940.
- (S) “Testimonial” means any statement by a current client or investor in a private fund advised by the investment adviser:
  - (i) About the client or investor’s experience with the investment adviser or its supervised persons;
  - (ii) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or
  - (iii) That refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.
- (T) “Third-party rating” means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of business.
- (p) Making, in the solicitation of clients, any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading.<sup>6</sup>
- (q) 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.

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<sup>6</sup> Note: 1956 Act § 102(b).

- (r) Disclosing the identity, investments, or other financial information of any client or former client unless required by law to do so, or unless consented to by the client.
- (s) 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 when the action of the investment adviser or investment adviser representative is subject to and does not comply with the requirements of Rule 411(f)-1.
- (t) Engaging in any act, practice, or course of business which is fraudulent, deceptive, manipulative or unethical.
- (u) 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 Act or any rule or regulation thereunder.
- (v) Accessing a client's account by using the client's own unique identifying information (such as username and password).\*
- (w) Failing to establish, maintain, and enforce a required policy or procedure.

\* This rule amendment is not intended to apply to data aggregation software where: (a) the investment adviser does not know, or have access to, the client's password(s); (b) there is an agreement between the data aggregation software company and the custodian(s)/online account platform which permits this "back-door" access; and (c) the data is read-only (*i.e.*, the investment adviser can only view the information and cannot effectuate any changes to the client's underlying account(s)).