COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13166

DHANANJAY PATEL; SAFDAR HUSSAIN; VATSAL CHOKSHI; DHAVAL PATEL; NIRAL PATEL

Plaintiffs – Appellants

v.

7-ELEVEN, INC.

Defendant/Third-Party Plaintiff-Appellee,

MARY CARRIGAN; ANDREW BROTHERS

Defendants,

DP MILK STREET INC.; DP JERSEY INC.; DP TREMONT STREET INC.; DPNEWT01

Third-Party Defendants

BRIEF OF THE LIFE INSURANCE ASSOCIATION OF MASSACHUSETTS, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AMERICAN COUNCIL OF LIFE INSURERS AND NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS, AS AMICI CURIAE

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CORPORATE DISCLOSURE STATEMENT

Amici, the Life Insurance Association of Massachusetts, Inc. ("LIAM"), the Securities Industry and Financial Markets Association ("SIFMA"), the American Council of Life Insurers ("ACLI"), and the National Association of Insurance and Financial Advisors ("NAIFA"), are all nonprofit corporations or organizations that have no parent corporation, and no publicly held corporation owns 10 percent or more of their respective stock.

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INTEREST OF AMICI CURIAE

Founded in 1974, LIAM is a trade association representing many of the nation's leading life, long term care, and disability income insurers. LIAM develops consensus on issues of importance to the industry and represents its members before the Massachusetts legislature and state government agencies.

Each day, life insurers pay out $55.5 million in life insurance and annuities to Massachusetts families and businesses. In Massachusetts, the life insurance industry, through the 374 companies licensed to do business in Massachusetts, *inter alia*: generates 72,400 jobs; invests $171 billion in the Massachusetts' economy; and provides $20 billion in mortgage loans on farms, residential, and commercial property.

SIFMA was founded in 1912 and is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. It serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations.

ACLI is the leading life insurance industry trade association representing approximately 280 member companies operating across the United States and abroad.

ACLI advocates in state, federal, and international fora for public policy that supports the industry marketplace and the policyholders that rely on life insurers' products for financial and retirement security and peace of mind. ACLI member companies are the leading providers of financial and retirement security products covering individual and group markets. Over ninety-million American families depend on ACLI's members for life insurance, disability income insurance, long-term care insurance, annuities, retirement plans, pension products, dental and vision insurance, and reinsurance. In the United States, these members represent more than 95% of industry assets, 93% of life insurance premiums, and 98% of annuity considerations of the life insurance and annuity industry.

Founded in 1890 as The National Association of Life Underwriters, NAIFA is one of the nation's oldest and largest associations representing the interests of insurance and financial professionals from every Congressional district in the United States. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, multiline, and financial advising and investments.

NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

LIAM, ACLI, and SIFMA's member companies and NAIFA's members all operate in the highly regulated insurance and financial services industries. Like franchisors and franchisees, LIAM, ACLI, and SIFMA's member companies are legally obligated, under numerous laws, rules, and regulations, to exercise regulatory "supervision" over their affiliated agents and advisors, which Appellants would claim is control for purposes of the ABC test. As a result, their members, as well as NAIFA's, have a significant interest in the crux of the question presented – *i.e.*, whether § 148B should apply where industry regulations *both* expressly allow independent contractor business models but also require that companies take actions that are alleged to preclude independent contractor status under the § 148B standard. That question should be answered in the negative because of the significant harm that will result.

As just two examples, reversal of the District Court's holding will imperil the regulatory compliance controls required, by law, of insurance companies,

securities firms, and other financial services businesses. Both the public and the insurance and financial services industries have a strong interest in ensuring that insurance agents, advisors, and brokers comply with externally-imposed legal and regulatory requirements. Appellants' position, that an employment relationship is created by measures taken to ensure legal and regulatory compliance (such as supervising the content of marketing materials), could disincentivize insurance and financial services companies from employing the best practices for compliant behavior for fear of creating an employment relationship. *See, e.g.*, *Gross v. Sun Life Assurance Co. of Canada*, 880 F.3d 1, 20 (1st Cir. 2018) (recognizing courts should avoid creating a rule that would create a perverse incentive); *Norkunas v. HPT Cambridge, LLC*, 969 F. Supp. 2d 184, 200 n.8 (D. Mass. 2013) (same); *White v. Blue Cross & Blue Shield of Mass., Inc.*, 442 Mass. 64, 71 (2004) (same); *Commonwealth v. Jacobbe*, 79 Mass. App. Ct. 1122, at *2 (2011) (table decision) (same); *Town of Brookfield v. Labor Relations Comm'n*, 443 Mass. 315, 326 (2005) (declining to adopt an interpretation of a statute that could "encourage delay in securing compliance" with that statute); *People v. Arjune*, 30 N.Y.3d 347, 366 (2017)

(Rivera, J., dissenting) (disagreeing with majority holding because, *inter alia*, it "risks disincentivizing compliance with the rules"). In addition, if the holding is reversed it will force businesses to "guess" as to what regulatory enforcement mechanisms it may implement without crossing the line from independent contractor to common-law employee. *See Commonwealth v. Ruiz*, 453 Mass. 474, 478 (2009) ("[A] statute may not be enforced 'when . . . the statute[] . . . may differ as to its application, thus denying them fair notice of the proscribed conduct.'" (quoting *Commonwealth v. Disler*, 451 Mass. 216, 223 (2008)); *infra* at 30 n.5. Both of those results would significantly undermine the public interest. Amici believe that in addressing these and other issues, their brief will assist the Court in deciding the question presented in this case, which has significant implications for Amici member companies and for the public, policyholders, and the independent insurance agents/producers themselves.[1]

[1] Pursuant to Mass. R. App. 17(c)(5), Amici state that neither party nor their counsel authored this brief in whole or in part, and no person other than Amici and their counsel contributed money towards the preparation or submission of this brief. Amici further state that neither Amici nor their counsel has ever represented any of the parties to the present appeal in another proceeding involving similar issues – nor were they a

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

LIAM, SIFMA, ACLI, and NAIFA ("Amici") address the issue presented by the Court in its amicus announcement of September 2, 2021:

"Whether the three-prong test for independent contractor status set forth in Mass. Gen. Laws ch. 149 § 148B applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the FTC Franchise Rule."

SUMMARY OF ARGUMENT

Companies in the Commonwealth operating in industries that impose regulatory obligations inconsistent with the standard set forth in M.G.L. ch. 149, § 148B ("§ 148B") presently face an irreconcilable Catch-22: Comply with industry regulations and face misclassification claims under § 148B or violate industry regulations and safeguards in an attempt to avoid misclassification claims under § 148B.

The only logical (and narrow) way to resolve that conflict, while striking a balance that protects the public, policyholders, and century-old independent

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party or a party's representative in a proceeding or legal transaction that is at issue in the present appeal.

contractor models in the Commonwealth, is to apply the principles set forth in *Monell v. Boston Pads LLC*, 471 Mass. 566 (2015) beyond the real estate industry and in the limited context of similarly highly regulated industries. In *Monell*, this Court held that where industry regulations require activity inconsistent with a prong of § 148B, § 148B should not apply. *See id.* at 577. *Monell* involved two inconsistent Massachusetts laws requiring real estate salespersons to be ***affiliated with*** *a licensed broker,* while simultaneously, to demonstrate independent contractor status under § 148B, requiring proof that the worker performed services ***outside of*** *the usual course of the putative employer's business*. *Id.* at 574-75. Because of the inherent inconsistency between the regulatory requirements imposed on the real estate firm and the § 148B standard, and because there was no evidence that the Legislature intended to exclude real estate salespersons from independent contractor status, the Court held that "the independent contractor statute does not apply to real estate salespersons." *Id*. at 576, 578.

As the District Court aptly recognized, and as other courts in Massachusetts have suggested, the *Monell* holding need not be (and should not be) confined to the

real estate industry. *Monell*'s rationale should extend to the limited number of additional highly regulated work relationships where regulations expressly provide for the use of independent contractors, but simultaneously compel conduct that is inconsistent with the § 148B standard. *See Patel v. 7-Eleven, Inc*., 485 F. Supp. 3d 299, 309 (D. Mass. 2020) (*Monell* "stands for the proposition that the Massachusetts [independent contractor law] is inapplicable if a competing statutory scheme precludes satisfaction of any one prong"); *Ruggiero v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 114 (D. Mass. 2015) ("The recent decision by the Supreme Judicial Court in *Monell* . . . suggests that where a relationship as defined by regulation expressly precludes the satisfaction of a prong of the independent contractor statute, the independent contractor statute will not govern.").

In this regard, the insurance and financial services industries are faced with, and highlight, the dilemma of the real estate industry and in the franchisor-franchisee dynamic. *Ruggiero,* 137 F. Supp. 3d at 115 ("The relationship of a registered representative and a broker-dealer is no doubt highly regulated in a fashion similar in some respects to that addressed

in *Monell.*"). In each context, important regulations in place to protect the public require the individual service providers to be appointed, licensed, and/or otherwise connected to a company entity (the alleged employer) before they can provide the services at issue. For insurance agents – they must be both licensed by the state and appointed by a company that must provide specific regulatory oversight. M.G.L. ch. 175, §§ 162I, 162S. For advisors – they must likewise register their business under Massachusetts law and must register with FINRA and the Securities Exchange Commission ("SEC") as a representative of a registered firm. M.G.L. ch. 110A, §§ 201, 401; FINRA Rule 1210; 15 U.S.C. §§ 80b–2(a)(11), 80b-3. For stockbrokers – they must be licensed through the SEC, must join a self-regulatory organization, and are required to provide services through a registered broker dealer. 15 U.S.C. §§ 78c(a)(3)-(4), 78o(a)(1). In all instances, to protect the public, customers, and the agents/advisors themselves, a company is then required, pursuant to external governmental and self-regulatory authority, to exercise certain oversight over the individual. Simultaneously, various laws, regulations, and over a century of jurisprudence, provide for and specifically allow the use of independent contractors in

each context.

This dynamic compels the same result in both the franchisor and insurance/financial services contexts as the court in *Monell* reached in the real estate context. Specifically, § 148B cannot be applied where complying with a regulatory scheme designed to protect the public, policyholders, and investors potentially precludes an industry from using (or at a minimum requires substantial, unavoidable risk in using) an independent contractor sales model.

This issue has significant, real-world implications for the insurance and financial services industries. Hundreds of thousands of individuals who sell securities and insurance products have chosen to be, and have been classified as, independent contractors. *See* Katherine Lim, et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Admin. Tax Data*, at 38 fig.6 (July 2019), www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf (stating that in 2016 there were nearly 600,000 independent contractors in the financial and insurance industries). Courts around the country, including in Massachusetts, have consistently and uniformly upheld that classification. *See infra* at 41-42 & n.9. If this Court were to limit *Monell*'s

rationale to the real estate context and permit compliance with industry regulations to eliminate or undercut independent contractor status under § 148B, it would upend those industries in Massachusetts and cause a result that the Legislature neither contemplated nor intended in enacting § 148B.[2]

To resolve the conflict between § 148B and certain industry regulations, this Court should extend *Monell*'s reasoning to hold that § 148B does not apply to a franchisor-franchisee relationship where the franchisor must, and does, comply with the FTC Franchise Rule.

ARGUMENT

I. Compliance With Industry Regulations Should Not Subject Companies To Misclassification Claims Under § 148B.

The independent contractor test set forth in § 148B does not fit in all contexts. *See, e.g.*, *Monell*, 471 Mass. 566 (finding § 148B inapplicable in the real estate context); *Mass. Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016) (§ 148B does not apply in truck

[2] As was found to be true for the real estate industry, *Monell*, 471 Mass. at 568, there is nothing in the text or legislative history of § 148 that states or implies that the Legislature intended to eliminate the use of independent contractors in the insurance or financial services industries or in the franchisor-franchisee relationship.

driver context where application of Prong B would compel a finding of employee status). Where applying § 148B would place companies between a rock and a hard place – leaving them with the unenviable choice of complying with industry regulations or avoiding misclassification claims – § 148B should not apply. *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 102 (2016) (holding that usual course of business prong's "de facto ban [on use of independent contractors] constitutes an impermissible 'significant impact' on motor carriers that would undercut Congress's objectives in passing the FAAAA . . . ."); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 438 (1st Cir. 2016) (holding that application of the usual course of business prong would "pose[] a serious potential impediment to the achievements of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them").

That is the situation here with 7-Eleven and, more broadly, in those specific and limited industries in which a regulatory framework imposes both a statutory relationship and compliance oversight obligations on companies contracting with independent contractors. To

meet its burden under Prong A of § 148B, a purported employer must demonstrate that the worker is free from supervision and control as to the result to be accomplished and the means and methods utilized in the performance of the work. *Patel*, 485 F. Supp. 3d at 307 (quoting *Athol Daily News v. Bd. of Review of Div. of Emp. & Training*, 439 Mass. 171, 178 (2003)). Under Prong B of § 148B, the putative employer must also prove that the worker's service is performed outside the purported employer's usual course of the business. *Monell*, 471 Mass. at 575.

Industry regulations, such as those in the franchise context and in the insurance and financial services industries, that require workers to affiliate with licensed companies that must exercise regulatory supervision over the worker, are at odds with the test set forth in § 148B. That irreconcilable conflict requires a limit on § 148B in those limited contexts.

A. Following Regulatory Requirements Concerning The Formation Of The Working Relationship Cannot Be Determinative Of Employment Status.

As explained above, Prong B of § 148B requires the putative employer to prove that the service of the worker is performed outside the usual course of business of the purported employer. *Monell*, 471 Mass. at 575. In *Monell*,

this Court found that because industry-specific laws required real estate salespeople to affiliate with, and operate only as representatives of, a real estate broker, a real estate broker could "never prove that the service [provided by a salesperson] is performed outside the usual course of the [putative] employer's business." *Id.* (citing M.G.L. ch. 112, § 87RR); *see* 254 C.M.R. 3.00(6) (1998) ("A licensed salesperson must be engaged by a licensed broker and a licensed salesperson shall not conduct his own real estate business."). Because real estate regulations also allow the engagement of independent contractors as real estate salespersons, the Court concluded that § 148B could not apply in the real estate context. In other words, in certain limited contexts, following regulatory requirements concerning the formation of the working relationship cannot be dispositive of employment status. *Monell*, 471 Mass. at 575; *Kennedy v. Weichert Co.*, No. 0518-19, 2021 WL 2774844, at *8 (N.J. Sup. Ct., App. Div. July 2, 2021) ("[I]t would be inconsistent with the intent of the 2018 statute to apply an employment status test [*i.e.*, an ABC test] in such a way that it would deny independent-contractor status solely on the basis of compliance with Brokers Act requirements.").

In this case, 7-Eleven entered into a franchise agreement with its franchisees under the regulatory scheme governing franchisor-franchisee relationships. To be a franchise you must be in a franchisee-franchisor relationship. The fact that 7-Eleven and hundreds of other independent contractors have formed that relationship, as they were legally required to do, cannot be determinative of employment status. As a result, § 148B cannot be applied.[3]

On this point, insurers and financial services firms are in the same predicament as franchisors and real estate firms. Financial advisors and insurance agents cannot sell securities or insurance products without being licensed and registering with and/or becoming appointed by a broker or insurance company. *See, e.g.*, FINRA Rule 1210; M.G.L. ch. 110A, §§ 201, 401; M.G.L. ch. 175, § 162S. Likewise, the regulations

[3] The Massachusetts Attorney General appears to agree. *See* Advisory from the Mass. Attorney General's Fair Labor and Business Division, 2008/1 ("AG Advisory Opinion 2008/1"), at 5 ("The AGO is cognizant that there are legitimate independent contractors and business-to-business relationships in the Commonwealth. These business relationships are important to the economic wellbeing of the Commonwealth and, provided that they are legitimate and fulfill their legal requirements, ***they will not be adversely impacted by enforcement of the [ABC] Law***.") (emphasis added).

require financial advisors to register with a FINRA-member firm and obtain approval to sell securities products. *See* FINRA Rule 1210 ("Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative . . . ."); M.G.L. ch. 110A, §§ 201, 401 (requiring agents and investment advisors to register such business under Massachusetts law).

Given the complicated nature of the product, and to protect policyholders and the public, an independent contractor who wants to sell any "variable" life insurance must pass both a state insurance exam and securities exams. M.G.L. ch. 175, § 162K; FINRA Rule 1220(b); FINRA Rule 1210, Supp. Material .03. He or she must be licensed to sell insurance and be separately licensed to sell securities regulated products. M.G.L. ch. 175, § 162I; M.G.L. ch. 110A, §§ 201, 401; FINRA Rule 1210; 15 U.S.C. §§ 80b-2(a)(11), 80b-3. He or she must be appointed by an insurance company and can sell the product only through a registered broker-dealer. M.G.L. ch. 175, § 162S; M.G.L. ch. 110A, §§ 201, 401; FINRA Rule 1210.

Contrary to Appellants' argument that these indicia of control can somehow be avoided (Dkt. 6 at 19-23),

none of these requirements can be waived. The individual must have the regulatory supervision required by *two* regulatory bodies and sell the product of and through both an insurance company and a securities broker-dealer. *See supra* at 23-24. There is no other way for that product to be sold - just as there is no way to operate a franchise as an independent contractor without following the franchise laws requiring operation in a certain manner. *Monell*, 471 Mass. at 575.

Per these regulations, independent agents and financial advisors must be affiliated with insurance companies and/or broker dealers. They cannot operate on their own without regulatory compliance oversight – a dynamic that leads to the claim that they are performing services in the "usual course" of the firm's business – the same argument advanced (and rejected) in *Monell*.

In *Monell*, this Court recognized that regulatory requirements, and not company policy, compelled the formation of a relationship between the real estate agent and the firm. *See id*. The agent could only operate though a properly licensed firm and the existence of that regulatory framework was not in that context, and should not be for franchisors, a basis for converting the relationship into employment. *See id.* at 575-76.

Consistent with that reasoning, the District Court in this case correctly recognized that it "cannot be the case . . . that, in qualifying as a franchisee pursuant to the FTC's definition, an individual necessarily becomes an employee." *Patel*, 485 F. Supp. 3d at 310; *see also Santangelo v. N.Y. Life Ins. Co.,* No. 12–11295, 2014 WL 3896323, at *9 (D. Mass. Aug. 7, 2014) ("A company does not exercise the requisite control necessary to create an employer-employee relationship merely because it restricts the manner or means of their work in order to comply with statutory and regulatory requirements."), *aff'd*, No. 14–1912, 785 F.3d 65 (1st Cir. Apr. 6, 2015).

Amici respectfully submit that this Court should hold, more broadly, that it cannot be the case that, by a company complying with industry regulations related to the formation and operation of the working relationship, the individuals associated with that company necessarily become that company's employees. If insurance and/or securities industry laws and regulations compelling agents and financial advisors to affiliate with licensed insurers and broker dealers were sufficient to negate independent contractor status, § 148B might never permit financial advisors or insurance agents to be anything

other than common law employees. *See Patel*, 485 F. Supp. 3d at 310 ("In effect, such a ruling by this Court would eviscerate the franchise business model, rendering those who are regulated by the FTC Franchise Rule criminally liable for failing to classify their franchisees as employees.").

This is underscored by the fact that, like the real estate salesperson in *Monell*, who by law could only affiliate with one broker, *see* 471 Mass. at 573 (citing M.G.L. ch. 112, § 87VV), financial advisors in Massachusetts cannot be registered as an agent of more than one broker-dealer or issuer. 950 C.M.R. 12.201(2). Reading § 148B to mean that individuals who are required to affiliate with licensed or regulated entities are always in the same business as those entities, and thus employees, could make it impossible for a financial advisor, insurance agent, or franchisee in Massachusetts ever to be an independent contractor.

This irreconcilable conflict is magnified in the insurance industry for the tens of thousands of individuals who choose to be statutory employees (independent contractors who are eligible for certain employee-like benefits under the Internal Revenue

Code).[4] Specifically, insurance agents are *one of only four* occupations that can be "statutory employees" under the Internal Revenue Code ("IRC" or the "Code"). IRC § 3121(d)(3)(A)-(D) (full-time life insurance salespersons, home workers, traveling salespersons, and agent or commission drivers). This special status allows insurance agents: (i) to be subject to withholding for FICA/Social Security taxes only; (ii) to take deductions from their income on a Schedule C, and without a two percent floor; and (iii) to participate in certain of a company's employee benefit plans. *See* IRC § 7701(a)(20).

However, there are certain preconditions to being a statutory employee. First and foremost, *only* individuals who qualify as *independent contractors* under the common law can have the designation and secure the special benefits without losing their independent contractor status. IRC § 3121(d)(3)(B); Internal Revenue Manual § 4.23.5.6.4(4). In other words, agents who are ***common law employees cannot be statutory employees***. IRC

[4] Under IRC § 7701(a)(20), statutory agent independent contractors may receive "accident and health insurance or accident and health plans," "stock bonus, pension, profit-sharing, or annuity plan(s)" and "cafeteria plans." Regular independent contractors ***cannot*** receive any of those benefits without risking that status.

§ 3121(d)(3)(B) (“statutory employees” are individuals “other than an individual who is an employee” who perform services for remuneration as a full-time life insurance salesman) (emphasis added); Internal Revenue Manual, 4.23.5.6.4(4) (“By definition, a worker cannot be a statutory employee under IRC § 3121(d)(3) if that worker is a common law employee.”); *Ewens & Miller, Inc. v. C.I.R.*, 117 T.C. 263, 269 (2001) (An individual qualifies “under section 3121(d)(3) *only* if [the individual] is *not* a common law employee.”) (emphasis added); I.R.S. Field Serv. Advisory, 2002 WL 1315702 (2002) (“[T]he legislative history indicates that the statutory employee provision was intended to be a relief provision for the benefit of . . . workers that were not common law employees.”).

The Code is clear that, to be a statutory employee, the salesperson ***must also*** be a full-time life insurance agent *who intends to sell primarily for one insurance company*. 26 C.F.R. § 31.3121(d)-1(d)(3)(ii)(agent’s “*entire* or *principal* business activity is devoted to the solicitation of life insurance or annuity contracts, or both, *primarily for one* life insurance company”) (emphasis added). If, to comply with § 148B, an agent is required to sell, or express an intent to sell, products

for more than one company, that would negate his status as an independent contractor under § 148B and as a statutory employee under IRC § 3121(d).[5]

[5] Appellants may try to argue that primarily selling one company's products is a choice and that nothing requires individuals to make that choice. However, as noted above, under the Code it is the *only* way for independent contractor insurance agents to be able to receive certain benefits (including health insurance) and remain an independent contractor. IRC § 3121(d)(3)(b). That important benefit has existed for decades, since 1954, and has never been more important than today in the face of Covid-19. Appellants' position on § 148 would eliminate that benefit by forcing insurance agents to choose between remaining an independent contractor by selling and intending to sell the products of multiple insurance companies and receiving important benefits by primarily selling the products of only one. Nothing in the legislative history of § 148 suggests that the Legislature intended to force that choice. Moreover, if the sale of multiple insurance companies' products is required to comply with § 148B, then § 148B is void for vagueness because insurance agents and companies would have no way of knowing in advance what the percentage or amount of any sales will be until after the agent finishes his or her sales during an applicable measuring period, and by which time they may have failed the test and any applicable wage and hour laws may have already been violated. As § 148B fails to define or specify terms critical to its meaning with respect to insurance agents, insurance companies cannot reasonably determine their compliance with its requirements. *See Ives Camargo's Case*, 479 Mass. 492, 504 (2018) (C.J. Gants, concurring) (noting in case analyzing application of § 148B that "[w]ith so many different standards, it is difficult for employers to classify their workers properly, even where they intend to comply with the law"). Without having any means of knowing for certain whether an insurance company was complying with § 148B, an insurance company would be unfairly exposed to the threat of litigation, as well as civil and criminal penalties. *See* § 148B (providing for "all of the criminal and civil remedies, including debarment, as provided in

That would turn the insurance industry on its head and effectively prevent numerous insurance companies from operating in Massachusetts. And if any insurance companies do remain in Massachusetts it will be without important benefits for agents and the State. Specifically, if, because of § 148, insurance companies cannot know whether they can utilize the statutory agent model, they will ***not*** simply convert individuals to employees (*because the agents do not want that*). *See Ruggiero*, 137 F. Supp. 3d at 115 (*Monell* "does not however, stand for the proposition that whenever a regulatory scheme precludes the application of the independent contractor statute, the individuals subject to that regulatory relationship must be classified as employees"). Instead, insurance companies will be forced to use a traditional independent contractor model. Such

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section 27C of this chapter"); § 27C (providing for fines and imprisonment). This absurd result further illustrates why § 148B cannot be applied in the context of certain highly regulated industries. *See Ruiz*, 453 Mass. at 478 ("[A] statute may not be enforced 'when . . . the statute[] . . . may differ as to its application, thus denying them fair notice of the proscribed conduct.'" (quoting *Disler*, 451 Mass. at 223); *Monell,* 471 Mass. at 577 ("Were we to conclude otherwise, we would be subjecting real estate brokerage firms to potential criminal penalties for misclassifying its real estate salespersons in a manner expressly authorized by the real estate licensing statute.").

independent contractors, unlike statutory employee independent contractors, may *not* receive health, pension, or other benefits and do not have Social Security taxes withheld. The result would be that none of these agents will receive any benefits and no Social Security tax withholding will occur – the ***opposite*** of what the federal and state governments expressly intended in creating the unique model for independent contractor insurance agents.[6]

In addition, if franchisors, insurance agents, and

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[6] Congress explicitly noted that the amendments creating the statutory agent classification were intended to benefit *both the government and the workers* by broadening the scope of Social Security coverage (and the taxation thereof) *without altering the common-law rules for determining employee/independent contractor status*. Soc. Sec. Act Amendments of 1950, 1950-2 C.B. 302 (I.R.S. 1950) (noting that the amendment adding life insurance salesmen to the list of statutory employees was occasioned by, *inter alia,* "the increasing burden on the general revenues [of the U.S. government]," and writing further that "[the] committee believes that the usual common-law rules for determining the employer-employee relationship fall short of covering certain individuals . . .[the statutory employee provisions] are designed to extend the definition to include those individuals who [are] *not employees under the usual common-law rules*" (emphasis added)); *see also* I.R.S. Field Serv. Advisory, 2002 WL 1315702 (2002) (citing *id.* for the proposition that "the legislative history indicates that the statutory employee provision was intended to be a relief provision for the benefit of . . . workers that were not common law employees.").

advisors are no longer consistently held to be independent contractors, that uncertainty may well force those individuals to abandon their independent business enterprises. Many of those individuals enjoy the freedom to make the business expenditures that they see fit, the potential for increased compensation, and the tax benefits associated with independent contractor status. Adopting Appellants' construct may well result in the agents and producers potentially facing negative tax and related consequences, and all under the auspices of "protecting" those same producers. That result would be highly disruptive to the livelihoods of the agents and advisors, and, ultimately, a consumer's ability to choose.

This is consistent with the views of NAIFA, a trade group consisting *not* of companies but of professional insurance agents and financial advisors. NAIFA's ongoing member survey indicates almost uniform opposition to attempts to reclassify agents as employees, with 95% of respondents saying they want to remain independent contractors. The top concerns of NAIFA members should they be reclassified as employees include, among others, loss of business deductions, loss of ability to set one's own schedule, loss of

renewal income if current clients were reassigned, nullification of existing agent contracts, and diminished product offerings due to inability to offer products outside of a primary carrier.

From the consumer's perspective, independent insurance producers often are not obligated to any specific insurance company or to that company's products. That flexibility allows an independent agent/producer - on behalf of his/her customer - to sift through the offerings of multiple companies and make recommendations based on the customer's unique requirements, needs, and price considerations, in order to procure the coverage necessary for the client's individual needs. They are free to recommend products from a broader portfolio of options than direct employee-agents. That, in turn, leads to Massachusetts consumers receiving better service and, often, a broader array of insurance and investment products that provide the appropriate level of coverage/return at an appropriate price point.

NAIFA's chief executive officer plainly summed up the point earlier this year:

> Reclassifying agents and advisors as employees would in many cases stifle their independence that allows them to provide clients with diverse

> options, complicate their tax filing status, and disrupt their business models and relationships with clients. Many agents and advisors have relationships with multiple insurance companies and financial institutions, which could make reclassifying them as "employees" problematic. The current independent-contractor relationship insurers consumers have the greatest access to products, services, and advice.

See NAIFA, *As The House Passes The Pro Act, NAIFA Continues To Work For Changes*, advocacy.naifa.orginews/as-the-house-considers-the-pro-act-naifa-continues-to-work-for-changes (Mar. 9, 2021)(quoting NAIFA CEO Kevin Mayeux).

The loss of franchises and other independent contractor commissioned producers in Massachusetts also will have a negative impact on the communities and businesses they serve. Independent producers are not conglomerates; they operate uniquely at a local level and maintain their offices in neighborhoods across the state. They participate in local government, support local youth sports and school organizations, and patronize and support other local businesses. The life insurance industry is credited with generating over 2.6 million jobs in the United States, including 72,400 jobs in Massachusetts. ACLI, Massachusetts Fact Sheet (2021), www.acli.com/-

/media/acli/public/files/pdfs-public-site/state-fact-sheet-infographics/massachusetts.pdf. The industry invests $171 billion in Massachusetts' economy and, each day, life insurers pay out $55.5 million in insurance and annuities to Massachusetts families and businesses. *Id*.

Generating uncertainty in the classification of agents, advisors, and brokers places both Massachusetts consumers and the individual producers at a disadvantage, unnecessarily jeopardizes a significant and beneficial segment of Massachusetts' economy, and serves no positive policy aims.

B. Maintaining Regulatorily-Required Oversight Over Affiliated Workers Cannot Be Determinative Of Employment Status.

In this case, 7-Eleven conceded that it "does exercise some level of control over its franchisees," but argued that it was bound to do so by the FTC Franchise Rule, which was intended "to prevent deceptive and unfair practices . . . and to correct consumers' misimpressions about franchise and business opportunity offerings." *Patel*, 485 F. Supp. 3d at 307-08. That is merely an admission that franchisors are highly regulated. They are obliged to take actions under the Franchise Rule that Appellants claim are inconsistent

with being an independent contractor under § 148B.

So, too, insurers and financial services companies are required to maintain robust regulatory supervision programs as relate to their associated agents and financial representatives. Like the FTC Franchise Rule, these laws and regulations are designed to protect consumers. *See, e.g.*, FINRA, *About FINRA*, www.finra.org/about (last visited Nov. 15, 2021) ("[T]o protect investors and ensure the market's integrity, FINRA is a government-authorized not-for-profit organization that oversees U.S. broker-dealers"); Massachusetts Division of Insurance, www.mass.gov/orgs/division-of-insurance (last visited Nov. 15, 2021) ("Protection of consumer interests is of prime importance to the Division and is safeguarded by providing accurate and unbiased information so consumers may make informed decisions . . . .").

By way of example, firms are required to:

- Maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA Rules. FINRA Rule 3110.
- Ensure that their affiliated agents comply with licensing requirements. *See, e.g.*, M.G.L. ch. 175, §§ 162I, 162K; FINRA Rule 1210.
- Provide continuing education programs to their affiliated persons and track completion of those

programs. *See, e.g.*, 211 C.M.R. 96.05-06; FINRA Rules 1240 and 3310.

- Conduct periodic examinations of customer files and associated records. *See, e.g.*, M.G.L. ch. 175, § 4; M.G.L. ch. 63, § 26; NAIC, Market Regulation Handbook (2017 ed.); 211 C.M.R. 31.07; FINRA Rules 2040, 3110, and 4511.

- Capture and supervise the client communications of financial advisors. *See* FINRA Rule 3110.

- Require disclosure of outside business activities by all associated persons. *See* FINRA Rule 3270.

- Make and preserve books and records as required under various rules, laws, and regulations. *See* FINRA Rule 4511(a).

- Maintain all retail communications and institutional communications for particular periods and in a particular format and media. *See* FINRA Rule 2210(b)(4).[7]

Like franchisors, insurance and financial services firms cannot presently meet those (and other) regulatory obligations without running the risk that some agent, advisor, or plaintiff's attorney will argue that actions taken to ensure regulatory compliance are evidence of independent contractor misclassification. On the flip side, FINRA requires, expects, and examines, whether companies develop and maintain adequate supervision

[7] A chart containing numerous additional examples of the laws, rules, and regulations that insurance and financial services companies are required to follow in connection with their agent and advisor relationships is included in the Addendum (Add. 57-79).

programs, and imposes fines and other consequences where supervision is lacking. Without question, as the District Court recognized, regulations like the FTC Franchise Rule are "in direct conflict with Prong [A]," because it requires the company to exert control over the putative employee. *Patel*, 485 F. Supp. 3d at 308.

But that is only part of the story. At the same time that regulated companies (like insurance and financial services firms) are compelled to supervise their associated persons, the regulations provide that those individuals may be independent contractors, and other laws, including the Massachusetts Unemployment Act, recognize that independent contractor status has long been engrained in certain regulated industries.[8]

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[8] *See, e.g.*, FINRA Rule 1011(b) (defining "Associated Person" as "a natural person registered under FINRA rules"); M.G.L. ch. 110A, §§ 401(b), 401(n) (defining "agent" as including any individual employed "or associated with" an investment adviser); M.G.L. ch. 175, § 162T(a)(discussing the termination of the appointment, employment, contract, or other insurance business relationship" with a producer); M.G.L. ch. 175, §§ 113I, 162 (permitting insurance products to be sold by individuals and entities who are not employees, including by brokers); M.G.L. ch. 151A, § 6(n) (excluding services performed by commissioned insurance agents from the definition of employment for unemployment purposes); 26 U.S.C. §§ 3121(d)(3)(B), 7701(a)(20) (allowing independent contractor insurance agents to participate in certain benefit programs normally available only to common law employees (such as pension and medical plan benefits) while retaining their

That dynamic creates the same conundrum as existed in *Monell* – comply with industry regulations and long-standing industry best practices at the risk of facing a misclassification claim under § 148B. To prevent that dynamic and the potential deleterious consequences, § 148B should not apply where regulations compel the putative employer to maintain a relationship or engage in externally imposed regulatory conduct alleged to be inconsistent with some aspect of the § 148B standard. *Monell*, 471 Mass. at 575; *Kennedy*, 2021 WL 2774844, at *8 ("[P]rovisions, which require salespersons to submit to the control of his or her broker, should not preclude a salesperson's independent-contractor status."); *cf. Laurel Sports Activities v. Unemployment Comp. Comm'n*, 51 A.2d 233 (N.J. Sup. Ct. 1947) (finding various wrestling and boxing participants were free of control of wrestling and boxing promoter because "[t]he details of employment and control over the referees, timekeepers, announcers, boxers and wrestlers are so completely exercised by the State that the promoter has no control or direction whatever, save as noted").

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independent contractor status); M.G.L. ch. 175, § 36A (similar MA exemption).

C. Holding That § 148B Does Not Apply In This Context Comports With The Many Decisions Recognizing That Regulatory Compliance Is ***Not*** Employer-Type Control.

Holding that § 148B does not apply in the limited context of highly regulated industries would comport with the numerous decisions holding that "[a] company does not exercise the requisite control necessary to create an employer-employee relationship merely because it restricts the manner or means of their work in order to comply with statutory and regulatory requirements." *Santangelo,* 2014 WL 3896323, at *9 (agent was independent contractor and regulatory requirements to refrain from selling certain annuities and submit client correspondence and sales documents for compliance reviews did not change that result); *see, e.g.*, *Taylor v. Waddell & Reed, Inc*., No. 09-02909, 2013 WL 435907, at *6 & n.27 (S.D. Cal. Feb. 1, 2013) (company requirement that financial advisors comply with regulations was not indicative of an employer-employee relationship).[9] Consistent with these decisions, the

[9] *See also Jammal v. Am. Fam. Ins. Co.*, 914 F.3d 449, 460 (6th Cir. 2019) ("This court has time and again declared insurance agents to have independent-contractor status . . . ."); *Murray v. Principal Fin. Grp., Inc*., 613 F.3d 943, 944-45 (9th Cir. 2010) ("We, along with virtually every other Circuit to consider similar issues, have held that insurance agents are independent

United States District Court for the District of Massachusetts found that an individual selling the products of United Life Insurance Company was an independent contractor under § 148B. *Ruggiero*, 137 F. Supp. 3d at 116-17 (noting that "federal courts have

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contractors and not employees . . . ."); *Weary v. Cochran*, 377 F.3d 522, 523 (6th Cir. 2004) (affirming grant of summary judgment for insurance company because the insurance agent was an independent contractor); *Wortham v. Am. Fam. Ins. Grp.*, 385 F.3d 1139, 1140-41 (8th Cir. 2004) (insurance agent was independent contractor as a matter of law); *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1313 (9th Cir. 1998) (insurance agent was an independent contractor); *Zipser v. Ewing*, 197 F.2d 728, 728 (2d Cir. 1952) (same); *Hennighan v. Insphere Ins. Sols., Inc.*, 38 F. Supp. 3d 1083, 1107 (N.D. Cal. 2014) (same); *Rose v. Nw. Mut. Life Ins. Co.*, 220 F. Supp. 3d 363, 374 (E.D.N.Y. 2016) (same); *Holden v. Nw. Mut. Fin. Network*, No. 07-0930, 2009 WL 440937, at *7 (E.D. Wis. Feb. 23, 2009) (same); *Sofranko v. Nw. Mut. Life Ins. Co.*, No. 06-1657, 2008 WL 145509 (W.D. Pa. Jan. 14, 2008) (same); *Nixon v. Nw. Mut. Life Ins. Co.*, 58 F. Supp. 2d 1269, 1273 (D. Kan. 1999) (dismissing claims based on independent contractor relationship); *Linton v. Desoto Cab Co., Inc.*, 15 Cal.App.5th 1208, 1225 (2017) ("A putative employer does not exercise any degree of control merely by imposing requirements mandated by government regulation."); *Keating v. Nw. Mut. Life Ins. Co.*, Commonwealth of Massachusetts Executive Office of Labor and Workforce Development, Department of Unemployment Assistance (Feb. 28, 2014) ("services" of insurance agents did not constitute "employment"); *Medrek v. Nw. Mut. Life Ins. Co.*, Commonwealth of Massachusetts, Commission Against Discrimination, Docket No. 90-SEM-0385 (Nov. 19, 1990) (dismissing complaint because the "employer/employee relationship issue" between insurance agents and insurance company has been sufficiently litigated and it has been determined that agents are independent contractors).

consistently found that insurance agents acting just as Ruggiero did were independent contractors"); *see also Sebago v. Bos. Cab Dispatch, Inc.*, 471 Mass. 321, 329 (2015) (taxi drivers were independent contractors); AG Advisory Opinion 2008/1, at 3 (holding that an individual who "complete[d] the job using [his] own approach with little direction and dictate[d] the hours that [he worked] on the job" was properly classified as an independent contractor). Thus, while financial advisors and insurance agents are undisputedly subject to various forms of "control" that the firms with which they are required to associate must impose, such control should not compel the conclusion (or even be evidence) that such advisors and agents can never be independent contractors.

Because franchisors, like financial services and insurance companies, are compelled to engage in conduct which Appellants claim is inconsistent with § 148B's independent contractor standard, the District Court correctly concluded that *Monell* precludes the application of § 148B in that context.

II. There Is No Evidence That The Legislature Intended To Exclude Franchisees, Insurance Agents, Or Financial Advisors From Independent Contractor Status In Enacting § 148B.

Among the factors considered in *Monell* in determining if § 148B applied, was whether there was any evidence that the Legislature intended to exclude real estate agents from independent contractor status. *Monell*, 471 Mass. at 576 (concluding that "[t]he exclusion of real estate salespersons from independent contractor status clearly was not intended by the Legislature" in enacting § 148B). There is similarly zero evidence that the Legislature intended that franchisees (or insurance agents or financial advisors) be classified as employees because their affiliated companies chose to comply with applicable laws and regulations. To the contrary, as *Monell* concluded, the Massachusetts Legislature did not intend such disharmony. *See id.* at 578; *see also* Office of AG Advisory Opinion 2008/1, at 6 (citing *Athol Daily News*, 439 Mass. at 180) (stating that "the AGO recognizes the complexity that prong two presents and the concerns regarding legitimate independent contractors, particularly among certain segments of the workforce . . . no prong should be read so broadly as to render

the other factors of the test superfluous").

§ 148B was amended to its present formulation of the ABC test solely as a result of construction union pressure to stop the practice *in the construction industry* of having a company improperly designate the workers on its job site as independent contractors. *See* An Act Further Regulating Public Construction in the Commonwealth, 2004 Mass. Acts ch. 193, §26; AG Advisory Opinion 2008/1, at 2; *Monell*, 471 Mass. at 571 ("[T]he statute was part of legislation making changes to the public construction industry[.]"). This concern does not exist in the franchise context, where franchisees epitomize independent business owners. Likewise, it does not exist in the insurance or financial services industries, where agents have chosen for well over a century to be independent contractors because of the substantial tax and other benefits they receive.

Given the absence of any legislative intent to foreclose independent contractor status in the franchise context, the only result consistent with principles of statutory construction is that "the independent contractor statute does not apply" in this limited context. *Monell*, 471 Mass. at 578; *see also Sebago*, 471 Mass. at 327 (the more harmonious reading of the

statutory framework (in which drivers may operate as independent contractors) is that the Legislature intended to preserve the ability of taxicab drivers to operate as either employees or independent contractors); *Ruggiero*, 137 F. Supp. 3d at 114-15 (holding that *Monell* "suggests that where a relationship as defined by regulation expressly precludes the satisfaction of a prong of the independent contractor statute, the independent contractor statute will not govern").

Another key aspect of the *Monell* holding was that, if the Court were to apply § 148B in the real estate context against the existing regulatory backdrop, parties would be subject to legal sanctions and criminal penalties under § 148B merely for complying with another law. 471 Mass. at 577; *see also Patel*, 485 F. Supp. 3d at 310 ("It cannot be the case . . . that . . . those who are regulated by the FTC Franchise Rule [become] criminally liable for failing to classify their franchisees as employees.").

The same is true for insurance and financial services companies, and in all circumstances where industry regulations allow the use of independent contractors but mandate conduct that would effectively criminalize their use. Massachusetts securities and

insurance laws and regulations – like franchise regulations – are intended to govern individuals who are independent contractors as well as employees. *See supra* at 39 n.8. However, if those individuals are deemed to be controlled by or in the same business as any company with which they are required to affiliate for compliance purposes, then § 148B could make it impossible to form independent contractor relationships in those situations. Because such an absurd result was never contemplated by the Legislature, the Court should hold that the three-prong test for independent contractor status set forth in § 148B does not apply to the relationship between a franchisor and its franchisee.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the three-prong test in Mass. Gen. Laws ch. 149, § 148B should be held to not apply to the relationship between a franchisor and its franchisee, where the franchisor must also, and does, comply with the FTC Franchise Rule.

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Dated: November 17, 2021

RULE 17(c)(5) CERTIFICATION

The undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The brief complies with the applicable page limit of Rule 20(a)(3)(E) because it uses Courier New font, size 12, and contains 10 characters per inch for 34 non-excluded pages as defined by Rule 16(a)(5)-(11). Microsoft Word for Microsoft 365 is the word-processing program used.

RULE 16(k) CERTIFICATION

The undersigned affirms that no party or a party’s counsel authored the brief in whole or in part; no party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; no person or entity—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief; neither the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or

represented a party in a proceeding or legal transaction that is at issue in the present appeal.

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-13166

Patel, et al. v. 7-Eleven, Inc., et al.

CERTIFICATE OF SERVICE

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

Other Authorities

ADDENDUM
Chart of Regulatory and Statutory Requirements

Topic	Statutory/Regulatory Requirements
Registration of Firms	**15 U.S.C. §§ 80b-2(a)(11), 80b-3 (Definitions; Registration of Investment Advisers)** Requiring investment advisers to register with the SEC and defining "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . ." **15 U.S.C. §§ 78c(a)(4), 78o (Definitions and Application; Registration and Regulation of Brokers and Dealers)** Requiring brokers to register with the SEC and join a self-regulatory organization and defining "broker" as "any person engaged in the business of effecting transactions in securities for the account of others . . ." **M.G.L. ch. 110A, §§ 201, 401 (Registration Requirement; Definitions)** Requiring broker-dealers and investment advisors that transact business in the Commonwealth to register such business under Massachusetts law and defining "broker-dealer" as "any person engaged in the business of effecting transactions in securities for the account of others or for his own account" and "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities [and] financial planners and other persons who, as an integral component of other financially related services, provide the

	foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation." **950 C.M.R. 113.48** **(Foreign Corporation Certificate of Registration)** "(1) A foreign corporation shall file a certificate of registration within ten days after it commences transacting business in the commonwealth" and "[i]fa foreign corporation has failed to comply with the provisions of law requiring the filing of reports with the Division or the filing of any tax returns or the payment of any taxes under M.G.L. c. 62C or M.G.L. c. 63 for two or more consecutive years, the Division may commence a proceeding to revoke the authority of the corporation to transact business in the commonwealth."
Licensing, Registration, & Appointment of Agents	**FINRA Rule 1010** **(Electronic Filing Requirements for Uniform Forms)** "Upon filing an electronic Form U4 on behalf of a person applying for registration, a member shall promptly submit fingerprint information for that person. FINRA may make a registration effective pending receipt of the fingerprint information. If a member fails to submit the fingerprint information within 30 days after FINRA receives the electronic Form U4, the person's registration shall be deemed inactive." **FINRA Rule 1210** **(Registration Requirements)** "Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative…" *See also* FINRA Rule 1011 (defining "associated person" to include "any person directly or indirectly controlling the Applicant whether or not such person is registered or exempt from registration under the FINRA By-Laws or NASD Rules" and "any person who will be or is anticipated to be," *inter*

	alia, "a natural person registered under NASD Rules"). **FINRA Rule 3110** **(Supervision)** "Each member shall ascertain by investigation the good character, business reputation, qualifications and experience of an applicant before the member applies to register that applicant with FINRA and before making a representation to that effect on the application for registration . . . . In addition, each member shall establish and implement written procedures reasonably designed to verify the accuracy and completeness of the information contained in an applicant's initial or transfer Form U4 no later than 30 calendar days after the form is filed with FINRA. Such procedures shall, at a minimum, provide for a search of reasonably available public records to be conducted by the member, or a third-party service provider, to verify the accuracy and completeness of the information contained in the applicant's initial or transfer Form U4." **M.G.L. ch. 110A, §§ 201, 401** **(Registration Requirement; Definitions)** Requiring agents and investment adviser representatives that transact business in the Commonwealth to register such business under Massachusetts law, and defining "agent" as "any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities . . ." and "investment adviser representative" as "any partner, officer, director, 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 . . . " an investment adviser. **17 C.F.R. § 275.203A-3** **(Definitions)** Defining "Investment adviser representative" as "a supervised person of the investment adviser: (i) Who has more than five clients who are natural

	persons (other than excepted persons described in paragraph (a)(3)(i) of this section); and (ii) More than ten percent of whose clients are natural persons (other than excepted persons described in paragraph (a)(3)(i) of this section).” **M.G.L. ch. 175, § 162I** **(License Required to Sell, Solicit or Negotiate Insurance)** “A person shall not sell, solicit or negotiate insurance in the commonwealth for any class or classes of insurance unless the person is licensed for that line of authority in accordance with sections 162H to 162X, inclusive.” **M.G.L. ch. 175, § 162S** **(Insurance Producers Acting as Agents of Insurers; Appointment Procedures)** “An insurance producer shall not act as an agent of an insurer unless the insurance producer becomes an appointed agent of that insurer . . . . To appoint a producer as its agent, the appointing insurer shall file, in a format approved by the commissioner, a notice of appointment within 15 days from the date the agency contract is executed or the first application is submitted.” **M.G.L. ch. 175, § 177** **(Unlicensed Persons; Compensation; Penalty)** “No company and no officer, agent or employee thereof, and no duly licensed insurance producer, shall, directly or indirectly, pay or allow or offer or agree to pay or allow compensation or anything of value to any person, excepting an officer of a domestic company acting under section one hundred and sixty-five, for acting in this commonwealth as an insurance producer, as defined in section 162H who is not then duly licensed as an insurance producer.”
Supervision & Compliance	**FINRA Rule 3120** **(Supervisory Control System)** “(a) Each member shall designate and specifically identify to FINRA one or more principals who shall establish, maintain, and enforce a system of

	supervisory control policies and procedures that: (1) test and verify that the member's supervisory procedures are reasonably designed with respect to the activities of the member and its associated persons, to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules; and (2) create additional or amend supervisory procedures where the need is identified by such testing and verification." **FINRA Rule 3130** **(Annual Certification of Compliance and Supervisory Processes)** **"**Each member shall have its chief executive officer(s) (or equivalent officer(s)) certify annually, as set forth in paragraph (c), that the member has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations, and that the chief executive officer(s) has conducted one or more meetings with the chief compliance officer(s) in the preceding 12 months to discuss such processes." **17 C.F.R. § 275.206(4)-7** **(Compliance Procedures and Practices)** "If you are an investment adviser registered or required to be registered under section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3), it shall be unlawful within the meaning of section 206 of the Act (15 U.S.C. 80b-6) for you to provide investment advice to clients unless you: (a) Policies and procedures. Adopt and implement written policies and procedures reasonably designed to prevent violation, by you and your supervised persons, of the Act and the rules that the Commission has adopted under the Act; (b) Annual review. Review, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and (c) Chief compliance officer. Designate an

	individual (who is a supervised person) responsible for administering the policies and procedures that you adopt under paragraph (a) of this section." **15 U.S.C. § 78o(b)** **(Registration and Regulation of Brokers and Dealers)** Authorizes the SEC to impose sanctions on a firm or any person that fails to reasonably supervise a person subject to their supervision that commits a violation of the federal securities law.
Training & Examinations	**FINRA Rule 1210, Supp. Material .03** **(Registration Requirements)** "Before the registration of a person as a representative can become effective under Rule 1210, such person shall pass the Securities Industry Essentials ("SIE") and an appropriate representative qualification examination as specified in Rule 1220(b)." **FINRA Rule 1240** **(Continuing Education Requirements)** "This Rule prescribes requirements regarding the continuing education of certain registered persons subsequent to their initial qualification and registration with FINRA. The requirements shall consist of a Regulatory Element and a Firm Element . . . . (A) Each member must maintain a continuing and current education program for its covered registered persons to enhance their securities knowledge, skill, and professionalism. At a minimum, each member shall at least annually evaluate and prioritize its training needs and develop a written training plan. The plan must take into consideration the member's size, organizational structure, and scope of business activities, as well as regulatory developments and the performance of covered registered persons in the Regulatory Element. If a member's analysis establishes the need for supervisory training for persons with supervisory responsibilities, such training must be included in the member's training plan.

	(B) Minimum Standards for Training Programs — Programs used to implement a member's training plan must be appropriate for the business of the member and, at a minimum must cover training in ethics and professional responsibility and the following matters concerning securities products, services, and strategies offered by the member: (i) General investment features and associated risk factors; (ii) Suitability and sales practice considerations; and (iii) Applicable regulatory requirements. (C) Administration of Continuing Education Program — A member must administer its continuing education programs in accordance with its annual evaluation and written plan and must maintain records documenting the content of the programs and completion of the programs by covered registered persons." **FINRA Rule 1240** **(Continuing Education Requirements)** "This Rule prescribes requirements regarding the continuing education of certain registered persons subsequent to their initial qualification and registration with FINRA. The requirements shall consist of a Regulatory Element and a Firm Element . . . . Each member must maintain a continuing and current education program for its covered registered persons to enhance their securities knowledge, skill, and professionalism." **FINRA Rule 3310** **(Anti-Money Laundering Compliance Program)** "Each member shall develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act (31 U.S.C. 5311, et seq.), and the implementing regulations promulgated thereunder by the Department of the Treasury….The anti-money laundering programs required by this Rule shall, at a minimum, . . . (b) Establish and implement policies, procedures, and internal controls reasonably designed to achieve compliance with the Bank Secrecy Act and the implementing regulations thereunder."

	M.G.L. 175, § 162K **(Insurance Producer License; Written Examination)** "A resident individual applying for an insurance producer license shall pass a written examination . . . . The examination shall test the knowledge of the individual concerning the lines of authority for which application is made, the duties and responsibilities of an insurance producer and the insurance laws and regulations of the commonwealth." **211 C.M.R. 96.05-06** **(Duties of Producers and Insurers; Insurance Producer Training)** "An insurer shall establish a supervision system that is designed to achieve compliance with 211 CMR 96.00, including, but not limited to, the following: 1. The insurer shall maintain procedures to inform its insurance producers of the requirements of 211 CMR 96.00 and shall incorporate the requirements of this regulation into relevant insurance producer training manuals; 2. The insurer shall establish standards for insurance producer product training and shall maintain procedures to require its insurance producers to comply with the requirements of 211 CMR 96.06; 3. The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its insurance producers . . . ." "An insurance producer who engages in the sale of annuity products shall complete a one-time training course for four (4) CE credits, approved by the Commissioner and provided by a continuing education provider."
Exclusivity & Approval of Outside Business Activities	**950 C.M.R. 12.201(2)** **(Prohibition Against Dual Registration)** "No person may be registered concurrently as an agent of more than one broker-dealer or issuer."

	FINRA Rule 3210 **(Accounts At Other Broker-Dealers and Financial Institutions)** "(a) No person associated with a member…shall, without the prior written consent of the member, open or otherwise establish at a member other than the employer member . . . or at any other financial institution, any account in which securities transactions can be effected and in which the associated person has a beneficial interest." **FINRA Rule 2111** **(Suitability)** "A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile." **FINRA Rule 3270** **(Outside Business Activities of Registered Persons)** "No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member." **FINRA Rule 3270.01** (**Outside Business Activities of Registered Persons**) "Upon receipt of a written notice under Rule 3270, a member shall consider whether the proposed activity will: (1) interfere with or otherwise compromise the registered person's responsibilities to the member and/or the member's customers or (2) be viewed by customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will

	be offered. Based on the member's review of such factors, the member must evaluate the advisability of imposing specific conditions or limitations on a registered person's outside business activity, including where circumstances warrant, prohibiting the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of Rule 3280. A member must keep a record of its compliance with these obligations with respect to each written notice received and must preserve this record for the period of time and accessibility specified in SEA Rule 17a-4(e)(1)."
Payments & Accounts	**17 C.F.R. § 275.206(4)-2** **(Custody of Funds or Securities of Clients by Investment Advisers)** Requiring advisers to maintain client funds with broker-dealers or other qualified custodians and deeming it a fraudulent practice for a registered investment adviser to have custody of client funds or securities. **17 C.F.R. 240.15c3-3** **(Customer Protection)** Specifying how broker-dealers must handle customer funds, including how and when such funds must be transmitted and deposited. **FINRA Rule 2040** **(Payments to Unregistered Persons)** "No member or associated person shall, directly or indirectly, pay any compensation, fees, concessions, discounts, commissions or other allowances to: (1) any person that is not registered as a broker-dealer under Section 15(a) of the Exchange Act but, by reason of receipt of any such payments and the activities related thereto, is required to be so registered under applicable federal securities laws and SEA rules and regulations; or (2) any appropriately registered associated person unless such payment complies with all applicable federal securities

	laws, FINRA rules and SEA rules and regulations.” **FINRA Rule 4512** **(Customer Account Information)** “(a) Each member shall maintain the following information: (1) for each account: (A) customer's name and residence; (B) whether customer is of legal age; (C) name(s) of the associated person(s), if any, responsible for the account, and if multiple individuals are assigned responsibility for the account, a record indicating the scope of their responsibilities with respect to the account, provided, however, that this requirement shall not apply to an institutional account; (D) signature of the partner, officer or manager denoting that the account has been accepted in accordance with the member's policies and procedures for acceptance of accounts; (E) if the customer is a corporation, partnership or other legal entity, the names of any persons authorized to transact business on behalf of the entity; and (F) subject to Supplementary Material .06, name of and contact information for a trusted contact person age 18 or older who may be contacted about the customer's account . . . .” **17 C.F.R. § 240.17a-3(a)(17)** **(Record-Keeping Requirements)** Requiring brokerage firms to create a record for each account with an individual customer that includes, *inter alia*, the customer’s name, address, phone number, and date of birth. **FINRA Rule 2121** **(Fair Prices and Commissions)** “In securities transactions . . . if a member . . . acts as agent for his customer in any such transaction, he shall not charge his customer more than a fair commission or service charge, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense of executing the order and the value of any service he may have rendered by reason of his experience in and knowledge of such security and the market therefor.”

	M.G.L. ch. 175, § 3 **(Unauthorized Insurance, Annuity or Variable Annuity Contracts; Prohibition)** "No company shall make a contract of insurance or annuity…and no person shall negotiate, solicit, sell or in any manner aid in the transaction of such contracts . . . except as authorized by this chapter or chapter one hundred and seventy-six . . . ." **M.G.L. ch. 175, § 23** **(Life Company; Impairment of Funds; Issuance of Policies; Penalty)** "No life company whose actual funds, exclusive of its capital, are not of a net cash value equal to its liabilities, including the net value of its policies, computed by the rules of valuation established by sections nine and eleven, shall issue new policies of life or endowment insurance or annuity or pure endowment contracts until its funds have become equal to its liabilities, and it has obtained from the commissioner a certificate to that effect with authority to resume business. A company or any officer or agent thereof who issues any such policy or contract in violation of this section shall forfeit not more than one thousand dollars." **M.G.L. ch. 175, § 119A** **(Proceeds of Annuity Contract or Policy of Life Insurance Retained by Life Company)** "If, under the terms of any annuity contract or policy of life insurance, or under any written agreement supplemental thereto, issued by any life company, the proceeds are retained by such company at maturity or otherwise, no person entitled to any part of such proceeds, or any instalment of interest due or to become due thereon, shall be permitted to commute, anticipate, encumber, alienate or assign the same, or any part thereof, if such permission is expressly withheld by the terms of such contract, policy or supplemental agreement; and if such contract, policy or supplemental agreement so provides, no payments of interest or of principal shall be in any way subject to such person's debts, contracts or

	engagements, nor to any judicial processes to levy upon or attach the same for payment thereof. No such company shall be required to segregate such funds but may hold them as a part of its general corporate funds." **M.G.L. ch. 175, § 119B** **(Refund of Prepaid Individual Life Insurance Premiums Upon Death of Insured)** "Upon the death of an insured, the proceeds payable under any policy of individual life insurance, other than a single-premium life insurance policy, delivered or issued for delivery in the commonwealth which is in force on a premium-paying basis on the date of death, shall include premiums paid for any period beyond the end of the policy month in which death occurred, unless such refund of premiums is due some other person pursuant to contract provisions." **M.G.L. ch. 175, § 144** **(Default in Payment of Premium on Policy of Life Insurance; Surrender of Policy for Cash Value)** "In the event of default in the payment of any premium on any policy of life insurance issued or delivered in the commonwealth by any life company, the holder thereof may elect by a writing filed with the company at its home office within sixty days after the due date of the defaulted premium and prior to the death of the insured, to (a) surrender the policy and receive its value in cash, provided that, except as provided in section one hundred and forty-six, premiums have been paid for at least three full years, or (b) take a specified paid-up nonforfeiture benefit effective from the due date of the premium in default." **M.G.L. ch 175, § 176** **(Larceny by Agent or Broker)** "An insurance agent or broker who acts in negotiating or renewing or continuing a policy of insurance or an annuity or pure endowment contract issued by a company lawfully doing business in the commonwealth, and who receives any money or substitute for money as a premium for such a policy or contract from the insured or holder thereof, shall be deemed to hold such premium in trust for

	the company. If he fails to pay the same over to the company after written demand made upon him therefor, less his commission and any deductions to which, by the written consent of the company, he may be entitled, such failure shall be prima facie evidence that he has used or applied the said premium for a purpose other than paying the same over to the company, and upon conviction thereof he shall be guilty of larceny.”
Commissions	**N.Y. Insurance Law § 4228** **(Life Insurance and Annuity Business; Limitations of Expenses)(Applicable in Massachusetts)** Prohibiting insurance companies from compensating agents in excess of 55% of “any first year premium received” to ensure financial stability.
Books & Records	**FINRA 4511** **(General Requirements)** “(a) Members shall make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules. (b) Members shall preserve for a period of at least six years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules. (c) All books and records required to be made pursuant to the FINRA rules shall be preserved in a format and media that complies with SEA Rule 17a-4.” **FINRA Rule 3110** **(Supervision)** “Each member shall conduct a review, at least annually (on a calendar-year basis), of the businesses in which it engages. The review shall be reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA rules… If applicable to the location being inspected, that location's written inspection report must include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and

	procedures in the following areas: (i) safeguarding of customer funds and securities; (ii) maintaining books and records; (iii) supervision of supervisory personnel . . . ." Section 17(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "SEA") requires registered broker-dealers to make, keep, furnish and disseminate records and reports prescribed by the Securities and Exchange Commission ("SEC"). The SEC books and records rules applicable to broker-dealers, SEA Rules 17a-3 and 17a-4, specify minimum requirements with respect to the records that broker-dealers must make, how long those records and other documents relating to a broker-dealer's business must be kept and in what format they may be kept. The SEC requires that broker-dealers create and maintain certain records so that, among other things, the SEC, self-regulatory organizations ("SROs") and state securities regulators may conduct effective examinations of broker-dealers.
Audits	**FINRA Rule 3110** **(Supervision)** "(c)(1) Each member shall conduct a review, at least annually (on a calendar-year basis), of the businesses in which it engages. The review shall be reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA rules. Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses. Each member shall also retain a written record of the date upon which each review and inspection is conducted. (A) Each member shall inspect at least annually (on a calendar-year basis) every OSJ and any branch office that supervises one or more non-branch locations. (B) Each member shall inspect *at least* every three years every branch office that does not supervise one or more non-branch locations. In establishing how often to inspect

	each non-supervisory branch office, the member shall consider whether the nature and complexity of the securities activities for which the location is responsible, the volume of business done at the location, and the number of associated persons assigned to the location require the non-supervisory branch office to be inspected more frequently than every three years. If a member establishes a more frequent inspection cycle, the member must ensure that at least every three years, the inspection requirements enumerated in paragraph (c)(2) have been met. The member's written supervisory and inspection procedures shall set forth the non-supervisory branch office examination cycle, an explanation of the factors the member used in determining the frequency of the examinations in the cycle, and the manner in which a member will comply with paragraph (c)(2) if using more frequent inspections than every three years." **M.G.L. ch. 175, § 4** **(Examination of Companies)** "In scheduling and determining the nature, scope and frequency of the examinations, the commissioner shall consider such matters as the results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, reports of independent certified public accountants and other criteria as set forth in the examiners' handbook adopted by the National Association of Insurance Commissioners and in effect when the commissioner exercises discretion under this section. The commissioner may also consider other matters reasonably related to solvency or market conduct. In conducting the examination, the examiner shall observe guidelines and procedures set forth in the examiners' handbook adopted by the National Association of Insurance Commissioners." **National Association of Insurance Commissioners, Market Regulation Handbook Examination Standards Summary (2021 ed.)** Setting forth areas of review and standards for all insurance companies, insurance producers, and all entities contracting with them, which include

	standards for maintaining consistent, compliant records. *See generally* content.naic.org/sites/default/files/publication-mes-hb-market-handbook-examination.pdf.
Branch Offices & Offices of Convenience	**FINRA Rule 3110** **(Supervision)** "A 'branch office' is any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, or is held out as such . . . ." **FINRA Rule 4511** **(General Requirements)** "(a) Members shall make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules. (b) Members shall preserve for a period of at least six years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules. (c) All books and records required to be made pursuant to the FINRA rules shall be preserved in a format and media that complies with SEA Rule 17a-4." **FINRA Rule 3120** **(Supervisory Control System)** "(a) Each member shall designate and specifically identify to FINRA one or more principals who shall establish, maintain, and enforce a system of supervisory control policies and procedures that: (1) test and verify that the member's supervisory procedures are reasonably designed with respect to the activities of the member and its associated persons, to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules; and (2) create additional or amend supervisory procedures where the need is identified by such testing and verification." **FINRA Rule 3110** **(Supervision)** "Each member shall conduct a review, at least annually (on a calendar-year basis), of the

	businesses in which it engages. The review shall be reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA rules… If applicable to the location being inspected, that location's written inspection report must include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and procedures in the following areas: (i) safeguarding of customer funds and securities; (ii) maintaining books and records; (iii) supervision of supervisory personnel . . . ."
Public Communica-tion	**FINRA Rule 2210** **(Communications with the Public)** "All retail communications and correspondence must: (A) prominently disclose the name of the member, or the name under which the member's broker-dealer business primarily is conducted as disclosed on the member's Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction; (B) reflect any relationship between the member and any non-member or individual who is also named; and (C) if it includes other names, reflect which products or services are being offered by the member." **FINRA Rule 3110** **(Supervision)** "The supervisory procedures required by this paragraph (b) shall include procedures for the review of incoming and outgoing written (including electronic) correspondence and internal communications relating to the member's investment banking or securities business. The supervisory procedures must be appropriate for the member's business, size, structure, and customers. The supervisory procedures must require the member's review of: (A) incoming and outgoing written (including electronic) correspondence to properly identify and handle in accordance with firm procedures, customer complaints, instructions, funds and securities, and communications that are

	of a subject matter that require review under FINRA rules and federal securities laws . . . .” **17 C.F.R. § 275.206(4)-1** **(Advertisements by Investment Advisers)** Prohibits inclusion of certain representations and statements in advertisements and marketing materials that are circulated or published or distributed to the public. **M.G.L. ch. 110A, § 101** **(Sales and Purchases)** “It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” **M.G.L. ch. 110A, § 102** **(Advisory Activities)** “It is unlawful for any person who receives, directly or indirectly, any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise (1) to employ any device, scheme, or artifice to defraud the other person, or (2) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person.”
Forms	**FINRA Rule 3110** **(Supervision)** “Each member shall conduct a review, at least annually (on a calendar-year basis), of the businesses in which it engages. The review shall be reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA

	rules . . . . If applicable to the location being inspected, that location's written inspection report must include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and procedures in the following areas: (i) safeguarding of customer funds and securities; (ii) maintaining books and records; (iii) supervision of supervisory personnel . . . .” **FINRA 4511** **(General Requirements)** “(a) Members shall make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules. (b) Members shall preserve for a period of at least six years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules. (c) All books and records required to be made pursuant to the FINRA rules shall be preserved in a format and media that complies with SEA Rule 17a-4.” **M.G.L. ch. 175, § 2B** **(Readability of Policy Form; Definition; Approval; Actions Based on Language)** “No policy form of insurance shall be delivered or issued for delivery to more than fifty policyholders in the commonwealth until a copy of the policy form has been on file for thirty days with the commissioner, unless before the expiration of said thirty days the commissioner shall have approved the form of the policy in writing as complying with this section . . . nor shall any such policy form be so delivered or issued for delivery unless: (a) The text achieves a minimum Flesch scale readability score of fifty; (b) It is printed, except for tables, in not less than ten point type, one point leaded; (c) The style, arrangement and overall appearance of the policy give no undue prominence to any portion of the text of the policy and any endorsements or riders; (d) It contains a table of contents or an alphabetical subject index; (e) The width of margins and ink to paper contrast do not unreasonably interfere with the readability of the form; and (f) The organization of the content of

	the policy and the summary of the policy is conducive to understandability of the form." **211 C.M.R. 96.00** **(Consumer Production and Suitability in Annuity Transactions)** "Insurance producers and insurers shall maintain or be able to make available to the Commissioner records of the information collected from the consumer and other information used in making the recommendations that were the basis for insurance transactions for five years after the insurance transaction is completed by the insurer." **211 C.M.R. 28.00** **(Life Insurance Illustrations)** "The purpose of 211 CMR 28.00 is to provide rules for life insurance policy illustrations that will protect consumers and foster consumer education. 211 CMR 28.00 provides illustration formats, prescribes standards to be followed when illustrations are used, and specifies the disclosures that are required in connection with illustrations." **211 C.M.R. 31.07** **(Life Insurance Solicitation)** "Each insurer shall maintain at its home office or principal office, a complete file containing one copy of each form authorized by the insurer for use pursuant to 211 CMR 31.00."
Statutory Employee Requirements	**26 U.S.C. § 3121(d)(3)(B)** **(Definitions)** "For the purposes of this chapter, the term 'employee' means . . . any individual . . . who performs services for remuneration for any person . . . as a *full-time* life insurance salesman." **26 C.F.R. § 31.3121(d)-1(d)(3)(ii)** **(Full-Time Life Insurance Salesman)** "An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman . . . . An individual who is

	engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman." **26 U.S.C. § 7701(a)(20)** **(Definitions)** "For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term "employee" shall include a full-time life insurance salesman . . . ." **M.G.L. ch. 175, § 36A** **(Agents and Agency Employees;** **Retirement or Insurance Benefits)** "Any domestic life company or any domestic company transacting business solely under subdivisions (a) and (d) of clause sixth of section forty-seven may establish a plan for retirement or insurance benefits, or both, for agents, or any class or classes thereof as the company may determine, having a written contract with such company or with any agent thereof under which he solicits exclusively applications for policies of life or endowment insurance or annuity or pure endowment contracts or accident and health insurance issued by such company, and for the agency employees of any agent having such a contract; provided, that qualification requirements for such plans and the determination of the amounts of such retirement

	benefits shall be based exclusively upon the solicitation and sale of life or endowment insurance or annuity or pure endowment contracts or accident and health insurance for such company and shall not in any manner directly or indirectly be based upon the solicitation or sale of any other kind of insurance by said agent.”
Termination of Appointment/ Association	**M.G.L. ch. 175, § 162T (Insurer’s Termination of Appointment, Contract, Etc. With Producer; Procedures)** “An insurer or authorized representative of the insurer that terminates the appointment, employment, contract or other insurance business relationship with a producer shall notify the commissioner within 30 days following the effective date of the termination . . . .” **FINRA By-Laws, Art. V, § 3(a) (Notification by Member to the Corporation and Associated Person of Termination; Amendments to Notification)** “Following the termination of the association with a member of a person who is registered with it, such member shall, not later than 30 days after such termination, give notice of the termination of such association to the Corporation via electronic process or such other process as the Corporation may prescribe on a form designated by the Corporation, and concurrently shall provide to the person whose association has been terminated a copy of said notice as filed with the Corporation.”

2009 WL 440937
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

Michael J. HOLDEN, Plaintiff,
v.
NORTHWESTERN MUTUAL FINANCIAL NETWORK, Thomas Goris, Jr. and Michael A. Formella, Defendants.

No. 07–C–0930.
|
Feb. 23, 2009.

West KeySummary

1 **Civil Rights** Nature and Existence of Employment Relationship

Civil Rights Persons Protected and Entitled to Sue

Plaintiff was an individual contractor and thus lacked standing to sue defendant under the Americans with Disabilities Act (ADA). The plain language of the employment contract established that plaintiff was an independent contractor and thus not an employee of defendant under the ADA. Plaintiff was free to determine his own work schedule, individually responsible for deciding which clients to pursue and did so without guidance from defendant. In addition, plaintiff did not receive hourly wages or a salary. Lastly, plaintiff's income tax returns identified the plaintiff as a sole proprietor business person. Americans with Disabilities Act of 1990, § 202 et seq., 42 U.S.C.A. § 12132 et seq.

Attorneys and Law Firms

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DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

PATRICIA J. GORENCE, United States Magistrate Judge.

***1** The plaintiff, Michael J. Holden, filed this action on October 18, 2007, alleging that the defendants terminated his employment in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 et. seq. Defendants Michael A. Formella and Thomas Goris, Jr. have filed a motion for summary judgment. (Docket # 24). Defendant Northwestern Mutual Financial Network also has filed a motion for summary judgment. (Docket # 27). The motions are fully briefed and will be addressed herein.

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the matter arises under federal statutes. Venue is proper under 28 U.S.C. § 1391. The case was assigned according to the random assignment of civil cases pursuant to 28 U.S.C. § 636(b)(1)(B) and General Local Rule 72.1 (E.D.Wis.). The parties have consented to United States magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c) and General Local Rule 73.1 (E.D. Wis .).

STANDARD FOR SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also, Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *McNeal v. Macht,* 763 F.Supp. 1458, 1460–61 (E.D.Wis.1991). "Material facts" are those facts that under the applicable substantive law "might affect the outcome of the suit." *See Anderson,* 477 U.S. at 248. A dispute over "material facts" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The burden of showing the needlessness of a trial —(1) the absence of a genuine issue of material fact and (2) an entitlement to judgment as a matter of law—is upon the movant. In determining whether a genuine issue of material

fact exists, the court must consider the evidence in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

However, when the nonmovant is the party with the ultimate burden of proof at trial, that party retains its burden of producing evidence which would support a reasonable jury verdict. *Anderson,* 477 U.S. at 267; *see also, Celotex Corp.,* 477 U.S. at 324; Fed.R.Civ.P. 56(e) ("When a summary judgment motion is made and supported as provided in [Rule 56(c)], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial"). "Rule 56(c) *mandates* the entry of summary judgment, ... upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322 (emphasis added).

***2** Evidence relied upon in a motion for summary judgment must be of a kind that would be admissible at trial. *See Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 921 n. 2 (7th Cir.1994) (citing *Gustovich v. AT & T Communications, Inc.,* 972 F.2d 845, 849 [7th Cir.1992]; Fed.R.Civ.P. 56 [e]). Federal Rules of Civil Procedure 56(e) expressly provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

See also, Halloway v. Milwaukee County, 180 F.3d 820, 827 n. 9 (7th Cir.1999) (upholding district court's exclusion on summary judgment of portions of affidavit as hearsay).

RELEVANT UNDISPUTED FACTS [1]

1 The undisputed relevant factual information is taken from the defendants' proposed findings of fact, the plaintiff's complaint which is a verified complaint (*See Ford v. Wilson,* 90 F.3d 245,246 [7th Cir.1996]) and the plaintiff's first letter filed in response to the defendants' motions for summary judgment which was sworn to by the plaintiff and notarized. The plaintiff did not file a response to the defendants' proposed findings of fact

On June 1, 1957, plaintiff Michael Holden began his career in the insurance business when he signed a contract with Harold Pritchard, a Northwestern Mutual Life Insurance Company (Northwestern Mutual) district agent, to become a special agent. (Deposition of Michael J. Holden [Holden Dep.] at 38; Holden Dep., Exh. 1). In accordance with this contract and subsequent Northwestern Mutual agent contracts, the plaintiff was authorized to sell the insurance and financial products of Northwestern Mutual, until the termination of his agent contract on October 13, 2006.

Defendant Northwestern Mutual [2] is a mutual life insurance company headquartered at 720 East Wisconsin Avenue, Milwaukee, Wisconsin. (Affidavit of Michael Ertz [Ertz Aff.] ¶ 2). Northwestern Mutual's primary business consists of underwriting, issuing and servicing life insurance, disability income insurance, long term care insurance and annuity products. It employs all of its management and support staff in its home office.

2 The court notes that the plaintiff's complaint cites the Northwestern Mutual Financial Network (NMFN) as a defendant. NMFN is solely the marketing name for the sales and distribution arm of Northwestern, its subsidiaries and affiliates. (Ertz Aff. ¶ 4). It is not a legal entity. The proper defendant is Northwestern Mutual Life Insurance Company (Northwestern Mutual).

Defendant Thomas Goris, Jr. is a general agent of Northwestern Mutual. Northwestern Mutual enters into

contracts directly with general agents located throughout the United States. Northwestern Mutual's contract with each of its general agents expressly provides that general agents are independent contractor, not employees, of Northwestern Mutual. General agents, such as defendant Goris, are free to enter into contracts with district agents and field directors to grow their general agencies.

Defendant Michael Formella is a district agent of Northwestern Mutual. Defendant Formella operates his district agency under the terms of a contract formed with defendant Goris. A district agent has the authority to enter into contracts with sales agents. Defendant Formella entered into such a contract with the plaintiff for the first time on June 1, 1992, as a special agent. Subsequently, on April 1, 1996, and later on May 1, 1999, the plaintiff entered into contracts with defendant Formella as a senior agent.

***3** Northwestern Mutual does not solicit prospective costumers to apply for or purchase its insurance products, does not hire any employees to sell its products, and does not sell insurance from its home office, or through direct marketing, bank affiliations or the internet. Instead, Northwestern Mutual utilizes a network of professional insurance agents for the exclusive marketing and sales of its various products. Based on the belief that a professional, entrepreneurial sales force who is responsible for the success or failure of their business will perform at a higher level than employees, Northwestern Mutual's network of insurance agents is composed entirely of independent contractors. This sales force is structured such that Northwestern Mutual directly enters into contracts with general agents. General agents are free to contract with district agents and field directors, all of whom are free to contract with sales agents.

The plaintiff did not sign a contract with Northwestern Mutual or defendant Goris. Each of the agent contracts the plaintiff signed with Mr. Formella state:

> Agent shall be an independent contractor and nothing contained herein shall be construed to make Agent an employee of the Company, General Agent or First Party. Agent shall be free to exercise his own judgment as to the persons from whom he will solicit Applications and the time, place and manner of solicitation, but the Company from time to time may adopt regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of Agent.

(Holden Dep., Exh. 8 ¶ 4, Exh. 10 ¶ 4). Each agent contract the plaintiff signed between June 1, 1957, and May 1, 1999, contained language that specified his status as an independent contractor. The plaintiff understood the contract language and stated that the terms of the contract accurately represented the actual working relationship. (Holden Dep. at 38–40, 46–47).

The plaintiff alone decided what clients and market niche to pursue. He was never instructed by anyone to pursue any particular client, nor was he provided a list of leads for soliciting new clients. Instead, the plaintiff developed his own leads, first by tapping into his own circle of acquaintances, and then by relying upon referrals from those existing clients. The plaintiff alone "decided how much time and effort [he was] going to put in to try to make [his] career successful." (Holden Dep. at 26).

The plaintiff decided when to show up for work each day, when to leave work at the end of the day, how hard to work on any particular day, and how many hours to put in each week. He was not required to report the time he spent at work, and he alone decided "which hours, days, weeks, [and] months of the year to work or not work." (Holden Dep. at 67). The plaintiff had the "right to choose whether or not [he was] going to contract" with another general agent in the Northwestern Mutual network. (Holden Dep. at 106).

***4** Although general agents and district agents rent space to sales agents within their respective agencies, Northwestern Mutual does not require sales agents to maintain their offices in a District Agency or General Agency facility. Northwestern Mutual sales agents often rent their own office space in locations detached from the General Agency and District Agency, and even operate their insurance businesses out of their homes. The plaintiff was not required to maintain an office in the District Agency or General Agency. The plaintiff chose to maintain his office in District Agency and/or General Agency facilities over the years. The plaintiff rented his own, detached office space during the six to 12 months prior to the termination of his Northwestern Mutual agent's contract in October 2006. The plaintiff and the assistants he hired never

worked out of an office located on Northwestern Mutual's premises.

The plaintiff had complete freedom to decide what products to discuss with clients, what products not to discuss with clients, and how to present those products to the clients. The plaintiff had his "own style and [his] own approach that [he was] free to develop." (Holden Dep. at 72–73). The plaintiff was subject only to company rules and guidelines designed to ensure the sales agents' compliance with state and federal laws and regulations governing insurance and financial products. Within this framework, the plaintiff "had the freedom of choice as an independent business person to approach this the way [he] saw fit," including "freedom of choice as to how to approach these topics, what products to discuss and how to present them to the clients." (Holden Dep. at 72–74; Ertz Aff. ¶ 17). The plaintiff alone "sat down with the client and undertook that discussion with the client" and Northwestern Mutual had "no role whatsoever" in the plaintiff's "meeting with clients and selling insurance and soliciting clients." (Holden Dep. at 71, 66). Moreover, none of the plaintiff's district agents or general agents ever attended these client meetings or instructed the plaintiff what to discuss with his clients.

Although the plaintiff preferred selling Northwestern Mutual products due to their superior quality, if Northwestern Mutual did not offer certain products, could not issue products to a particular insured, or could not underwrite a product at rates satisfactory to the applicant, the plaintiff was free to sell insurance products issued by competitors of Northwestern Mutual. The plaintiff took advantage of this right and entered into numerous brokerage contracts with competitors of Northwestern Mutual over the years.

The plaintiff chose whether and where to advertise to prospective clients, whether and when to purchase gifts for his clients and when and how to entertain his clients. Although the plaintiff was subject to company and agency minimum sales production requirements as a condition to maintaining his soliciting agent's contract, the plaintiff was never required to provide "any kind of accounting or report of the sales [he] made that week or month." (Holden Dep. at 101–103, 106, Exh. 8, ¶ 8). When he became a senior agent on April 1, 1996, the plaintiff was no longer even required to meet minimum production standards as a condition to keeping his agent's contract. The plaintiff decided which industry and certifications to pursue and he alone decided whether, when, and whom to hire as secretaries and assistants to support his insurance sales business.

***5** Each year that the plaintiff sold Northwestern Mutual insurance and financial products, he submitted state and federal tax returns identifying himself as a self-employed, sole proprietor business person. The plaintiff reported his income each year on a Schedule C—Profit or Loss from Business "based on [his] status as a sole proprietor and independent business person," and thus was "able to take advantage of deducting [his] business [expenses]." (Holden Dep. at 83–84). The income reported on the plaintiff's tax returns was obtained through commissions the plaintiff received through the sale of various insurance and securities products and was not obtained through hourly wages or a salary.

Between October 23, 2003, and January, 2004, the plaintiff experienced three incidents of fainting. (Complaint at 3). As a result, the plaintiff sustained various injuries including fractured ribs, a punctured lung, facial abrasions and substantial blood loss. *Id.* The plaintiff's doctor suggested that the cause of fainting spells was due to medications the plaintiff had been prescribed over the years. (Plaintiff's Response Letter dated May 20, 2008, at 1). As a result of the plaintiff's final fainting incident, he was hospitalized for three weeks (including time at a rehabilitation center) and spent two months at an assisted living center. *Id.*

ANALYSIS

In seeking summary judgment, defendant Northwestern Mutual asserts that the court lacks jurisdiction to hear the plaintiff's ADA claim because the plaintiff was an independent contractor and not an employee of any of the defendants. Defendants Goris and Formella joined in the motion for summary judgment filed by defendant Northwestern Mutual and also filed their own motion asserting that the plaintiff failed to establish that he is disabled as defined under the ADA.

The purpose of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213, is to eliminate discriminatory practices against individuals with disabilities. *See* 42 U.S.C. § 12101(b). Title I of the ADA forbids certain employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement,

or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). An individual has a "disability" if he: 1) has a physical or mental impairment that substantially limits one or more of the major life activities; [3] 2) has a record of such an impairment; or 3) is regarded as having such an impairment. *See* 42 U.S.C. § 12102(2); *Roth v. Lutheran General Hosp.,* 57 F.3d 1446, 1454 (7th Cir.1995) (citing *Hamm v. Runyon,* 51 F.3d 721, 724 [7th Cir.1995]).

3 Major life activities are defined as "functions, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Roth v. Lutheran General Hosp.,* 57 F.3d 1446, 1454 (7th Cir.1995) (*citing* 29 C.F.R. §§ 1613.702[c], 1630 [i]; *Hamm v. Runyon,* 51 F.3d 721, 724 [7th Cir.1995]).

To state a cause of action under the ADA, a plaintiff must establish three elements: 1) that he is a disabled person within the meaning of the ADA, 2) that he is otherwise qualified, with or without reasonable accommodation, to perform the essential functions of the job, and 3) that the employer discriminated against him because of his disability. *Howard v. Navistar Intern. Trans. Corp .,* 904 F.Supp. 922, 927 (E.D.Wis.1995); *see also, White v. York International Corp.,* 45 F.3d 357, 360–61 (10th Cir.1995).

***6** However, the protections granted by Title I are applicable only to an employer—employee relationship. *Aberman v. J Abouchar & Sons, Inc.,* 160 F.3d 1148, 1150 (7th Cir.1998). Title I does not provide protection for independent contractors. *Id.* The court of appeals for this circuit expressly held that "[t]he ADA protects 'employees' but not independent contractors." *Id.* Accordingly, independent contractors do not have standing to sue under the ADA. *See Vakharia v. Swedish Covenant Hosp.,* 190 F.3d 799, 805 (7th Cir.1999)

"The ultimate question of whether an individual is an employee or an independent contractor is a 'legal conclusion' which involves 'an application of the law to the facts.' " *E.E.O.C. v. North Knox School Corp.,* 154 F.3d 744, 747 (7th Cir.1998) (quoting *Knight v. United Farm Bureau Mut. Ins. Co.,* 950 F.2d 377, 379 [7th Cir.1991]). To differentiate between an "employee" and an "independent contractor", the court considers the following factors:

> (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 378–79 (7th Cir.1991). The most important factor is the employer's right to control the worker's actions. *Worth v. Tyer,* 276 F.3d 249, 263 (7th Cir.2001).

The undisputed facts establish each of the plaintiff's contracts with Mr. Formella state:

> Agent shall be an independent contractor and nothing contained herein shall be construed to make Agent an employee of the Company, General Agent or First Party. Agent shall be free to exercise his own judgment as to the persons from whom he will solicit Applications and the time, place and manner of solicitation, but the Company from time to time may adopt regulations respecting the conduct of the business covered hereby, not interfering with such freedom of action of Agent.

(Holden Dep., Exh. 8, ¶ 4, Exh. 10, ¶ 4). Each agent contract the plaintiff signed between June 1, 1957 and May 1, 1999, contained language that specified his status as an independent contractor. Although the label "independent contractor" in a contract is not binding, the undisputed facts establish that the terms of the contract accurately represented the actual working relationship.

The plaintiff was free to determine his personal work schedule. He was individually responsible for deciding which clients to pursue and he did so without the guidance or assistance of personnel from either the Northwestern Mutual home office, General Agent office, or District Agent office. The plaintiff chose whether and where to advertise to prospective clients, whether and when to purchase gifts for his clients, and when and how to entertain his clients.

Additionally, the plaintiff was never required to provide "any kind of accounting or report of the sales [he] made that week or month." (Holden Dep. at 101–103, 106, Exh. 8 ¶ 8).

***7** Although at various times throughout his career the plaintiff located his office in either the General Agent's or District Agent's office, he was not required to maintain an office in either agency. Moreover, the plaintiff decided which industry and certifications to pursue and he alone decided whether, when, and whom to hire as secretaries and assistants to support his insurance sales business. The plaintiff paid for any secretarial or filing assistance he required, as well as other expenses associated with running his business.

In addition, the Wisconsin and federal tax returns filed by the plaintiff between 1992 and 2006 identified the plaintiff as a sole proprietor business person. The plaintiff obtained the income reported on these tax returns through commissions he received because of the sale of various insurance and securities products. The plaintiff did not receive hourly wages or a salary.

The undisputed facts before the court establish that the plaintiff was an independent contractor. As such, he does not have standing to sue under the ADA. Accordingly, defendant Northwestern Mutual Financial Network's motion for summary judgment will be granted.

The court notes that defendant Northwestern Mutual asserts in its reply brief that the court should dismiss the plaintiff's state law breach of contract claims with prejudice as a matter of law. Defendant Northwestern Mutual did not address in its motion for summary judgment the plaintiff's state law breach of contract claims. Therefore, the plaintiff did not have an opportunity to respond to defendant Northwestern Mutual's assertion that such claims should be dismissed. Moreover, jurisdiction over any state law claims alleged by the plaintiff is based on the supplemental jurisdiction statute, 28 U.S.C. § 1367. The statute provides that a district court "may decline to exercise supplemental jurisdiction" over the pendant state law claims if the court has dismissed all claims over which it has original jurisdiction. *Wright v. Associated Ins. Companies Inc.,* 29 F.3d 1244, 1251 (7th Cir.1994).

In this case, the court's jurisdiction was based on the plaintiff's apparent ADA claim. The court found, however, that the plaintiff lacked standing to sue under the ADA. Therefore, under the circumstances, the court declines to exercise supplemental jurisdiction over the plaintiff's state law claims. *See United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (stating that the federal claim must have substance sufficient to confer subject matter jurisdiction on the court); *see also, Groce v. Eli Lilly & Co.,* 193 F.3d 496, 501 (7th Cir.Ind.1999) ("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial.").

In sum, defendant Northwestern Mutual's motion for summary judgment will be granted. Given the court's conclusion regarding defendant Northwestern Mutual's summary judgment motion, defendants Michael A. Formella and Thomas Goris, Jr's motion for summary judgment will be denied as moot.

ORDER

***8 NOW, THEREFORE, IT IS ORDERED** that defendant Northwestern Mutual Financial Network's motion for summary judgment be and hereby is **granted.** (Docket # 27).

IT IS FURTHER ORDERED that defendants Michael A. Formella and Thomas Goris, Jr.'s motion for summary judgment be and hereby is **denied as moot.** (Docket # 24).

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 1367(c)(3), the court declines to exercise supplemental jurisdiction over the plaintiff's state law claims. Jurisdiction over said claims are relinquished to the state courts.

IT IS FURTHER ORDERED that this action be and hereby is **dismissed.**

IT IS ALSO ORDERED that the Clerk of Court enter judgment accordingly.

All Citations

Not Reported in F.Supp.2d, 2009 WL 440937

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

REVENUE SERVICE
Charles F. Hurley Building
19 Staniford Street
Boston, MA 02114

NORTHWESTERN MUTUAL LIFE INS CO
720 WISCONSIN AVE
MILWAUKEE, WI 53202
ATTN: JOHN THOMPSON

February 28, 2014
Employer Liability
Telephone: 617-626-5022
Employer#: 82951190

Dear Employer:

Based on information received by this Division, it has been determined that the services performed by: JOSHUA KEATING: SS#: XXX-XX-7882

and others similarly employed, does not constitute "employment" within the meaning of Section 2 of the Massachusetts Unemployment Insurance Law, as it appears that you did not retain sufficient right to direct and control the performance of services to make him your employee(s).

Therefore, you are *not* required to report earnings or to pay contributions thereon. *Please be advised that this determination may also affect your UHI/EMAC (Employer Medical Assistance Contribution).*

However, you are advised that if the individual is aggrieved by this determination they will have the right to request a hearing. You will be notified of that hearing by the DUA Hearings Department.

You are further advised that this determination applies only to your liability under the Massachusetts Unemployment Insurance Law. It has no bearing on your obligation under any other law, federal or state.

If you have any questions, please call me at (617) 626-5022.

Sincerely,

GLADYS OLIVE, SUPERVISOR,
Employer Liability
Revenue Service

2021 WL 2774844
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

James KENNEDY, II, on behalf of himself and those similarly situated persons, Plaintiff-Respondent,
v.
WEICHERT CO. d/b/a Weichert Realtors, Defendant-Appellant.

DOCKET NO. A-0518-19
|
Argued March 23, 2020
|
Decided July 2, 2021

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2266-19.

Attorneys and Law Firms

John F. Birmingham (Laddey, Clark & Ryan, LLP) of the Michigan bar, admitted pro hac vice, and Jennifer M. Keas (Foley & Lardner, LLP) of the District of Columbia bar, admitted pro hac vice, argued the cause for appellant (Laddey, Clark & Ryan, LLP, Foley & Lardner, LLP and Jennifer M. Keas, attorneys; Thomas N. Ryan, John F. Birmingham and Jennifer M. Keas, on the briefs).

Ravi Sattiraju argued the cause for respondent (Sattiraju & Tharney, LLP, attorneys; Ravi Sattiraju, of counsel and on the briefs; Anthony S. Almeida, on the briefs).

Darren C. Barreiro argued the cause for amicus curiae New Jersey Realtors® (Greenbaum Rowe Smith & Davis LLP, attorneys; Barry S. Goodman and Darren C. Barreiro, of counsel; Darren C. Barreiro and Conor J. Hennessey, on the brief).

Before Judges Messano, Ostrer and Susswein.

Opinion

The opinion of the court was delivered by

OSTRER, J.A.D.

***1** Are commissioned real estate salespersons exempt from the Wage Payment Law (WPL)? That is the issue in this appeal on leave granted.

James Kennedy, II, was a commissioned salesperson with Weichert Company, a licensed real estate broker. Kennedy alleges, for himself and a putative class, that Weichert violated the WPL's limitation on wage withholdings or diversions, N.J.S.A. 34:11-4.4, by deducting marketing, insurance and other expenses from his wages. In its dismissal motion, Weichert argued that fully commissioned real estate salespersons are independent contractors, whom the WPL does not cover. See N.J.S.A. 34:11-4.1. The trial court denied the motion after declaring that the "ABC test" under the Unemployment Compensation Law (UCL), N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), determines a real estate salesperson's status as an independent contractor under the WPL. In so doing, the trial court followed the Supreme Court's holding in Hargrove v. Sleepy's, LLC, 220 N.J. 289, 106 A.3d 449 (2015). There, responding to a certified question from the Third Circuit, the Court held "that the 'ABC' test ... governs whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim." Id. at 295, 106 A.3d 449.

Although Hargrove involved a truck driver's WPL claim, the Court's broad statement was unqualified. But Weichert contends the Court's holding does not reach real estate salespersons. Weichert argues that the ABC test does not apply to real estate salespersons because the UCL expressly excludes them from coverage. Also, Weichert contends that the Real Estate Brokers and Salesmen Act (Brokers Act) recognizes real estate salespersons' independent-contractor status, while requiring relationships inconsistent with the ABC test.

We affirm as modified the trial court's order denying Weichert's motion to dismiss.

I.

We assume the facts in Kennedy's complaint. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166, 876 A.2d 253 (2005) (stating that, on a motion to dismiss for failure to state a claim, a court must assume a plaintiff's factual assertions and extend to the plaintiff all favorable factual inferences).

Kennedy contracted to be a real estate salesperson for Weichert between August 8, 2012 and November 6, 2018. [1] Weichert classified Kennedy as an independent contractor. It did the same for the putative class of other real estate salespersons it contracted with since March 25, 2013.

1 Kennedy did not attach the contract to his complaint and Weichert did not submit it in support of its motion.

Nonetheless, Weichert "exercised a significant level of control and direction" over Kennedy's and the class's work. Weichert required Kennedy to work under its supervision and in its facilities. Kennedy could not charge customers less than the sales commission Weichert set, but Weichert could change the commission structure at will, and modify a marketing fee. Weichert could withhold some of its listings from Kennedy, but Kennedy had to "introduce" all his customers to real-estate related services that Weichert sold. Kennedy could not work for other brokers while he worked for Weichert. He had to join real estate organizations that Weichert belonged to, and he had to pay the fees for doing so. Even if Weichert terminated him, which it retained the right to do at will, all of Kennedy's prospects belonged to Weichert and Kennedy retained no right to compensation from transactions with them after he left. Kennedy had to name Weichert as a co-insured on his automobile insurance policy, but Weichert retained the right to control any litigation or dispute.

***2** Relevant to his WPL claims, Kennedy alleged that Weichert compensated him on a strictly commission basis, but it "made, took and/or required" at least eighteen forms of "deductions" from his and the class's wages. The complaint does not clearly say that Weichert subtracted these expenses from his commissions, rather than "required" him to pay the expenses after he received his commissions. The listed deductions include marketing fees, MLS fees for listings and membership, and costs and expenses for collections and marketing. The required payments included trade association dues, mail and travel costs, and health and errors and omissions insurance. He also had to pay for his business cards. Kennedy alleged these deductions unlawfully decreased his and the class's wages that the WPL entitled them to receive.

II.

In lieu of an answer, Weichert moved to dismiss for failure to state a claim because Kennedy, as a matter of law, was not an employee under the WPL. Alternatively, Weichert asked the court to declare that the ABC test did not apply, and that Weichert's and Kennedy's independent contractor agreement defined their relationship under the Brokers Act. Alternatively, Weichert asked the court to apply "the traditional control test or the hybrid test" that the Court applied to worker's compensation cases in Estate of Kotsovska, ex rel. Kotsovska v. Liebman, 221 N.J. 568, 116 A.3d 1 (2015). [2]

2 The New Jersey Realtors unsuccessfully moved to intervene. We affirmed the trial court's order denying intervention, and sua sponte granted the organization leave to participate as amicus curiae and present argument, which it did. See Kennedy v. Weichert, No. A-0395-19 (App. Div. Feb. 21, 2020).

The trial judge declined Weichert's invitation to distinguish Hargrove. The judge noted that the Court adopted the ABC test for WPL employee-vs-independent-contractor questions without addressing those workers the UCL exempts. The court's order denied the motion to dismiss and declared that the ABC test governed. Thereafter, we granted Weichert's motion for leave to appeal.

III.

A.

Since 1899, New Jersey law has protected employees' right to timely payment of cash wages. See L. 1899, c. 38, § 1, formerly codified at N.J.S.A. 34:11-4, repealed by L. 1965, c. 173, § 13. The law entitled employees to wage payment in "lawful money of the United States" every two weeks; it declared null and void agreements to the contrary; and imposed penalties for violations. L. 1899, c. 38, §§ 1, 2.

The law was originally designed to combat "the practice prevalent among factory owners, particularly by owners of glass factories in southern New Jersey, of paying wages in the form of order books or scrip, redeemable only at company-owned stores." Dep't of Labor & Indus. v. Rosen, 44 N.J. Super. 42, 45, 129 A.2d 588 (App. Div. 1957). More generally, the statute furthered the "economic and social necessity" of assuring "payment in cash at regular intervals of wages upon which an employee" and the employee's family depend for support. Id. at 46, 129 A.2d 588. The

statute penalized employers who did not pay workers their earned wages, even if the employer simply lacked the money to do so. Id. at 49-50, 129 A.2d 588. The law excluded agricultural workers and "watermen," but did not mention independent contractors. L. 1899, c. 38; N.J.S.A. 34:11-4 (repealed 1965). [3]

3 Over forty states have some form of wage payment law to vindicate workers' rights to their wages. See S. Samaro, The Case for Fiduciary Duty as a Restraint on Employer Opportunism Under Sales Commission Agreements, 8 U. Pa. J. Lab. & Emp. L. 441, 446 (2006); see, e.g., State ex rel. Nilsen v. Or. State Motor Ass'n, 248 Or. 133, 432 P.2d 512, 515 (Or. 1967) (stating that policy of wage payment law "is to aid an employe[e] in the prompt collection of compensation due him and to discourage an employer from using a position of economic superiority as a lever to dissuade an employee from promptly collecting his agreed compensation" and noting that "[t]he smaller the amount of the unpaid compensation the greater is the need for assistance in effecting collection").

***3** In 1965, the Legislature modernized the wage payment law, and for the first time, defined "employee" to mean "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors, shall not be considered employees." L. 1965, c. 173, § 1, codified at N.J.S.A. 34:11-4.1. [4] The law expressly includes commissions as a form of wages. See N.J.S.A. 34:11-4.1(c); Minoia v. Kushner, 365 N.J. Super. 304, 310, 839 A.2d 90 (App. Div. 2004).

4 The new law removed the exclusion of agricultural workers and watermen, but did not disturb a provision that, at the time, required bi-monthly wage payments to railroad employees, L. 1911 c. 371, amended by L. 1974 c. 172, and permitted monthly payment of wages to "bona fide executive, supervisory and other special classifications of employees," N.J.S.A. 34:11-4.2.

Pertinent to Kennedy's claim, the law states that "[n]o employer may withhold or divert any portion of an employee's wages unless" expressly permitted by the WPL or by other laws. N.J.S.A. 34:11-4.4. For example, the law expressly permits withholdings or diversions for retirement, health, and profit-sharing plans, N.J.S.A. 34:11-4.4(b)(1); savings plans, N.J.S.A. 34:11-4.4(b)(3); repayment of employee loans, N.J.S.A. 34:11-4.4(b)(4); and approved charitable contributions, N.J.S.A. 34:11-4.4(b)(5). The law permits few withholdings or diversions directly related to an employee's work performance, but it does permit them for "safety equipment," N.J.S.A. 34:11-4.4(b)(4) and for the rental and cleaning of work clothing, if authorized in advance by the employees or their collective bargaining agreement, N.J.S.A. 34:11-4.4(b)(6). The law also allows the Commissioner of Labor and Workforce Development to authorize by regulation other "contributions, deductions and payments" if approved by the employer. N.J.S.A. 34:11-4.4(b)(11).

The WPL's public policy goal remained unchanged: "to protect employees' wages and to guarantee receipt of the fruits of their labor." Rosen v. Smith Barney, Inc., 393 N.J. Super. 578, 585, 925 A.2d 32 (App. Div. 2007), aff'd, 195 N.J. 423, 950 A.2d 205 (2008).

B.

We do not write on a clean slate in deciding if Kennedy, a fully commissioned real estate salesperson, is an employee or an independent contractor under the WPL. As we noted at the outset, the Supreme Court broadly declared that the ABC test determines if a person is an employee or an independent contractor under the WPL. Hargrove, 220 N.J. at 295, 106 A.3d 449.

To satisfy the ABC test, a person must demonstrate:

> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
>
> [N.J.S.A. 43:21-19(i)(6)(A),(B),(C); see also Hargrove, 220 N.J. at 305, 106 A.3d 449.]

The Court applied the same test to the employee-status question under the Wage and Hour Law (WHL), which sets

a minimum wage and limits hours of work. Id. at 312, 106 A.3d 449. Like the WPL, the WHL refers to suffering or permitting work in defining employ or employee, see N.J.S.A. 34:11-56a1(f) (stating " '[e]mploy' " includes to suffer or permit to work") and N.J.S.A. 34:11-56a1(h) (stating " '[e]mployee' includes any individual employed by an employer"). Although the WHL does not expressly exclude independent contractors, it has been interpreted to do so. See Hargrove, 220 N.J. at 304, 106 A.3d 449 (noting that the WHL "does not prescribe the minimum wage or overtime rate payable to independent contractors"). The Court reasoned that the same test should apply to both statutes because they both "address the most fundamental terms of the employment relationship," and "[s]tatutes addressing similar concerns should resolve similar issues ... by the same standard." Id. at 313, 106 A.3d 449. The Court noted that "[t]he WPL is designed to protect an employee's wages and to assure timely and predictable payment" and the "WHL is designed to protect employees from unfair wages and excessive hours" by "establish[ing] a minimum wage for employees and the overtime rate for each hour of work in excess of forty hours in any week." Ibid.

***4** In deciding to apply the ABC test to the WPL and WHL, the Court deferred to the view of the agency that enforces both laws. Id. at 312, 106 A.3d 449 (concluding "that no good reason has been presented to depart from the standard adopted by the DOL"). In 1995, the Department of Labor expressly incorporated the ABC test in its WHL regulations. 27 N.J.R. 3958 (Oct. 16, 1995); N.J.A.C. 12:56.16.1 (stating "[t]he criteria identified in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A)(B)(C) and interpreting case law will be used to determine whether an individual is an employee or independent contractor for purposes of the Wage and Hour Law").

The department did not adopt a comparable provision in its WPL regulation, N.J.A.C. 12:55-1.2, which simply tracks the WPL's statutory definition. But, in its comments adopting the WHL regulation, the department said it "feels that it is necessary to include reference to this criteria [that is, the ABC test] in the Wage and Hour rules since an individual's employment status impacts determinations concerning entitlements under the minimum wage, overtime, wage payment and wage collection statutes." 27 N.J.R. 3958 (emphasis added); see also Hargrove, 220 N.J. at 303, 106 A.3d 449 (citing this regulatory history). As amicus curiae in Hargrove, the department also informed the Court that it "applied the 'ABC' test for independent contractor determinations under the WPL as well." Ibid. For example, the agency did so in New Jersey Department of Labor and Workforce Development v. SG America, Inc., 2011 N.J. AGEN LEXIS 67, 2011 WL 4944213 (Mar. 18, 2011), where it affirmed penalties for WPL as well as WHL violations after applying the ABC test to determine that a garment worker was an employee and not an independent contractor.

In its 1995 rulemaking, the department initially proposed the "economic realities" test that federal courts apply to determine independent-contractor status under the Federal Fair Labor Standards Act (FLSA):

> 1. The degree of the alleged employer's right to control the manner in which the work is performed;
>
> 2. The alleged employee's opportunity for profit or loss depending upon the managerial skill;
>
> 3. The alleged employee's investment in equipment or materials required for his or her task, or his or her employment of helpers;
>
> 4. Whether the service rendered requires a special skill;
>
> 5. The degree of permanence of the working relationship; and
>
> 6. Whether the service rendered is an integral part of the alleged employer's business.
>
> [27 N.J.R. 2871 (Aug. 7, 1995).]

See, e.g., Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1383-88 (3d Cir. 1985) (applying the six-factor "economic realities" test in FLSA case).

But the department ultimately opted to formally adopt the ABC test, even though the WHL's definitions mirror those in the FLSA, see 29 U.S.C. 203(g) (stating " '[e]mploy' includes to suffer or permit to work") and 29 U.S.C. 203(e)(1) (stating " '[e]mployee' means any individual employed by an employer"). [5] Business interests objected to the FLSA standard because it "appear[ed] to expand the present 'ABC Test' " and might deny independent-contractor status to certain unskilled workers. 27 N.J.R. 3958 (Oct. 16, 1995).

5 The United States Supreme Court has stated, regarding that definition, "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."

United States v. Rosenwasser, 323 U.S. 360, 362, 65 S.Ct. 295, 89 L.Ed. 301 (1945). The FLSA definition "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). As noted, the WPL and WHL also use the suffer-or-permit language.

***5** The Hargrove Court likewise declined to adopt the FLSA test. The Court concluded that the New Jersey department's reliance on the ABC test, which requires that independent contractors satisfy all three factors A, B, and C, "operates to provide more predictability" than the FLSA multi-factor 'economic realities' standard" in which no single factor is determinative. Hargrove, 220 N.J. at 314, 106 A.3d 449. The Court opined that the WPL and WHL might overall cast a "wider net" using the ABC test. Ibid. The Court also noted that the department's approach "presumes that the claimant is an employee and imposes the burden to prove otherwise on the employer." Ibid.

C.

Turning to the issue at hand, Weichert argues that, despite the Hargrove Court's broadly-worded holding, the ABC test does not control whether a fully commissioned real estate salesperson is an employee or independent contractor under the WPL.

At the outset, we reject Weichert's argument that the only Hargrove holding worthy of stare decisis treatment pertains to truck drivers. Without limitation, the Court "conclude[d] that the 'ABC' test ... governs whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim." Hargrove, 220 N.J. at 295, 106 A.3d 449. We need not decide if the Court's conclusion is dictum as applied to anyone but truck drivers. We are "bound by [the] Court's pronouncements, whether classified as dicta or not." State v. Dabas, 215 N.J. 114, 136-37, 71 A.3d 814 (2013). At the same time, we remain free "to fill lacunae in the law," Pannucci v. Edgewood Park Senior Hous. – Phase 1, LLC, 465 N.J. Super. 403, 414, 243 A.3d 948 (App. Div. 2020) (quoting A.N. ex rel. S.N. v. S.M. ex rel. S.M., 333 N.J. Super. 566, 579-80, 756 A.2d 625 (App. Div. 2000) (Kestin, J., concurring)). So, the question is whether the Court left any daylight between its declaration that the ABC test applies to WPL employee-status questions, and the issue presented here.

Weichert presents two principal reasons why the ABC test does not apply here, despite Hargrove's ABC-test endorsement: first, the UCL, which includes the ABC test, exempts fully commissioned real estate salespersons; second, the ABC test is inconsistent with the Brokers Act's more specific provisions on real estate salespersons' status. We address these issues in turn.

1.

Weichert highlights that, unlike the truck drivers in Hargrove, real estate salespersons are expressly exempt from the UCL, regardless of the ABC test. See N.J.S.A. 43:21-19(i)(7)(K) (stating "the term 'employment' shall not include ... [s]ervices performed by real estate salesmen or brokers who are compensated wholly on a commission basis"). Thus, Weichert contends, the Hargrove Court did not confront the issue whether it was appropriate to apply the UCL's ABC test to a WPL employment status dispute involving persons whom the law expressly exempts without resort to the ABC test. [6]

[6] Weichert also contends there is no evidence that the department has ever actually applied the ABC test to determine if the WPL or WHL applies to real estate salespersons.

We reject Weichert's (and amicus's) argument that real estate salespersons are exempt, as a matter of law, from the WPL, because they are exempt from the UCL. To decide if a worker is an employee under a statute or under a common law rule, a court must consider the statute's terms and purpose. "[I]n each setting-specific analysis, what matters most is that an individual's status be measured in the light of the purpose to be served by the applicable legislative program or social purpose to be served." D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 122 n.7, 927 A.2d 113 (2007). "An individual may be considered an employee for some purposes but an independent contractor for others." MacDougall v. Weichert, 144 N.J. 380, 388, 677 A.2d 162 (1996); see also Gil v. Clara Maass Med. Ctr., 450 N.J. Super. 368, 389, 162 A.3d 1093 (App. Div. 2017) (Ostrer, J., concurring) (comparing various "employee" tests). Also, a court "must look beyond the label attached to [a] relationship" and consider its underlying features, to decide if it creates an employment or an independent-contractor relationship. D'Annunzio, 192 N.J. at 122, 927 A.2d 113.

***6** The Hargrove Court determined that, given the common employee-protection goals of the WPL and the WHL, the general test for independent contractors should be the same. Although the Court approved the department's use of the UCL's ABC test, the Court did not read the UCL in pari materia with those other two laws.

Furthermore, in specially treating real estate salespersons under the UCL, the Legislature did not alter the generally applicable independent contractor test. The Legislature evidently granted real estate brokers and salespersons an exemption not because the ABC test did not apply; but because it did.

The exemption's history is instructive. The exemption was modeled on one for insurance agents. Insurance agents were found not to meet the ABC test for independent-contractor status. See Superior Life, Health and Acc. Ins. Co. v. Bd. of Review, 127 N.J.L. 537, 539-40, 23 A.2d 806 (Sup. Ct. 1942). The Legislature then exempted wholly commissioned insurance agents "exclusive of industrial life insurance agents." See L. 1941, c. 385, codified at N.J.S.A. 43:21-19(i)(7)(J). The real estate exemption soon followed, with the drafters expressing the intent to place real estate brokers and salespersons "on the same par with insurance agents." Statement to A. 64 (L. 1946, c. 37).

Notably, neither exemption was unqualified. Real estate brokers and salespersons are exempt only if compensated wholly on a commission basis. The Legislature expressly withheld the insurance agent exemption from industrial life insurance agents, who typically were assigned territories to collect premiums from persons already insured. See Washington Nat'l Ins. Co. v. Bd. of Review, 137 N.J.L. 596, 597, 61 A.2d 178 (Sup. Ct. 1948). That distinction does not necessarily relate to the agents' respective degree of independence from the insurer paying the compensation.

We reject Weichert's argument that "[i]t would be a perverse result" if the UCL's ABC test rendered Kennedy an employee under the WPL, while the UCL exempts Kennedy from coverage. As noted, a person may be an employee under one statute and not another. Had the Legislature intended to exempt real estate salespersons from the WPL's reach, it could have said so. The Legislature obviously found good cause to exempt commissioned real estate salespersons from the UCL. Perhaps, the Legislature believed real estate salespersons should not qualify for unemployment compensation because of their control over when and where they work. At the same time, the Legislature evidently found no sound reason to deny real estate salespersons their right under the WPL to timely payment of compensation they already have earned, without unauthorized withholdings or diversions. [7]

7 If certain withholdings or diversions are essential to the common business model of brokers and real estate salespersons, the Legislature could specifically authorize those deductions, rather than exempt real estate salespersons from the law's protections entirely.

Notably, the UCL exempts twenty-five specific categories of workers from covered "employment." See N.J.S.A. 43:21-19(i)(7)(A) to (Z); Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 580-81, 593 A.2d 1177 (1991) (noting exemptions). Exemptions from the minimum wage under the WHL include persons engaged in motor vehicle sales and "outside sales," N.J.S.A. 34:11-56a(4)(a), but the WHL does not expressly exempt commissioned real estate salespersons. [8] Outside salespersons, as well as individuals working in a "bona fide executive, administrative, professional" capacity are also exempt from overtime requirements. N.J.A.C. 12:56-7.1; see also N.J.S.A. 34:11-56a(4)(b)(1). Yet, the Legislature has included no industry-specific exemptions under the WPL (jettisoning the previous exemptions for agricultural workers and watermen), placing only independent contractors and subcontractors entirely beyond its reach.

8 See Donovan v. Walter W. Cheney, Inc., 510 F. Supp. 748 (D.N.H. 1981) (holding that FLSA applied to wholly commissioned real estate salespersons who received no salary or draw against commission, but were required to perform "floor" work and spent more than twenty percent of their time on matters not related to their personal sales efforts, such as answering telephones); see also Luther v. Z. Wilson, Inc., 528 F. Supp. 1166 (S.D. Ohio 1981).

***7** In sum, we conclude that the UCL's special treatment of commissioned real estate salespersons does not render the ABC test inappropriate to determine a real estate salesperson's independent-contractor status under the WPL.

2.

We next turn to Weichert's contention that applying the ABC test in this case is inconsistent with the Brokers Act, which defines aspects of the relationship between brokers and licensed salespersons. We generally reject Weichert's contention, because any inconsistency only arises on and after August 10, 2018, the effective date of amendments to the Brokers Act. L. 2018, c. 71, § 29.

The Supreme Court in Re/Max of New Jersey, Inc. v. Wausau Insurance Cos. held that the Brokers Act "define[d] a real estate agent or salesperson as an employee of the broker" and established an "employer-employee relationship" between a salesperson and a broker. 162 N.J. 282, 287-88, 744 A.2d 154 (2000). The Court noted that the Brokers Act at the time "provide[d] that a real estate agent or salesperson is one 'who, for compensation, valuable consideration or commission, or other things of value, ... is employed by and operates under the supervision of a licensed real estate broker ....' " Ibid. (quoting N.J.S.A. 45:15-3 (1993)). Throughout the Brokers Act, the relationship between a broker and a licensed salesperson was described as an employment relationship. For example, real estate brokers are required to prominently display the license certification of "all licensed persons in his employ." N.J.S.A. 45:15-12. "All licenses issued to ... salespersons shall be kept by the broker by whom such real estate licensee is employed" and "[w]hen any real estate licensee is terminated or resigns his employment with the real estate broker by whom he was employed at the time of the issuing of such license to him, notice of the termination shall be given in writing." N.J.S.A. 45:15-14 (1993). Also, upon termination "such employer" shall notify the Real Estate Commission. Ibid. And, if a broker loses his or her license, that automatically suspends "every real estate ... salesperson's license granted to employees of the broker." N.J.S.A. 45:15-15 (1996).

The question in Re/Max was whether the real estate salespersons were employees under the Workers' Compensation Act. The trial court held that they were, under both the "control test" and the "relative nature of the work test." Re/Max of New Jersey, Inc. v. Wausau Ins. Cos., 304 N.J. Super. 59, 65-69, 697 A.2d 977 (Ch. Div. 1997). We affirmed for the reasons stated, highlighting the court's use of the "relative nature of the work test." Re/Max of New Jersey, Inc. v. Wausau Ins. Cos., 316 N.J. Super. 514, 516, 720 A.2d 658 (App. Div. 1998). The Supreme Court affirmed on the basis of the trial court's opinion. Re/Max, 162 N.J. at 286, 744 A.2d 154. The Court held that Re/Max agents were employees, despite the broker's "sophisticated attempt to thwart the employer-employee relationship established as a matter of public policy under the Brokers Act and the implementation of the Workers' Compensation Act." Id. at 288.

We recognize the case addressed salespersons' status under the Workers' Compensation Act, and not the WPL. However, Weichert has presented no policy inherent in the Workers Compensation Act and the WPL for affording a salesperson workers compensation if he or she, say, tripped and broke an ankle on the job, but uniformly denying that same salesperson the right under the WPL to prompt payment of his or her compensation without unauthorized withholdings or diversions. Furthermore, the Hargrove Court later determined the ABC test, which casts a wider net than other tests, should apply to WPL employee-status questions.

***8** However, eighteen years after the Court's holding in Re/Max, the Legislature extensively amended the Brokers Act to expressly authorize independent contractor relationships between brokers and salespersons. The 2018 statute included a provision expressly stating that "[n]otwithstanding any provision of R.S.45:15-1 et seq. [the Brokers Act] or any other law, rule, or regulation to the contrary, a business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or the provision of services by an independent contractor." L. 2018, c. 71, § 3(b), codified at N.J.S.A. 45:15-3.2(b). The amendments required that every salesperson enter into a written agreement with his or her broker before starting work, L. 2018, c. 71, § 3(a), codified at N.J.S.A. 45:15-3.2(a), and "[t]he nature of the business affiliation shall be defined in the written agreement," L. 2018, c. 71, § 3(b), codified at N.J.S.A. 45:15-3.2(b). The amendments also added the words "or contracted" almost everywhere the word "employed" was found in the act, and added "or contractors" after the word "employees." See L. 2018, c. 71. [9]

9 The change was not made everywhere. For example, the Brokers Act still states that a broker's office shall prominently display "the license certificate of ... all licensed persons in his employ," N.J.S.A. 45:15-12, without mentioning those "contracted."

The Brokers Act amendments may affect the application of a test for determining a real estate salesperson's employment status under the WPL. The amendments not only authorized independent contractor relationships; they did so, "[n]otwithstanding ... any other law, rule, or regulation to

the contrary" and "[n]otwithstanding any provision" of the Brokers Act to the contrary. Based on the 2018 statute's plain language, the Legislature evidently concluded that an independent contractor relationship could subsist, even though a broker exercised the extensive controls over his or her salespersons that the Brokers Act required.

In other words, it would be inconsistent with the intent of the 2018 statute to apply an employment status test in such a way that it would deny independent-contractor status solely on the basis of compliance with Brokers Act requirements. For example, a real estate salesperson may receive commissions only through his or her broker. N.J.S.A. 45:15-16. A salesperson may not sue anyone for a commission other than his or her broker. N.J.S.A. 45:15-3. A salesperson's license shall be kept by his or her brokers, and upon termination or resignation, the salesperson lacks authority to earn commissions until licensed by the Commission through another broker. N.J.S.A. 45:15-14. These provisions, which require salespersons to submit to the control of his or her broker, should not preclude a salesperson's independent-contractor status. Cf. Laurel Sports Activities v. Unemployment Comp. Comm'n, 135 N.J.L. 234, 237, 51 A.2d 233 (Sup. Ct. 1947) (finding various wrestling and boxing participants were free of control of wrestling and boxing promoter because "[t]he details of employment and control over the referees, timekeepers, announcers, boxers and wrestlers are so completely exercised by the State that the promoter has no control or direction whatever, save as noted").

However, we are unpersuaded by Weichert's argument that the 2018 amendments were curative and therefore retroactive. Curative amendments are retroactive because they are "designed merely to carry out or explain the intent of the original statute," or "remedy a perceived imperfection in or misapplication of" the statute. Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 388, 143 A.3d 254 (2016) (quoting Nelson v. Bd. of Educ. of Twp. of Old Bridge, 148 N.J. 358, 370, 689 A.2d 1342 (1997)); see also Pisack v. B&C Towing, Inc., 240 N.J. 360, 371, 222 A.3d 693 (2020). A curative amendment must not change the original law's meaning. James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 564, 83 A.3d 70 (2014).

We doubt the Legislature intended the 2018 amendments to be curative and retroactive. There are three reasons. First, there is the statute's effective date provision. The Governor approved the Brokers Act amendments on August 10, 2018. The statute expressly provided that all the amendments were retroactive to January 1, 2018 except section 3, authorizing independent contractor and employee relationships "notwithstanding ... any other law, rule, or regulation to the contrary." That section was effective only upon enactment. L. 2018, c. 71, § 29. Had the Legislature intended section 3 to apply retroactively, it presumably would not have made it effective eight months after the rest of the 2018 amendments.

***9** Second, there is the matter of timing. The Re/Max Court declared in 2000 that the Brokers Act established an employer-employee relationship. The Legislature amended the Brokers Act in 2009 without altering the provisions on the employee-status issue. See L. 2009, c. 238. Rather, the 2009 statute created a new licensee – real estate referral agents – and provided that they, like other licensees, are "employed by ... a licensed real estate broker." L. 2009, c. 238, § 2. Another nine years later, the Legislature altered the provisions defining the relationship between salespersons and brokers.

We appreciate that "[l]egislative inaction" can sometimes be a "weak reed ... upon which to rely." Masse v. Bd. of Trs., Pub. Emps. Ret. Sys., 87 N.J. 252, 264 (1981) (quoting 2A Sutherland, Statutory Construction, § 49.10 (4th ed. 1973)). But we cite the inaction not to infer the Legislature approved of the Re/Max interpretation. Cf. Ibid. (rejecting inaction as a sign of approval). We cite the inaction to reject the inference that the Legislature not only disapproved it, but intended to cure it retroactively, and it just took eighteen years and a second amendatory statute for the Legislature to get around to the task.

Third, in the accompanying bill and committee statements, the Legislature did not express an intent to clarify the law or correct a misapplication of it. Cf. Nelson, 148 N.J. at 370, 689 A.2d 1342 (noting legislative history expressing intent to clarify and correct misapplication of statute and provision that the amendment would apply to persons who previously acquired rights under the earlier statute). Rather, the Legislature expressed its intent to codify certain recent Real Estate Commission regulations authorizing independent contractor agreements.

> [T]he bill codifies two existing provisions of regulations promulgated by the New Jersey Real Estate Commission. First, the bill mandates that two hours of continuing education courses be taken in the topic of ethics. Second, the bill requires a written agreement defining the business affiliation between a broker and a broker-salesperson or salesperson and the terms under which the services of the broker-salesperson or salesperson have been retained by

> the broker. The bill provides that the business affiliation between a broker and a broker-salesperson or salesperson may be that of an employment relationship or independent contractor relationship.
>
> [Sponsor's Statement to S. 430 (L. 2018, c. 71).]

The Real Estate Commission had adopted regulations effective July 3, 2017 redacting references to employment in its regulation governing broker-salespersons agreements, and stating that it "interprets 'employment agreement,' 'employ,' and 'employing broker' " in [the Brokers Act] "to permit an employment relationship or an independent contractor relationship between a broker and a broker-salesperson, salesperson, or referral agent." See N.J.A.C. 11:5-4.1(j); 49 N.J.R. 1910(a) (July 3, 2017). In its rule proposal, the Commission stated that "[h]istorical practice as well as current practice indicates that licensees determine the nature of their business relationship." 48 N.J.R. 1900(a) (Sep. 19, 2016).

However, the Commission was not empowered to overturn the Re/Max Court's interpretation that the Brokers Act "defines a real estate agent or salesperson as an employee of the broker," 162 N.J. at 287, 744 A.2d 154, and "established as a matter of public policy" an "employer-employee relationship," id. at 288, 744 A.2d 154.[10] Nor was the Commission empowered to limit the reach of another statute, such as the WPL, that depends on determining a person's employment status. As we have noted, a person may be an employee under one statute and not another. See MacDougall, 144 N.J. at 388, 677 A.2d 162. And, the Department of Labor and Workforce Development, not the Real Estate Commission, exercises the responsibility to enforce and administer the WPL, N.J.S.A. 34:11-4.9, and to promulgate implementing regulations, N.J.S.A. 34:11-4.11. Therefore, the department, not the commission, is owed deference in interpreting the meaning of "independent contractor" under the WPL. See Hargrove, 220 N.J. at 301-02, 106 A.3d 449.

10 We recognize that the United States Supreme Court has held, as a corollary to its Chevron doctrine, see Chevron, U.S.A. v. NRDC, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). Even if our Court were to adopt this rule because it "has applied a Chevron-like deference" to state agencies' statutory interpretation, see In re RCN of NY, 186 N.J. 83, 93, 892 A.2d 636 (2006), the rule does not apply here. The Re/Max court identified no ambiguity in the Brokers Act and, on its face, there was none.

***10** In sum, the Brokers Act amendments are prospective in effect. Consequently, at most, they can have only a minor impact on the dispute before us. Section 3 of the 2018 statute became effective August 10, 2018, and Kennedy seeks damages for the period between August 8, 2012 and November 6, 2018. So, the Brokers Act amendments would apply only to the last three months or so of Kennedy's relationship with defendant.

With the slim record before us, we decline to declare the amendments' impact on Kennedy's and the putative class's allegations for that brief period. We also decline to endorse the trial court's declaration that the ABC test governed Kennedy's employment-status for the period after August 10, 2018. Rather, determining the appropriate test and defining the parties' post-August 10, 2018 relationship should await development of a full factual record. Neither party presented their contract, or any amendments that may have been added over the years Kennedy worked for Weichert.

Although the Supreme Court declared we must "look beyond the label" to decide if someone is an employee or an independent contractor, D'Annunzio, 192 N.J. at 122, 927 A.2d 113, Weichert argues the 2018 amendment empowers parties to label their relationship however they want. But stating that parties' "business affiliation shall be defined in the written agreement," L. 2018, c. 71, § 3(b), codified at N.J.S.A. 45:15-3.2(b), may mean only that the written agreement shall specify the parties' respective rights and duties and those features shall define the relationship. We need not resolve this question either, both because the parties' contract is not before us, and it was, in any event, executed before the amendment's effective date.

IV.

In sum, we affirm the trial court's denial of Weichert's motion to dismiss. We conclude that the trial court correctly held

that the ABC test is the appropriate one to determine whether Kennedy and the putative class were employees under the WPL for the period until August 9, 2018. For the period thereafter, the trial court should determine the appropriate test in light of a full factual record. Particularly at this early stage of the litigation, and in light of the slim record before us, we express no opinion regarding whether plaintiffs will ultimately succeed under the ABC test for the period before August 10, 2018, or under the test that the court determines for the subsequent period.

Affirmed as modified.

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COMMONWEALTH OF MASSACHUSETTS

COMMISSION AGAINST DISCRIMINATION

TIMOTHY W. MEDREK, Complainant v. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Respondent	ORDER DOCKET NO: 90-SEM-0384

On September 13, 1990, Respondent, through its attorney, submitted materials which I interpret as a Motion to Dismiss in the above-referenced matter. As the basis for said motion, Respondent argues that Complainant's relationship to Respondent is that of an Independent Contractor, and, therefore, not within the Commission's jurisdiction under M.G.L. c. 151B.

In support of its position, Respondent has submitted two Federal Court decisions, Pierce v. Northwestern Mutual Life Insurance Co., 444 F. Supp. 1098 (1978), and Moore v. American Family Mutual Ins. Co., No. 87-C-0870-C (W. Dist. Wis. Aug. 20, 1990). Both of these decisions have adjudicated the same jurisdictional issue present in the instant case. In both instances,

the court found for the defendant insurance company. Therefore, Respondent argues that, based on the doctrine of collateral estoppel and/or res judicata, the complaint in the above-referenced matter should be dismissed.

The policy underlying the doctine of issue preclusion is expressed in the ancient maxim: Nemo debit bis vexari pro una et eadam causa. (No one shall suffer to be vexed twice for the same cause). This policy was early adopted and has been consistently followed in Massachusetts.

The application of the doctrines of res judicata and collateral estoppel[1] is not easily accomplished in the present case. There is not, for instance, identity of parties. And, at least with regard to the Pierce case, there is no identity of claims. This latter factor has been the basis of a line of Commission cases refusing to apply collateral estoppel. see

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[1] The two doctrines are frequently confused. Res judicata applies to matters which were, or should have been, adjudicated in another proceeding involving the same cause of action. Collateral estoppel concerns issues which were necessary and determined in another action between the parties.

Smith v. Jahn Foundry, 1 MDLR 1394 (1979); Taunton Redevelopment Authority v. MCAD, 6 MDLR 1243 (1984); Hussey and Romano v. Lowell Paper Box Company, 7 MDLR 1378 (1985); Alonge v. M. J. Flaherty Company, 8 MDLR 1173 (1985).

However, the Moore case, when considered in full, does provide a sufficient basis to preclude relitigation of the employer/employee relationship issue. In Moore, filed under Title VII of the Civil Rights Act of 1964 as well as 42 U.S.C. §1981, 1982 and 1983 and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution, the plaintiff alleged that his employment contract with defendants was terminated for discriminatory reasons. Following a very specific review of the employment contract between the parties the court granted the defendants' motion for summary judgment and dismissed the action.

In addition, the court held that:

> "every court that has considered whether an insurance agent's discharge is actionable under Title VII has held that it is not. Moore, at 8, citing Dixon v. Burman, 593 F. Supp. 6, 8 (N.D. Ind. 1983), aff'd., 742 F. 2d 1459 (7th Cir. 1984)."

Upon review of the pertinent materials before the Commission regarding the relationship between the parties, as well as the exhaustive findings of fact in the Pierce case,

regarding Respondent Northwestern Mutual Life Insurance Company's insurance agents' contract, I find that, in all essential respects, they are the same.[2]

Therefore, I find there is an identity of claims/defenses[3] which, when considered in conjunction with the undisputed facts, are sufficient for purposes of this Commission's present review. Further support for this conclusion is found by noting the relationship given by courts in other relitigation precluding cases, between the identity of the claim[s] and a "judgment on the merits by a court of competent jurisdiction." In Almeida, the Supreme Judicial Court noted that, "in order to satisfy this element, it is necessary that the judgment be rendered by a tribunal recognized by law as possessing the right to adjudicate the controversy." see Almeida, supra, at 230. While this was the

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2/ I note that Complainant has not submitted any information to the contrary. Therefore, I conclude there is no genuine issue of material fact on this issue. see 804 CMR 1.13(7)(a).

3/ Although the Commission is not strictly bound by Title VII or judicial determination of that statute, I find that in this regard, that state statute is substantially similar and, that Massachusetts courts adjudicating similar facts under M.G.L. c. 151B, have come to the same prerequisites in order to establish an employment relationship. see Comey v. Hill, 387 Mass. 11 (1982).

most important reason why the Commission has refused to apply litigations preclusion doctrines to decisions of other administrative agencies, see Smith, Taunton, Hussey, and Romano and Alonge, all supra., the present case provides a situation which, clearly, is distinguishable. Specifically, I conclude that a decision made by a federal court in a Title VII action establishes a decision by a court of competent jurisdiction. See Smith v. Jahn Foundry, supra. at 1395.

Therefore, and for all of the above-stated reasons, Respondent's motion is allowed and the case is hereby dismissed.

So Ordered this 19th day of November, 1990.

Frederick A. Hurst,
Investigating Commissioner

2014 WL 3896323
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Peter SANTANGELO, Plaintiff,
v.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Civil Action No. 12–11295–NMG.
|
Signed Aug. 7, 2014.

Attorneys and Law Firms

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William E. Hannum, III, Jessica Unwin Farrelly, Schwartz Hannum P.C., Andover, MA, for Defendant.

MEMORANDUM & ORDER

GORTON, District Judge.

***1** This case arises from the termination of a Field Underwriters Contract pursuant to which plaintiff Peter Santangelo ("plaintiff" or "Santangelo") sold insurance policies for over 35 years on behalf of defendant New York Life Insurance Company ("defendant" or "NYLIC"). Plaintiff asserts numerous contract-based claims against defendant and, more recently, has amended his pleadings to assert claims of age discrimination under the Americans with Disability Act and the Massachusetts Anti–Discrimination Statute.

Defendant moves for summary judgment on all claims asserted in two separate complaints. For the reasons that follow, defendant's motions will be allowed and judgment will enter in favor of defendant on all pending claims.

I. *Background*

A. Nature of Plaintiff's Relationship With NYLIC

In September, 1968, Santangelo entered into a Field Underwriter's Contract ("the Contract") with NYLIC. The Contract authorized him to act as an Agent of NYLIC and sell its products. The Contract provided that

> Neither the term 'Field Underwriter' ... nor anything contained herein or in any of the rules or regulations of [NYLIC] shall be construed as creating the relationship of employer and employee between [NYLIC] and the Field Underwriter. Subject to the provisions hereof and within the scope of authority hereby granted, the Field Underwriter, as an independent contractor, shall be free to exercise his own discretion and judgment with respect to the persons from whom he will solicit applications, and with respect to the time, place, method and manner of solicitation and of performance hereunder. But the Field Underwriter agrees that he will not conduct himself in such a manner as to affect adversely the good standing or reputation of [NYLIC].

Field Underwriter's Contract, Docket No. 102, Ex. 1, ¶ 5. Both parties had the right to terminate the Contract with or without cause on 30 days notice. *Id.* ¶ 9.

NYLIC contracts with two kinds of Agents: Training Allowance Subsidy Agents ("TAS Agents") and Established Agents. TAS Agents are agents who have worked in the life insurance industry for no more than three years. They receive intensive training and ongoing support from NYLIC and NYLIC considers them to be employees of NYLIC. After three years, TAS Agents become Established Agents.

At the time he was terminated, plaintiff had served as an Established Agent for over 30 years. As an Established Agent, plaintiff had total discretion over which clients to solicit. Occasionally NYLIC would refer potential clients to him and he would accept the clients to show NYLIC that he was interested in receiving referrals in the future. Plaintiff also decided when and where to meet prospective clients and what sales pitch he would employ. He was licensed in Maine, New Hampshire, Rhode Island, New York, Ohio, California and Massachusetts and therefore was limited to soliciting business within those states. He was also not permitted by NYLIC to

sell certain kinds of policies, including indexed annuities and "strangerowned life insurance policies."

***2** Plaintiff set his own schedule. He did not report to NYLIC on a daily basis and was not required to spend 40 hours per week selling NYLIC products although NYLIC did expect him to meet certain sales goals. He had to attend one training annually and attended other non-mandatory "sales meetings" on an irregular basis. He cannot recall any regular meetings with management at NYLIC other than meetings about his alleged non-compliance with NYLIC policy late in his tenure.

Plaintiff did not receive a salary from NYLIC and was instead compensated solely through sales-based commissions. Plaintiff did not receive medical leave or vacation leave from NYLIC. NYLIC did not withhold state or federal income from its payment of commissions to plaintiff. Along with NYLIC products, he sold the products of SB Life Insurance Company, John Hancock, Guardian, and Blue Cross and Blue Shield and received commissions for his sales from those companies.

Plaintiff had the option to sell NYLIC products out of his home but instead chose to rent office space at a building rented by NYLIC in Waltham. He bought his own office supplies and furniture and was free to hire, at his own expense, clerical staff or assistants to help him sell insurance products, subject to a background check of any candidate by NYLIC. His ingoing and outgoing mail was monitored by NYLIC and he was required to submit proposed correspondence to the Compliance Department for approval. Had plaintiff chosen to work from home or from a nonNYLIC building, he would have been required to post appropriate signage, report all incoming mail to NYLIC and allow NYLIC to regularly review his files.

B. Termination of Plaintiff by NYLIC

NYLIC Agents are not permitted to ask their customers to sign blank forms or to retain blank forms signed by customers in customer files. NYLIC monitors compliance with that policy and otherwise supervises its Agents through mandatory, unannounced, annual face-to-face supervisory interviews and inspections of Agents and their customer files.

John Quarella, Jr. ("Quarella"), a Senior Agency Standards Consultant for NYLIC, conducted several such reviews of plaintiff and his files between 2006 and 2008. In July, 2006, Quarella discovered two forms in plaintiff's files that were signed by the customers but otherwise incomplete. Quarella discussed the violation with plaintiff and, in September, 2006, NYLIC issued to plaintiff a "Letter of Reprimand".

In September, 2007, Quarella conducted another annual review of plaintiff's files and discovered three signed but otherwise incomplete forms. Quarella discussed his findings with plaintiff and informed him that he could be terminated if he continued to violate company policy. In March, 2008, NYLIC issued a "Letter of Severe Reprimand" based upon plaintiff's repeated violations of company policy.

In April, 2008, NYLIC decided to place plaintiff under "Enhanced Supervision" during which he would be subjected to additional unannounced reviews. Plaintiff contends that he was unaware that he was under "Enhanced Supervision" but admits that he knew that he was being subjected to more frequent reviews and supervised more closely than in the past. He states that it was NYLIC policy to provide Agents who were placed on Enhanced Supervision status with extra training but notes that he was not offered and did not receive such training.

***3** During an unannounced review in December, 2008, Quarella discovered signed but otherwise incomplete forms in two files. "Zone Agency Standards Officer" James A. Robertson III ("Robertson") met with Quarella and plaintiff and later recommended that plaintiff be terminated.

On April 1, 2009, plaintiff received a letter from the NYLIC human resources department dated March 27, 2009. The letter referenced his upcoming retirement on May 1, 2009 and discussed the benefits he stood to receive under the NYLIC Retirement Plan. Plaintiff called the human resources department to inquire about the letter the following day.

On the same day, April 2, 2009, plaintiff received by facsimile a letter dated the preceding day notifying him of his termination. The letter stated that his Contract would be terminated on May 1, 2009 and did not state the reason for his termination. Plaintiff claims that he did not receive a justification for his termination until December, 2009.

C. Denial of Access to Office Space and Files

Despite the fact that the letter stated that the termination would become effective on May 1, 2009, NYLIC deactivated plaintiff's key-card so that he could not access his office space in the NYLIC building in Waltham, Massachusetts and permanently disconnected him from its computer network beginning on April 7, 2009. He continued to pay rent for use

of the office space through May 31, 2009 despite being unable to access the property. On May 6, 2009, defendant issued a cease and desist order that threatened plaintiff with criminal prosecution if he tried to access his office. Plaintiff contends that he asked several times to have his desk, chair, bookshelf, filing cabinet and "book of business" returned to him but that property was never returned.

Plaintiff asserts that at the time he was terminated and for the next several years, the defendant hired hundreds of younger agents into plaintiff's "agent pool" and none of the new hires had as much experience with plaintiff. His Amended Complaint does not, however, contain any specific information about the age or identity of any new hires or whether any were hired to replace him. He also contends that he did not deserve to be issued Letters of Reprimand and that the fact that he received such letters is evidence of defendant's discriminatory animus and intent to use plaintiff's "book of business" to aid the young agents it hired subsequent to his termination.

D. Eligibility for Retirement Benefits

Plaintiff was put on "retired-terminated-active" status following his termination and was therefore eligible to receive retirement benefits under the NYLIC Retirement Plan, a defined benefit pension plan for NYLIC Agents. He continues to receive certain retirement benefits including retirement income and is covered the NYLIC medical and dental plans.

At the time of his termination, plaintiff was informally classified as an "N6 Agent" which meant that he contracted to become an insurance agent with NYLIC between 1964 and 1991. Plaintiff also contracted for a certain compensation arrangement that is available to N6 Agents known as the "Nylic Contract". That contract made plaintiff eligible to receive "Senior Nylic Income" after 20 years of service and an increase in his level of compensation every five years thereafter that he remained employed as an Agent.

***4** Agents who met certain qualifications are also eligible for "Supplemental Senior Nylic Income" ("SSNI"). The SSNI program entitles qualified Agents to receive increases in compensation every five years after terminating their Nylic Contracts. The terms of the SSNI program are governed by the SSNI Booklet provided to plaintiff during his tenure with NYLIC. To be eligible for SSNI, an agent must serve at least 30 years under an Agent's Contract and be in a position to elect a "Retired Agent's Contract" upon retiring from NYLIC. Retired Agents who elect to operate under an active Retired Agent's Contract are permitted to continue to conduct business for NYLIC. To be eligible for such a contract, an Agent must be in good standing with NYLIC. An agent whose Contract is terminated for violations of company policy is not in good standing and is therefore ineligible for a Retired Agent's Contract.

Because plaintiff was allegedly terminated for violating company policy, NYLIC takes the position that plaintiff is ineligible for an active Retired Agent's Contract and therefore is also ineligible to receive SSNI income.

II. *Procedural History*

On December 15, 2009, plaintiff filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination ("MCAD") in which he alleged age discrimination under M.G.L. ch. 151B and the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 ("the ADEA"). More than two years later, n February, 2012, MCAD determined that plaintiff had failed to demonstrate probable cause that defendant had discriminated against him on the basis of his age.

Plaintiff subsequently filed an action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment and quantum meruit ("the Original Complaint") in the Middlesex County Department of the Massachusetts Superior Court in March, 2012. Defendant removed the action to this Court in July, 2012 and moved for summary judgment on the Original Complaint in October, 2013.

In January, 2014, plaintiff, acting *pro se,* filed a second action against defendant in which he alleged that he was unlawfully terminated because of his age. The Court consolidated the two cases following a status conference in February, 2014 at which time plaintiff's counsel agreed to represent plaintiff in the consolidated action.

Shortly thereafter, plaintiff's counsel filed a Verified Amended Complaint ("the Amended Complaint"). The Amended Complaint claims that plaintiff is entitled to relief pursuant to the ADEA, M.G.L. ch. 151B, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e–17 ("Title VII") and the Civil Rights Act of 1991, Pub.L. No. 102–66, 105 Stat. 1071. Plaintiff seeks: return of his property (Count I), reinstatement of his contract (Count II), money damages for lost wages, commissions and benefits (Count III), reimbursement of the costs of renting office space and

paying utility bills during May, 2009 after his termination (Count IV), punitive damages (Count V) and attorneys' fees and costs (Count VI).

***5** An amended complaint normally supersedes the original complaint and the earlier complaint "is a dead letter and no longer performs any function in the case." *Connectu LLC v. Zuckerberg,* 522 F.3d 82, 91 (1st Cir.2008) (citations omitted). Thus, the failure of plaintiff's counsel to include the contractual and quasi-contractual claims raised in the Original Complaint in the more recent Amended Complaint would normally operate as a waiver of those claims. Nevertheless, the Court recognizes that the new claims were added to this case under unusual circumstances and defers to the apparent agreement of the parties that the Original Complaint remains operative.

Defendant moved to dismiss the Amended Complaint in March, 2014. In May, 2014, plaintiff filed a Notice of Voluntary Dismissal of Count I of the Amended Complaint and all claims arising under Title VII. In June, 2014, defendant moved for summary judgment on all claims asserted in the Amended Complaint.

III. *Motions for Summary Judgment*

Defendant has moved for summary judgment on the contractbased claims asserted in the Original Complaint and the discrimination claims asserted in the Amended Complaint.

A. Summary Judgment Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. Gen. Elec. Co.,* 950 F.2d 816, 822 (1st Cir.1991) (quoting *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 50 (1st Cir.1990)). The burden is on the moving party to show, through the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

If the moving party satisfies its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court must view the entire record in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor. *O'Connor v. Steeves,* 994 F.2d 905, 907 (1st Cir.1993). Summary judgment is appropriate if, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

B. Claims in Original Complaint

1. Breach of Contract (Count I)

Count I of the Original Complaint alleges that defendant breached the Contract by wrongfully denying SSNI income to plaintiff. To prevail on that claim under Massachusetts law, plaintiff must prove that 1) a valid, binding contract existed, 2) NYLIC breached the terms of the contract and 3) plaintiff sustained damages as a result of the breach. *Young v. Wells Fargo Bank, N.A.,* 717 F.3d 224, 232 (1st Cir.2013).

***6** Defendant contends, and the Court agrees, that plaintiff cannot show that NYLIC breached the terms of the subject Contract. Plaintiff's Contract with NYLIC and the terms of the SSNI Booklet establish that plaintiff would be entitled to SSNI only if he were eligible to elect an active Retired Agent's Contract. Thus, plaintiff's assertion that he *would have* elected to operate under a Retired Agent's Contract had he been able to access his computer between April 1, 2009 and May 1, 2009 is a non sequitur. Even if plaintiff had access to his computer during that entire period, he would not have been eligible to elect such a contract and therefore was ineligible for SSNI. He points to no other contractual provision that would entitle him to such benefits. As a result, defendant is entitled to summary judgment on Count I.

2. Breach of Implied Covenant of Good Faith and Fair Dealing (Count II)

Count II alleges that NYLIC breached the implied covenant of good faith and fair dealing by wrongfully denying plaintiff SSNI income. "The covenant of good faith and fair dealing is implied in every contract." *Uno Rests., Inc. v. Bos. Kenmore Realty Corp.,* 441 Mass. 376, 805 N.E.2d 957, 964 (Mass.2004) (citing *Kerrigan v. Boston,* 361 Mass. 24, 278 N.E.2d 387 (Mass.1972)). It provides that

> neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 583 N.E.2d 806, 820 (Mass.1991). The covenant is intended to guarantee that "the parties remain faithful to [their] intended and agreed expectations" but it does not create rights "not otherwise provided for in the existing contractual relationship." *Uno Rests.,* 805 N.E.2d at 964 (citations omitted).

Count II presents a closer case than Count I because the facts viewed in the light most favorable to plaintiff establish that defendant was clumsy, if not incompetent, in its handling of plaintiff's termination. Its error in mailing plaintiff a letter about his upcoming "retirement" before he was notified that he had been terminated is egregious. Nevertheless, the facts do not support the inference that defendant acted in bad faith or engaged in unfair dealing in order to deny SSNI income to plaintiff. *See Am. Paper Recycling Corp. v. IHC Corp.,* 775 F.Supp.2d 322, 330 n .8 (D.Mass.2011). The record is replete with evidence that plaintiff received multiple warnings before he was terminated and was terminated only after several discussions with Quarella and a final meeting with Quarella and Robertson. While plaintiff is correct that NYLIC made several administrative errors such as mailing plaintiff a letter about his upcoming "retirement" and sending his termination letter by facsimile rather than hand-delivery, such errors do not support the inference that NYLIC orchestrated plaintiff's termination to deny him SSNI.

3. Promissory Estoppel (Count III)

***7** Count III claims that defendant is estopped from denying plaintiff SSNI income because, according to plaintiff,

> Defendant promised the Plaintiff that it would allow the Plaintiff to elect to receive SSNI upon his retirement should he complete thirty (30) years of service to the Defendant and be awarded a NYLIC "N6" Agent Contract.

To prevail, plaintiff must establish that NYLIC made an unambiguous promise to pay him SSNI income and that he reasonably relied upon that promise. *See R.I. Hosp. Trust Nat'l Bank v. Varadian,* 419 Mass. 841, 647 N.E.2d 1174, 1179 (Mass.1995).

Based upon the undisputed facts in the record, defendant is entitled to judgment as a matter of law on that claim. Plaintiff does not seriously dispute that his entitlement to SSNI depended upon the terms of his Contract with NYLIC and the SSNI Booklet and he does not contend that anyone made an oral promise to him that the usual requirements for obtaining SSNI would be waived in his case. Thus, he is unable to demonstrate an unambiguous promise to pay him SSNI income based solely upon the length of tenure or his pre-termination Contract.

4. Unjust Enrichment (Count IV)

Count IV alleges that defendant was unjustly enriched by failing to compensate plaintiff in full for the benefits it received from plaintiff. That claim also fails because there is no genuine dispute that plaintiff's entitlement to SSNI is governed by the terms of his written contract and Massachusetts law precludes plaintiff from seeking relief in equity based upon a valid written contract. *See, e.g., Biltcliffe v. CitiMortgage, Inc.,* 952 F.Supp.2d 371, 380–81 (D.Mass.2013).

5. Quantum Meruit (Count V)

Count V, which states a theory of recovery in quantum meruit, fails for the same reason. Massachusetts law bars recovery on a theory of quantum meruit where there is a "valid contract that defines the obligations of the parties." *Bos. Med. Ctr. Corp. v. Sec'y of Exec. Office of Health & Human Servs.,* 463 Mass. 447, 974 N.E.2d 1114, 1131–32 (Mass.2012).

C. Claims in Amended Complaint

1. Status as Employee or Independent Contractor

Defendant asserts that plaintiff cannot prevail on his claims of age discrimination because he was an independent contractor and, as such, is not protected by the ADEA or Chapter 151B. *See Speen v. Crown Clothing Corp.,* 102 F.3d 625, 628–

29 (1st Cir.1996) ("[T]he federal and Massachusetts statutes prohibiting age discrimination in employment do not reach independent contractors.").

a. Legal Standard

Courts in Massachusetts and the First Circuit determine whether a party is an employee or independent contractor based upon "traditional agency law principles." *Speen,* 102 F.3d at 631. Those principles apply equally to claims brought under the federal ADEA and the Massachusetts Anti–Discrimination Statute. *See id.* at 627–34.

In general, whether one is found to be an employee or independent contractor under those statutes depends upon whether the hiring party has a "right to control the manner and means by which the product is accomplished." *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323–24, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) (quoting *Community for Creative Non–Violence v. Reid,* 490 U.S. 730, 751–52, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989)). Factors relevant to that inquiry include

> ***8** the skill required; the source of the instrumentalities and the tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hiring party.

Id. (quoting *Reid,* 490 U.S. at 751–52). All of the factors must be weighed and no single factor is dispositive. *Id.* (citing *N.L.R.B. v. United Ins. Co. of Am.,* 390 U.S. 254, 258, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968)).

Where there are no genuine, disputed issues of material fact, a court may decide whether an individual is classified as an employee or independent contractor as a matter of law on summary judgment where the *Darden* factors

> point so favorably in one direction that a fact finder could not reasonably reach the opposite conclusion.

Alberty–Vélez v. Corporación de P.R. Para La Difusión Pública, 361 F.3d 1, 7 (1st Cir.2004).

b. Analysis

Based upon the *Darden* factors, plaintiff is clearly an independent contractor, not an employee. Most importantly, there is no genuine dispute that plaintiff controlled the "manner and means" of his work as an insurance agent. *Darden,* 503 U.S. at 323. He admits that he arranged his own meetings with clients, determined his own sales strategy and could sell products in any state in which he was licensed. He worked whatever hours he felt were appropriate on a given day and was not required to report to NYLIC on a daily basis. He did not have regularly scheduled meetings outside of the one annual sales training. Plaintiff rented his own office space and bought his own supplies and office furniture. He was paid a commission rather than a salary and NYLIC did not withhold any state or federal taxes from his commissions. He did not receive medical leave or vacation leave. He was free to sell the products of other life insurance companies and did so during the time he had a contract with NYLIC. *See id.* at 323–24; *see also Murray v. Principal Fin. Grp., Inc.,* 613 F.3d 943, 944–45 (9th Cir.2010) ("We, along with virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for purposes of various federal employment statutes [including the ADEA]."); *Barnhart v. N.Y. Life Ins. Co.,* 141 F.3d 1310, 1313 (9th Cir.1998) (finding that NYLIC agent was an independent contractor for the purposes of the ADEA).

The fact that NYLIC would sometimes refer potential clients to plaintiff does not alter the foregoing conclusion. Plaintiff avers that he felt pressure to accept such clients so that he would continue to receive referrals. He does not state, however, the extent to which he and other Agents relied upon referrals for their commissions. Without more, that assertion does not support the inference that NYLIC exercised de facto control over his solicitation of business.

***9** Similarly, the fact that NYLIC placed certain restrictions on his sales activities is not dispositive of whether NYLIC exercised the requisite "control" over the manner or means of his work. *Darden,* 503 U.S. at 323. A company does not exercise the requisite control necessary to create an employer-employee relationship merely because it restricts the manner or means of their work in order to comply with statutory and regulatory requirements. *See, e.g., Taylor v. Waddell & Reed, Inc.*, No. 09–02909, 2013 WL 435907, at *6 & n. 27 (S.D.Cal. Feb.1, 2013) (explaining that compliance of a financial services company with restrictions mandated by the Financial Industry Regulatory Authority, Inc. and the Securities and Exchange Commission did not suggest that it had the requisite control over financial advisors that sold its products). Here, NYLIC asserts that its rules against selling certain annuities, requirements with respect to background checks of assistants and signage and review of his correspondence and sales documents were all mandated by state and federal law or rules promulgated by the Financial Industry Regulatory Authority and its predecessor, the National Association of Securities Dealers. Even if NYLIC is incorrect or mistaken as to those requirements, moreover, none of the restrictions identified by plaintiff outweigh the overwhelming evidence that he was an independent contractor of NYLIC.

Finally, the Court gives no weight to the fact that the Massachusetts Department of Unemployment Assistance found that plaintiff was an employee and therefore entitled to unemployment insurance benefits under M.G.L. ch. 151A. The test for who is an employee eligible for unemployment benefits under M.G.L. ch. 151A, is different than the "traditional agency law principles" applied to determine if someone is an employee for the purposes of asserting a claim of discrimination under the ADEA and M.G.L. ch. 151B. *See Athol Daily News v. Bd. of Review of Div. of Emp't & Training,* 439 Mass. 171, 786 N.E.2d 365, 369–70 (Mass.2003) (describing test for eligibility of unemployment insurance benefits under M.G.L. ch. 151A).

Thus, while a few factors weigh in favor of finding that plaintiff was an employee, such as his lengthy contractual relationship with NYLIC and his uncorroborated assertion that NYLIC did not allow him to retrieve certain belongings after terminating his Contract, a reasonable jury could only conclude that plaintiff was an independent contractor of NYLIC. *Alberty–Vélez,* 361 F.3d at 7.

2. Other Grounds for Summary Judgment

Because the Court finds that plaintiff was an independent contractor rather than an employee, it declines to address whether defendant is entitled to summary judgment on the grounds that plaintiff has proffered insufficient evidence of pretext or that his claims are barred by the statute of limitations and the equitable doctrine of laches.

ORDER

For the foregoing reasons,

1) defendant's motion for summary judgment (Docket No. 41) is **ALLOWED** and all claims asserted in the Complaint filed on March 30, 2012 (Docket No. 1, Ex. 1) are **DISMISSED;**

***10** 2) defendant's motion for summary judgment (Docket No. 99) is **ALLOWED** and all claims raised in the Amended Verified Complaint (Docket No. 87) are **DISMISSED;**

3) defendant's motion to strike portions of the affidavit of plaintiff (Docket No. 62) is **DENIED AS MOOT;**

4) defendant's motion to strike portions of plaintiff's response to defendant's statement of undisputed material facts (Docket No. 64) is **DENIED AS MOOT;**

5) defendant's motion to dismiss (Docket No. 88) is **DENIED AS MOOT;** and

5) the parties' joint motion for clarification regarding pending motion for summary judgment (Docket No. 96) is **DENIED AS MOOT.**

So ordered.

All Citations

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United States District Court,
W.D. Pennsylvania.

John SOFRANKO, on behalf of himself and all others similarly situated, Plaintiff,
v.
NORTHWESTERN MUTUAL LIFE INSURANCE CO., Northwestern Mutual Financial Network; and Does 1 through 10, inclusive, Defendants.

No. 2:06cv1657.
|
Jan. 14, 2008.

Attorneys and Law Firms

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Gregory A. Miller, Buchanan Ingersoll, Mark R. Hornak, Terrence H. Murphy, Alan M. Pittler, Buchanan Ingersoll & Rooney PC, Pittsburgh, PA, for Defendants.

MEMORANDUM ORDER

DAVID STEWART CERCONE, District Judge.

***1** AND NOW, this *14th* day of January, 2008, after the plaintiff filed a complaint in the above-captioned case, and after the defendants submitted a motion for summary judgment, and after a Report and Recommendation was issued by the United States Magistrate Judge, and the parties were granted thirteen days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by the plaintiff, as well as the defendants' response to those objections, and upon independent review of the pleadings, and the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of the Court,

IT IS ORDERED that the defendants' motion for summary judgment (Document No. 25) is granted.

REPORT AND RECOMMENDATION

ROBERT C. MITCHELL, United States Magistrate Judge.

I. *Recommendation:*
It is respectfully recommended that the defendants' motion for summary judgment (Document No. 25) be granted.

II. *Report:*
Presently before the Court is a motion for summary judgment submitted by the defendants. For reasons discussed below, the defendants' motion for summary judgment should be granted.

The plaintiff, John Sofranko, formerly a Financial Sales Representative or Sales Agent for defendant Northwestern Mutual Life Insurance Co. ("NM"), commenced this action to recover minimum wages and overtime compensation which he claims NM wrongfully denied him by mis-classifying him as an independent contractor rather than an employee. In filing this action, the plaintiff seeks to certify a nationwide collective class and a state-wide class of current and former NM Financial Sales Representatives who he claims are entitled to recover overtime compensation and unpaid minimum wages due to NM's willful violation of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. ("FLSA"), the Pennsylvania Minimum Wage Act of 1968, as amended, 43 Pa.C.S.C. § 333.101, et seq. ("PMWA"), and the Pennsylvania Wage Payment and Collection Law, 43 Pa.C.S.A. § 260. 1, et seq. ("PWPCL").

Named as defendants in the complaint are NM, Northwestern Mutual Financial Network ("NMFN")-which NM avers is not a legal entity, but rather, a service mark owned by it-and "Does 1 through 10, inclusive", described by the plaintiff as unidentified officers, agents or employees of the named defendants who participated in their unlawful acts. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1367.

The plaintiff contends that he and similarly situated persons were Financial Sales Representatives engaged in the sale and/or marketing of financial products on behalf of NM; that they regularly worked in excess of forty hours per workweek without any premium for overtime pay because NM wrongfully classified them as independent contractors, thereby denying them the protections afforded under the FLSA, PMWA and PWCL; and that NM willfully violated the aforesaid labor laws by failing to pay them for all

hours worked in a given workweek, as well as overtime compensation to which they were due, even though they are not exempt from the requirement of premium overtime pay. Due to the defendants' complained-of acts, the plaintiff seeks a declaration that NM has violated the aforesaid labor laws, imposition of a constructive trust on amounts which NM was unjustly enriched by at his expense, compensatory and punitive damages, statutory remedies, prejudgment interest and attorneys' fees.

***2** The defendants have moved for summary judgment on the plaintiff's claims. They argue that NMFN must be dismissed as an improper party, because it is not a legal entity, but a service mark owned by NM. With respect to NM, the movants assert that it is entitled to summary judgment, as the plaintiff cannot establish he was its "employee" within the meaning of the FLSA, PMWA or PWPCL, which is a necessary element of his claims.

Summary judgment is appropriate if no genuine issue of material fact is in dispute, and the movants are entitled to judgment as a matter of law. F.R.Civ.P. 56(c); *Biener v. Calio,* 361 F.3d 206, 210 (3d Cir.2004).

We agree that defendant NMFN should be dismissed as an improper party. The record shows that NMFN is not a corporation, partnership, or other legal entity; it is a service mark owned by NM (through Service Mark Registration No. 2530436). NMFN is simply a marketing name for the sales and distribution arm of NM, its subsidiaries and affiliates. [1] These uncontroverted facts concerning NMFN are set forth in the affidavit of Donald R. Wilkinson, NM's Vice President of Agency Administration at ¶ 4 (attached to the defendants' appendix in support of their current motion).

[1] See Document No. 41, which is defendants' reply to plaintiff's response to their statement of undisputed material facts at ¶ 3.

In responding to these facts, the plaintiff denies them on grounds that he lacks sufficient information to form a belief as to their truth or falsity, and he produces no evidence in support of his denial. As a result, we agree with the defendants that the plaintiff's response to their facts of record should be treated as an admission to them. That is because a denial based merely on lack of information or belief in a concise statement of fact does not comport with the requirements of F.R.Civ.P. 56(e) or Local Rule 56.1(C)(1), which require that a denial of material fact be supported by record evidence. See, *Bouriez v. Carnegie Mellon University,* 2005 WL 2106582, *3-4 (W.D.Pa., Aug.26, 2005) (holding that "lack of knowledge denials" without support in the record will be ignored, and Court will construe facts of record to be undisputed).

Since NMFN is a registered service mark owned by NM, "it is not a legal entity capable of suing or being sued". See, *Erbe v. Billeter,* 2006 WL 3227765, *10-11 (W.D.Pa., Nov.3, 2006) (dismissing insurance company's service mark as a defendant) (citations omitted). Thus, the plaintiff's claims against NMFN should be dismissed, as it is not a proper defendant.

It also appears that NM is entitled to summary judgment in this matter. The record shows that the plaintiff was not an employee of NM, but an independent contractor.

The FLSA broadly defines an employee as "any individual employed by an employer". 29 U.S.C. § 203(e)(1). The Act defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee". 29 U.S.C. § 203(d). To determine if an individual is an employee within the meaning of the FLSA, Courts look to the "economic realities" of the work relationship. *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).

***3** The Third Circuit Court of Appeals has stated:

> [T]he determination of the employment relationship does not depend on isolated factors but rather upon the circumstances of the whole activity ... Although neither the presence nor the absence of any particular factor is dispositive, we have held that there are six factors to determine whether a worker is an 'employee': (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special

> skill; (5) the degree of permanence of the working relationship; [and] (6) whether the service rendered is an integral part of the alleged employer's business.

Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir.1991), citing *Donovan v. DialAmerica Marketing, Inc.,* 757 F.2d 1376, 1382 (3d Cir.), *cert. denied,* 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985). Courts should also consider "whether, as a matter of economic reality, the individuals are dependent upon the business to which they render service." *Id.*

The above "economic reality" test is also utilized to determine a worker's status under the PMWA. See, *Com., Dept. of Labor and Industry, Bureau of Labor Law Compliance v. Stuber,* 822 A.2d 870, 873 (Pa.Cmwlth.2003), *aff'd.,* 580 Pa. 66, 859 A.2d 1253 (Pa.2004). With respect to the WPCL, "it merely provides a statutory vehicle for employees to recover earned wages from an employer who has breached an underlying contractual obligation to provide such wages." *Barvinchak v. Indiana Regional Medical Center,* 2007 WL 2903911, *10 (W.D.Pa., Sept.28, 2007), citing *Weldon v. Kraft,* 896 F.2d 793, 801 (3d Cir.1990). Applying the above criteria to the facts presented here, the plaintiff was an independent contractor, not an employee of NM.

The record shows that NM is a life insurance company headquartered in Milwaukee, Wisconsin. It does not directly solicit prospective customers to apply for, or purchase its insurance products; instead, it markets its products through a network of agents whose contracts expressly state that they are independent contractors, not employees of NM. As part of its "network of agents", NM contracts directly with General Agents in different parts of the United States. It is the General Agents' contractual right to solicit applications for NM products within a given territory. General Agents then enter into contracts with District Agents and/or Field Directors who, in turn, enter into contracts with Sales Agents, like the plaintiff. [2]

2 *Id.* at ¶¶ 1, 4-7, 11.

General Agents run their own businesses and have full authority to recruit, enter into contracts with and terminate District Agents, Field Directors and Sales Agents without NM's input, direction or control. NM endorses contracts that a General Agent executes after completing a background check to ensure there are no legal or regulatory obstacles to an agent selling its products, but NM has no contractual right to terminate such contracts or assign or transfer agents. Sales agents who enter into contracts with District Agents generally are identified as "Soliciting Agents", whereas sales agents like the plaintiff-who enter into contracts with Field Directors or General Agents-are identified as "Special Agents". [3]

3 *Id.* at ¶¶ 9, 12-15.

***4** During the time that the plaintiff worked as a Special Agent (from April 2003 to January 2005), NM's General Agent in Pittsburgh, PA was Charles Ferrara ("Ferrara"). Ferrara had the right to market NM products in southwestern Pennsylvania and in parts of Ohio and West Virginia. In developing his sales force, Ferrara contracted with Field Director Kevin Miller ("Miller"). In April 2003, Miller entered into a contract with the plaintiff, which authorized the plaintiff to solicit applications for insurance issued by NM, and specified that he was an independent contractor, not an employee of Ferrara, Miller or NM (the "Miller contract"). [4]

4 *Id.* at ¶¶ 20, 26, 38, 41, 43, 44.

Miller subsequently left Ferrara, and on November 1, 2004, the plaintiff contracted with Ferrara (the "Ferrara contract"). Like the Miller contract, the Ferrara contract authorized the plaintiff to solicit applications for insurance issued by NM, and specified that he was an independent contractor, not an employee of Ferrara or NM. On January 21, 2005, the plaintiff's tenure as a Special Agent ended when he and Ferrara mutually agreed to terminate their contract. The plaintiff admits that his work as an agent was not as productive as he hoped, and he never achieved the unlimited profits he sought. The plaintiff also concedes that his sales numbers were not satisfactory to himself or to Ferrara. [5]

5 *Id.* at ¶¶ 51, 52, 91-93.

In *Rutherford Food Corp., supra,* the Supreme Court opined that "[w]here the work done, in essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [FLSA]." 331 U.S. at 729. Thus, notwithstanding the plaintiff's aforesaid contracts which labeled him as an independent contractor, not an employee of NM, we look to the "economic realities" of the parties' work relationship and apply the six factor test recited in *Martin* above.

(1) The degree of NM's right to control the manner in which the plaintiff's work was performed:

In determining whether NM exerted significant control over the manner in which the plaintiff performed his work, we focus on several factors utilized by Courts in this Circuit, including: whether NM established a rigid working schedule for the plaintiff, or left him free to determine his own work hours; whether it oversaw or supervised his work; whether the plaintiff had an exclusive relationship with NM, or was free to engage in other business relationships with third parties; whether the plaintiff was required to provide NM with sales reports and records or had complete discretion with respect to record keeping; and whether the plaintiff had discretion to hire his own help and pay them. See, *Martin, supra,* 949 F.2d at 1294, and *Bates v. Bell Tel. Co. of PA.,* 1993 WL 379542, *3 (W.D.Pa., July 13, 1993), *aff'd.,* 22 F.3d 300 (3d Cir.1994).

Applying these factors to the facts presented here, it appears that NM did not exert significant control over the manner in which the plaintiff performed his work. The record shows that apart from the plaintiff's attendance at training sessions, he was free to work whenever and wherever he wanted; that he scheduled his own appointments, kept his own appointment book, and decided whether to keep files; that he did not record or report his time; that no one from NM reviewed, supervised or monitored the plaintiff's sales efforts, nor tracked his hours or controlled his activities; that he was free to take vacations or sick time as he saw fit; that he could sell NM products anywhere he became licensed; that he generated his own client lists, no clients were provided to him; that he decided what products to sell to customers; that he was free to sell, and did sell non-NM investment products, such as Franklin Templeton, American Funds and PIMCO mutual funds; that he was free to decide from whom to solicit business, and he chose the time and place of all solicitations; that he decided what approach and style to use to appeal to customers; that the plaintiff incurred and paid business expenses as he saw fit, including for a telephone, fax, postage, copying, office supplies and hiring and paying an assistant; and that the Miller contract and Ferrara contract provided that the plaintiff could sell insurance products of other insurance companies if NM did not offer the product desired, if NM had insured the client to its limit, if NM refused the risk of insuring the prospective policyholder, or if NM quoted rates higher than standard premium rates. [6]

6 See, defendants' brief in support of their current motion at pp. 8, 9, 11 & 17 (with citations to the record therein).

***5** The plaintiff insists that NM controlled the manner of his work, as he was required to attend NM compliance meetings and conferences, participate in mandatory training where he had to memorize sales scripts relating to NM's products, make 40 phone calls a day and set several meetings, and utilize advertising materials provided by NM. [7] In response to these facts, NM asserts that it did not conduct the plaintiff's training, require his attendance at meetings, or demand that he make any phone calls; rather, Ferrara conducted the plaintiff's training, held meetings at his offices and developed his own sales force without NM's input or control. [8]

7 See, plaintiff's brief in opposition to the current motion at pp. 4-6, 11-12 (with citations to the record therein).

8 See, Document No. 41, which is defendants' response to plaintiff's further statement of material facts at ¶¶ 62, 64 and 93.

As recited above, the plaintiff was not a party to a contract with NM; rather, he was recruited, contracted with, and trained by Kevin Miller and/or Charles Ferrara, and he worked in Ferrara's offices. [9] NM does not control Ferrara or his day-to-day operations. Indeed, Ferrara is independent of NM, and NM has no ownership interest in Ferrara. NM did not assign the plaintiff to work in Ferrara's offices, and it did not exercise control over his day-to-day business or his work schedule. [10]

9 See, defendants' reply brief at pp. 4-5 (with citations to the record therein).

10 *Id.*

NM acknowledges that it provided the plaintiff with its advertising materials. However, NM asserts that Pennsylvania law imposes strictly-enforced compliance responsibilities and legal requirements on insurers and agents, including the form and substance of literature an agent may use, how agents may advertise insurance products they sell, and the language an agent is permitted to use with a prospective client. [11] NM insists that requiring the plaintiff to have his advertising material approved and use language that accurately represents the products he sold is not evidence of

its control over him, but its compliance with state-mandated requirements that are imposed on the insurance industry.

11 See, defendants' reply brief at pp. 1-2, citing Pennsylvania statutory law.

The plaintiff also cites two agency manuals that NM allegedly provided him titled "The Agent's Manual of Information" ("AMI") and "Agency Models and Procedures" ("AMP"). According to NM, the latter of these manuals, AMP, is a resource for General Agents such as Ferrara, while AMI is a resource for Special Agents.

In support of his position that NM controlled many aspects of his work, the plaintiff cites a provision of AMP which provides: "The company's Agent Contract requires a commitment to being a full-time [NM] Financial Representative." In response thereto, NM reiterates that AMP is a resource for General Agents like Ferrara, not Special Agents like the plaintiff. [12] The plaintiff also cites portions of the AMI which provide that "Phones used for [NM's] business must be answered in a manner that clearly identifies [NM]" and requires NM's approval of certain advertising and sales materials. [13] With respect to the manuals, NM argues that the plaintiff has presented no facts to show that he received the manuals, acted in accordance with them, was disciplined for failing to comport with them, or received any directive from NM with respect to them. Indeed, NM insists that no record evidence indicates that the plaintiff even knew these manuals existed during his tenure as an agent, as he never referred to them in his Rule 26 disclosures or during his deposition. NM also asserts that many portions of the manuals cited by the plaintiff pertain to legal or regulatory requirements that are imposed on the insurance industry and do not evince its control over him.

12 See, Document No. 41, which is defendants' response to plaintiff's further statement of material facts at ¶ 41.

13 See, plaintiff's brief in opposition to the current motion at pp. 3-4 (with citations to the record therein).

***6** Based on the foregoing, we find that NM did not control the manner in which the plaintiff performed his work. As discussed above, NM did not establish a work schedule for the plaintiff, and it did not oversee, nor supervise his work. Rather, the plaintiff was free to set his own schedule and had complete discretion with respect to record keeping. The plaintiff generated his own client lists, decided what products to sell them, was free to sell non-NM products to customers, incurred and paid business expenses solely as he saw fit, including hiring and paying an assistant, and could take vacations or sick time as he chose. These facts support a finding that NM did not control the manner in which the plaintiff performed his work.

(2) The plaintiff's opportunity for profit or loss:

The record shows as follows: the plaintiff was paid on a commission basis and received no base salary or draw from NM or Ferrara. The plaintiff's sales activities and expenses were within his control, not NM's, as he determined his business expenses and paid for them, including costs for a telephone, fax, postage, office supplies, and hiring an assistant. The plaintiff also paid for his own transportation, advertising and client entertainment expenses. [14] Thus, we agree with NM that the plaintiff's opportunity for profit or loss depended on his skill in generating commissions and controlling expenses, not on it.

14 See, defendants' brief in support of their current motion at pp. 10-12 (with citations to the record therein).

(3) Investment in equipment or materials and his employment of helpers:

As recited above, the plaintiff was responsible for paying all business expenses he incurred as an agent for NM. He also had to generate his own client lists. NM did not provide the plaintiff with office supplies, equipment, or office space. [15] The plaintiff also paid for continuing education and related instructional materials. [16] With respect to employing helpers, when the plaintiff decided that an assistant might help business, he and another agent interviewed and hired one and paid the assistant's wages. [17] Thus, the plaintiff was financially responsible for the materials required for his work and the employment of helpers, not NM. As the record shows, for all three tax years in which he reported income as an agent for NM (2003-2005), the plaintiff deducted all of his expenses associated with the sale of NM products on as Schedule C (Profit and Loss from Business), not on a Schedule A (Itemized Deductions). [18]

15 See, Document No. 41, which is defendants' reply to plaintiff's response to their statement of undisputed material facts at ¶ 111.

16 *Id* at ¶ 84.

17 *Id.* at ¶ 83.

18 *Id.* at ¶ 89.

(4) Special skill of the service rendered:
In *Martin, supra,* the Third Circuit Court of Appeals stated: "Routine work which requires industry and efficiency is not indicative of independence and nonemployee status." 949 F.2d at 1295 (citation omitted). Here, in order to sell risk products as he did, the plaintiff had to prepare for, take and pass an examination to obtain his Pennsylvania insurance license.[19] To sell variable (i.e., securities-based) products and mutual funds, whether for NM or any other company, the plaintiff understood that NASD Rules required him to become registered with NASD, associated with a registered broker/dealer, and pass specialized Series 6 and 63 examinations to become licensed to sell such products.[20] In *Bates, supra,* this Court found that where a plaintiff "obtained his licensure to become a certified state inspector and auto mechanic", his services "required special skill" and were not "routine work", which was indicative of independent contractor status. 1993 WL 379542, at *4. That seems to be the case here, as the plaintiff acknowledged that Special Agents like himself required extensive training due to the complexity of NM products that were sold.[21]

19 *Id.* at ¶ 63.

20 *Id.* at ¶ 64.

21 *Id.* at ¶ 62.

(5) Permanence of the working relationship:
***7** In general, "an employee['s] ... relationship with an employer is continuous and of indefinite duration", whereas "an independent contractor often has fixed employment periods of indefinite work." *Bates,* 1993 WL 379542, * 4. Here, the Miller contract (which lasted for 19 months) and the Ferrara contract (which lasted three months) were terminable by any party without cause on 30 days' written notice or by mutual consent.[22] The plaintiff worked as a Special Agent for NM for 22 months, after which he and Ferrara mutually agreed to terminate their contract. Since the plaintiff estimates an attrition rate of 90% for new agents in Ferrara's offices[23], there was little permanence or continuity in the work. Still, this factor sheds little light on whether the plaintiff worked as an employee of NM or as an independent contractor.

22 *Id.* at ¶ 55.

23 *Id.* at ¶ 45.

(6) Whether the service rendered was an integral part of NM's business:
The Third Circuit Court of Appeals has stated:

> The critical consideration in assessing the integral relationship factor is the nature of the work performed by the workers: does that work constitute an 'essential part' of the alleged employer's business? In other words, regardless of the amount of work done, workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer.

Martin, 949 F.2d at 1295-96.

NM asserts that the plaintiff's services were not integral to its business, because its core business is underwriting, issuing and servicing insurance and annuity products; that it does not employ a sales force and does not sell insurance from its home office or via the internet; that it does not recruit, assign, promote, transfer or terminate Special Agents like the plaintiff who sell its products; that it does not provide agents with leads, prospects or client lists, nor does it maintain personnel files on them or appraise their performance; and that it markets its products through a network of agents who sell its products.[24]

24 See, defendant's brief in support of it current motion at p. 15 (with citations to the record therein).

The plaintiff argues, without citing to the record, that his work in selling insurance products was at the heart of NM's business. As recited above, however, NM's core business is underwriting, issuing and servicing insurance and

annuity products.[25] NM does not directly solicit prospective customers to apply for or purchase its insurance products, and it does not sell insurance from its home office or via the internet.[26] NM's products are sold by a network of agents[27], but in performing that sales function, it does not appear that the plaintiff performed the primary work of NM.

25 See, Document No. 41, which is defendants' reply to plaintiff's response to their statement of undisputed material facts at ¶ 2.

26 *Id.* at ¶ 4.

27 *Id.*

In *E.E.O.C. v. Zippo Mfg. Co.,* 713 F.2d 32 (3d Cir.1983), the Third Circuit Court of Appeals reviewed facts similar to here: where an alleged employer exercised virtually no control over the means and manner of an agent's sales practices, where the agent was a skilled worker who had the right (along with the party whom he contracted) to terminate the relationship without cause on thirty days notice, where the agent was paid a commission as a percentage of sales rather than a salary, where his potential for profit or loss was primarily a product of his own initiative, and where he absorbed all the expenses incurred in his sales efforts. *Id.* at 38.[28] Under these facts, the Court in *Zippo* counseled:

28 In *Zippo, supra,* the Court adopted a "hybrid standard" to determine whether certain individuals were employees or independent contractors under the Age Discrimination in Employment Act. It defined its test as a hybrid of the common law "right to control" standard and the FLSA's "economic realities" standard. 713 F.2d at 35-38.

> ***8** [E]ven if appellants were required to sell only Zippo products, and even if they were economically dependent on the income they earned as Zippo [agents], these factors are not sufficient to establish that they were employees when balanced against the other factors that tend to establish their status as independent contractors ... even under the more liberal 'economic realities' standard as applied in FLSA cases.
> *Id.*

Here, having examined the relevant factors in assessing the "economic realities" of the plaintiff's work relationship with NM, we find that he was not its employee, but an independent contractor. Therefore, it is recommended that the defendants' motion for summary judgment (Document No. 25) be granted.

Within thirteen (13) days after being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

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United States District Court,
S.D. California.

Michael E. TAYLOR, Kenneth B. Young, and Brian Jaeger, individuals, on behalf of themselves individually and on behalf of others similarly situated, Plaintiffs,
v.
WADDELL & REED INC., a Delaware Corporation, and Does 1 through 10 inclusive, Defendants.

Civil No. 09–cv–02909 AJB (WVG).
|
Feb. 1, 2013.

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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF JAEGER

ANTHONY J. BATTAGLIA, District Judge.

***1** Presently before the Court is Defendant Waddell & Reed Inc.'s ("W & R") Motion for Summary Judgment as to Plaintiff Brian Jaeger. (Doc. No. 172.) On August 20, 2012, the Court granted W & R's previous motions for summary judgment as to Plaintiffs Michael E. Taylor and Kenneth B. Young. (Doc. No. 167.) Thus, Jaeger is the sole remaining Plaintiff in this action. For the reasons set forth below, the Court **GRANTS** W & R's motion for summary judgment as to Jaeger's claims. [1]

[1] At the outset, the Court notes that much of the factual background, legal standard and analysis set forth in the Court's previous summary judgment order remains applicable and is incorporated when appropriate herein.

Subject Matter Jurisdiction

As noted above, despite their inclusion in the operative Second Amended Complaint ("SAC"), the Court granted Defendants summary judgment as to Taylor and Young on August 20, 2012. (Doc. No. 167.) In the same order, the Court granted Plaintiffs' counsel thirty days to file a revised SAC containing Jaeger's claims. (*Id.* at 10–11.) On September 12, 2012, counsel filed the SAC which added Jaeger as a Plaintiff, but failed to remove Young and Taylor. (Doc. No. 170.) Insomuch as the Court previously granted summary judgment with regard to Young and Taylor on the same claims reasserted on their behalf in the SAC, these claims have already been ruled upon and the Court will not readdress them here. Accordingly, the Court limits its consideration to those claims pled on behalf of Jaeger as the sole remaining Plaintiff.

The SAC contends that the Court has subject matter jurisdiction based upon Taylor and Young's federal Fair Labor Standards Act ("FLSA") claims. (Doc. No. 170 at 5, ¶ 11.) This becomes problematic as the Court granted Defendants' summary judgment as to Taylor and Young's FLSA claims, and Taylor and Young are no longer plaintiffs in this action. (Doc. No. 137.) Jaeger, while referenced at various times throughout the SAC, is not included within the FLSA allegations. [2] As a result, Jaeger's state law claims are the only remaining causes of action, and there is no longer an independent basis for finding subject matter jurisdiction. Nevertheless, supplemental jurisdiction may exist over state-law claims that are so related to the federal-law claims that they form part of the same case or controversy. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639, 129 S.Ct. 1862, 173 L.Ed.2d 843 (2009) (citations omitted). In situations such as this one, a "district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Id.* In the interest of judicial economy and having previously addressed similar issues with regard to Taylor and Young, the Court finds it appropriate to exercise supplemental jurisdiction over

Jaeger's state-law claims. Accordingly, the Court will now turn to the merits of W & R's motion.

[2] The SAC repeatedly refers to Young and Taylor as the "FLSA Plaintiffs," but never includes Jaeger in this category; rather, the SAC includes Jaeger in the "California Plaintiffs" category.

Background

This matter is a proposed wage and hour collective action brought by former W & R financial advisors ("Advisors"). (SAC, Doc. No. 170 at ¶ 1.) Jaeger seeks to represent a class of Advisors who allege they were incorrectly classified as independent contractors when, in fact, they were employees. (*Id.* at ¶¶ 3, 5.)

***2** W & R sells financial products, which are distributed through a sales force of Advisors. (*Id.* at ¶ 2.) When Advisors begin working for W & R, they are required to sign a "Professional Career Agreement" ("PCA"). (*Id.* at ¶ 35.) The PCA provides the basic terms governing the association with W & R Inc. and Waddell & Reed Affiliates ("W & R Affiliates"). (*Id.*) The PCA classifies Advisors as independent contractors and provides for payment on a commission-only basis. (*Id.* at ¶ 35, 100, 104.) Specifically, the PCA states: "At all times you shall act as an independent contractor, and nothing in this agreement shall be construed to create or to impose conditions that create the relationship of employer and employee between you and W & R." (PCA, Doc. No. 1 at 40, ¶ 8.) With regard to the independent contractor relationship, the PCA specifically states, "Subject to the responsibilities and limitations stated in this Agreement, you shall be free to use W & R office facilities and to exercise your own judgment as to the persons whom you solicit and the time, place and manner of solicitation." (*Id.* at 40, ¶ 7.) In accordance with the PCA's terms, Advisors did not receive a salary or hourly wage and were not paid overtime. (SAC, Doc. No. 170 at ¶¶ 102–104.)

Plaintiffs Taylor and Young filed suit on December 28, 2009, alleging nine causes of action for violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206–207, the California Labor Code, and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200, et. seq. (Doc. No. 1.) On April 28, 2010, Taylor and Young filed a First Amended Complaint ("FAC"). (Doc. No. 21.) W & R previously filed motions for partial summary judgment as to Taylor and Young's FLSA claims. (Doc. No. 91 and 92.) On January 3, 2012, the Court granted W & R's motions, finding that the FLSA claims failed because Taylor and Young fell under the FLSA's "outside salesperson" exemption. (Doc. No. 137.) The Court simultaneously denied as moot Plaintiffs' motion for conditional class certification since it involved only the FLSA claims. (Doc. No. 137.) Plaintiffs filed a motion to amend on March 12, 2012. (Doc. No. 142.) W & R subsequently filed a motions for summary judgment as to Young, (Doc. No. 149), and Taylor, (Doc. No. 150), on June 21, 2012. On August 20, 2012, the Court granted W & R's motions for summary judgment as the remainder of Taylor and Young's claims. (Doc. No. 167.) The Court also granted Plaintiffs' counsel leave to file a SAC adding Jaeger's claims within thirty days. (*Id.*)

On September 12, 2012, counsel filed a SAC properly adding Jaeger as Plaintiff. (Doc. No. 170.) In the SAC, Jaeger alleges the following state law claims: (1) Failure to Pay Timely Wages and Fringe Benefits During Employment and Upon Separation of Employment in violation of California Labor Code §§ 201, 202, 203, 204, 218.5, 218.6; (2) Failure to Pay Minimum Wages in violation of California Labor Code §§ 1182.12, 1194, 1194.2, 1197, and Wage Order No. 4–2001 § 4(A); (3) Failure to Pay Overtime Compensation in violation of California Labor Code §§ 510, 1194, and Wage Order No. 4–2001 § 3(A); (4) Failure to Provide Meal Periods in violation of California Labor Code §§ 226.7 and 512 and Wage Order No. 4–2001 § 11(A); (5) Failure to Reimburse Losses and Expenditures Incurred in violation of California Labor Code § 2802; (6) Violations of California Labor Code § 226 for Failure to Provide Itemized Wage Statements; (7) Remedies for Violations of the California Unfair Business Practices Code § 17200 *et seq.;* (8) Violation of Attorneys General Act, Labor Code § 2698 et seq. (*Id.*) W & R now moves for summary judgment as to Jaeger's claims. (Doc. No. 172.)

Legal Standard

***3** Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict for a non-moving party. *Miller v. Glenn Miller Prod., Inc.,* 454 F.3d 975, 987 (9th Cir.2006).

In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the nonmoving party's claim, or to a defense on which the nonmoving party will bear the burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000). When the nonmoving party would bear the burden of proof at trial, the moving party may satisfy its burden on summary judgment by simply pointing out to the Court an absence of evidence from the nonmoving party. *Miller,* 454 F.3d at 987. "The moving party need not disprove the other party's case ." *Id.*

Once the movant has made that showing, the burden shifts to the opposing party to produce "evidence that is significantly probative or more then 'merely colorable' that a genuine issue of material fact exists for trial." *LVRC Holdings, LLC v. Brekka,* 581 F.3d 1127, 1137 (9th Cir.2009) (citing *FTC v. Gills,* 265 F.3d 944, 954 (9th Cir.2001)); *see also Miller,* 454 F.3d at 988 ("[T]he nonmoving party must come forward with more than 'the mere existence of a scintilla of evidence.' ") (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

The Court must review the record as a whole and draw all reasonable inferences in favor of the nonmoving party. *Hernandez v. Spacelabs Med. Inc.,* 343 F3d 736, 738 (9th Cir.2000). However, unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. *Id.; Surrell v. Cal. Water Service Co.,* 518 F.3d 1097, 1103 (9th Cir.2008). "Thus, '[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.' " *Miller,* 454 F.3d at 988 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

Discussion

To succeed on his California wage and hour claims, Jaeger must have been acting as W & R's "employee" rather than an independent contractor.[3] W & R argues that Jaeger was an independent contractor, not an employee; thus, summary judgment is warranted because Jaeger has no valid cause of action. Jaeger contends that W & R has not has not met its burden of proof for summary judgment under the test for employment set forth in *Martinez v. Combs.* 49 Cal.4th 35, 64, 109 Cal.Rptr.3d 514, 231 P.3d 259 (2010).[4]

3 *See* Cal. Labor Code §§ 201–204, 218, 226, 510, 512, 1194, 1197, 2802; IWC Wage Order 4–2001.

4 In *Martinez,* seasonal agricultural workers, who were employed by a strawberry farmer, brought action against first produce merchant, second produce merchant, and a field representative for second produce merchant, seeking to recover unpaid minimum wages. 49 Cal.4th at 35. The court held that the merchants and field representative were not joint employers of the agricultural workers, and therefore could not be held liable for unpaid minimum wages under IWC's wage order 14, which governs agricultural occupations. *Id.* at 74. The court reasoned that the merchants and field representative did not exercise sufficient control over agricultural workers in light of the totality of the circumstances, despite telling workers how they wanted strawberries packed and pointing out mistakes in packing. *Id.* at 77.

In *Martinez,* the California Supreme Court interpreted the Industrial Welfare Commission ("IWC") Wage Order's definition of employment[5] to embody three alternative definitions. Employment "means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship."[6] *Martinez* also held that, in actions under California Labor Code Section 1194 to recover unpaid wages, an IWC wage order governing a subject industry defines the employment relationship, and thus also determines who may be liable as an employer for unpaid wages. *Id.* at 56, 109 Cal.Rptr.3d 514, 231 P.3d 259. Accordingly, the Court applies the *Martinez* definition to determine whether an employer-employee relationship existed in this instance. *See Futrell v. Payday California, Inc.,* 190 Cal.App.4th 1419, 1429, 119 Cal.Rptr.3d 513 (2010).

5 The court in *Martinez* also determined that the IWC's definition of employment did not incorporate the federal definition of employment under the FLSA. *Martinez,* 49 Cal.4th at 64, 109 Cal.Rptr.3d 514, 231 P.3d 259. As noted above, the Court granted summary judgment as to Young and Taylor's claims under FLSA on January 3, 2012 in accordance with the "outside salesperson"

exemption. (Doc. No. 137.) Thus, the IWC's definition of employment remains applicable to Jaeger's state law claims.

6 *Martinez,* 49 Cal.4th at 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.

A. "To exercise control over the wages, hours or working conditions"

***4** The first method of establishing an employment relationship under *Martinez* requires evidence that the alleged employer "exercise[d] control over the wages, hours or working conditions." *Martinez,* 49 Cal. 35 at 71. Jaeger contends that "[a]t the very least, W & R exercise[d] control over Jaeger's wages ...." [7] However, the evidence presented contradicts Jaeger's assertion. The SAC acknowledges that Jaeger was paid solely on a commission basis, indicating that W & R did not control Jaeger's wages . [8] Further, Jaeger set his own hours and schedule. [9] At his discretion, Jaeger chose to perform some sales activities outside of the office. [10] Jaeger chose his own work location; chose his own clients; determined his own business strategy; and was free to conduct business activities in addition to his sales business, within the bounds of regulatory requirements. Although Jaeger alleges that W & R held "mandatory" meetings and exercised some oversight over his activities, [11] this is simply an example of W & R's "broad general power ... to insure satisfactory performance," which is not enough to convert Plaintiff from an independent contractor to an employee. *Fireman's Fund Ins. Co. v. Davis,* 37 Cal.App.4th 1432, 1442–43, 44 Cal.Rptr.2d 546 (1995). Considering the totality of the circumstances, W & R did not retain control sufficient to transform the independent contractor relationship into an employment relationship.

7 *See* Am. Pl's Opp., Doc. No. 180 at 1:27–28.

8 *See* SAC, Doc. No. 170 at ¶¶ 30, 100, 104.

9 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 27:17–20; 29:16–19; 62:12–17; 153:17–154:10; 169:11–25.

10 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 82:13–22; 119: 22–120:9.

11 *See* SAC, Doc. No. 170 at 12 ¶ 66.

B. "To suffer or permit to work"

With regard to the second means of establishing an employment relationship under *Martinez,* Jaeger offers little in the way of support for his contention that W & R suffered or permitted him to work. Jaeger simply states that W & R " 'suffers or permits' him to work" without providing any factual assertions or analysis. [12] Nevertheless, the Court will consider whether W & R suffered or permitted Jaeger to work pursuant to the *Martinez* definition.

12 *See* Am. Pl's Opp., Doc. No. 180 at 1:27–28; 2:1.

Historically, the language, "suffer or permit," was "generally understood to impose liability on the proprietor of a business who knew child labor was occurring in the enterprise but failed to prevent it, despite the absence of a common law employment relationship." *Martinez,* 49 Cal.4th at 69, 109 Cal.Rptr.3d 514, 231 P.3d 259. In interpreting this standard, the *Martinez* court held that "the historical meaning continues to be highly relevant today: A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so." *Martinez,* 49 Cal.4th at 69, 109 Cal.Rptr.3d 514, 231 P.3d 259.

The "suffer or permit to work" standard, however, has typically been applied in the context of joint-employer situations. [13] For example, a joint-employer situation exists where a plaintiff claims that in addition to being the employee of their primary-employer, plaintiff also qualifies as an employee of a third-party proprietor with whom the primary-employer does business. The rationale is that the thirdparty proprietor has "suffered or permitted" plaintiff to work in that instance. Here, there are no facts to warrant such analysis under the "suffer or permit" standard. Jaeger claims to be the employee of W & R; W & R is the sole named Defendant; and no third-party is involved, much less alleged to have "suffered or permitted" Jaeger to work. Accordingly, the Court does not find that W & R suffered or permitted Jaeger to work within the meaning of the second *Martinez* factor.

13 *Martinez v. Combs,* 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259 (2010) (Produce merchants and field representatives did not "suffer or permit" seasonal agriculture workers to work in light of mere contractual relationship between produce merchants/field representatives and workers' employer, a farmer (i.e. no joint employer relationship).); *Futrell v. Payday California, Inc.,*

190 Cal.App.4th 1419, 119 Cal.Rptr.3d 513 (2010) (Payroll processing company, which operated in the local television production industry and which issued paychecks to worker who provided traffic and crowd control services during commercial shoot, did not qualify as worker's joint employer under the "suffer or permit to work" standard.); *Guifu Li v. A Perfect Day Franchise, Inc.,* 281 F.R.D. 373, 402 (N.D.Cal.2012) (Court held there to be genuine issues of material fact as to whether massage therapy school suffered or permitted therapists to work at massage corporation, precluding summary judgment on issue of whether school and corporation were joint employer of massage therapists.)

C. "To engage, thereby creating a common law employment relationship"

***5** The third way to establish an employment relationship under the *Martinez* test requires demonstration of a common law employment relationship. *Martinez* clarified that the common law test still plays an important role in the IWC's definition of the employment relationship as it "incorporates the common law definition as *one alternative.*" 49 Cal.4th 35, 64, 109 Cal.Rptr.3d 514, 231 P.3d 259 (2010). As set forth in this Court's prior summary judgment order (Doc. No. 167 at 6:3–4), California's common law test for determining worker status is explained in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). Under *Borello,* the "principle test of an employment relationship" is "[w]hether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Id.* at 350, 256 Cal.Rptr. 543, 769 P.2d 399 (citations and quotations omitted). *Borello* also recognizes the following "[a]dditional factors" for determining worker classification: whether the worker is engaged in a distinct occupation or business; the kind of occupation, with reference to whether the work is usually done under the direction of the principal or by a specialist without supervision, in the locality; the skill required in the occupation; whether the principal or the worker supplies the instrumentalities, tools, and place of work; the length of time over which the services are to be performed; the method of payment, whether by the time or by the job; whether the work is part of the regular business of the principal; whether the principal has the right to discharge at will, without cause; and whether the parties believe they are creating an employment relationship. *Borello,* 48 Cal.3d at 350–51, 256 Cal.Rptr. 543, 769 P.2d 399; *see also Arnold v. Mutual of Omaha Ins. Co.,* 202 Cal.App.4th 580, 584, 135 Cal.Rptr.3d 213 (Cal.Ct.App.2011).

The individual *Borello* factors "cannot be applied mechanically as separate tests; they are intertwined and their weight often depends on particular combinations." *Borello,* 48 Cal.3d at 351, 256 Cal.Rptr. 543, 769 P.2d 399 (internal citations and quotations omitted). "Even if one or two of the individual factors might suggest an employment relationship, summary judgment is nevertheless proper when ... all the factors weighed and considered as a whole establish that [plaintiff] was an independent contractor and not an employee." *Arnold,* 202 Cal.App.4th at 590, 135 Cal.Rptr.3d 213 (citations omitted).

Here, W & R argues that when the *Borello* factors are weighed and considered as a whole, the undisputed evidence shows that Jaeger was an independent contractors and not an employee. The Court agrees and finds the following facts to be particularly indicative of Jaeger's independent contractor status:

- **Jaeger believed he was creating, and intended to create, an independent contractor relationship.** [14] The PCA that Jaeger signed evidences both W & R and Jaeger's intent and mutual understanding that Jaeger was an independent contractor affiliated with W & R, not an employee. [15] The PCA's "notice of termination" provision indicates independent contractor status, and the Court previously found that the PCA's language indicated W & R intended for Advisors to have free rein to conduct their sales work in the manner and place of their choosing. [16] Further, Jaeger signed a second agreement when he voluntarily chose to participate in the New Financial Advisor Transition Program ("NFATP") whereby he acknowledged "... this is not an employment agreement. Advisor is and at all times during his/her affiliation with Waddell and Reed will be an independent contractor." [17]

14 *See Barnhart v. N.Y. Life Ins. Co.,* 141 F.3d 1310, 1313 (9th Cir.1998) (contract containing clear language that individual was an independent contractor, not an employee, supported finding of independent contractor status).

15 *See also* Jaeger Depo. Tr., Doc. No. 172–3, 37:8–14; SAC, Doc. No. 170 at ¶¶ 30, 32, 35, 100, 104; PCA, Doc. No. 1 at 39–40.

16 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 40:15–41:2; PCA, Doc. No. 1 at 40.

17 *See* Doc. No. 172–6 at 2.

*6 • **Jaeger reported his earnings based on 1099s.** [18] In addition, Jaeger deducted his business expenses and certified in his federal tax forms, under penalty of perjury, that he was an independent proprietor. Tax treatment and the way workers characterize their taxes may be indicative of the true nature of their employment status. [19]

18 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 91:5–10.

19 *See Barnes v. Colonial Life & Accident Ins. Co.,* 818 F.Supp. 978, 981 (N.D.Tex.1993) (issuance of 1099 indicates independent contractor status under test similar to *Borello*).

• **Jaeger's sales business was a "distinct business" that required licenses and skill to operate.** [20] W & R paid Jaeger semi-annually for his services selling securities offered by W & R at a respective commission rate. [21] However, Jaeger also sold financial plans and insurance which were not W & R products. [22] Jaeger ran his own business providing financial planning services, investment products, and insurance. To do so, he had to be highly skilled and licensed. He determined his own business strategies, made his own business decisions, and determined who he would target as potential clients.

20 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 2:19–21 (engineering degree),7:21–8:10, 8:24–9:11, 10:1–16, 30:7–31:5, 87:10–14 (licensed in 6 states); 9:12–19, 11:23–12:16, (spent 40–50 hours per week from April to July to prepare for license exams); 57:17–24, 57:25–58:5 (prepared own financial plans); 27:6–28:4, 29:24–30:6, 61:11–23; SAC, Doc. No. 170 at ¶ ¶ 46, 56 (chose clients and decided which products to sell each client).

21 PCA, Doc. No. 1 at 39.

22 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 31:21–32:3; SAC at ¶ 56.

• **Jaeger paid his own business expenses, had the authority to hire assistants, chose his own work location (frequently away from the office), and was paid solely on a commission basis.** [23] Jaeger met with prospective clients in a variety of locations and performed a substantial amount of his sales activities outside the office. Additionally, Jaeger had the ability to hire assistants, which further lends itself to independent contractor status.

23 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 123:17–19, 124:13–22, 126:2–20, 164:16–165:16 (Jaeger conducted sales and marketing activities outside the office); Doc. 172–6 at 20–21 (marketing events planned by Jaeger and his partner).

W & R had no legally significant right to control the manner and means by which Jaeger conducted his sales business. As noted above, Jaeger determined his own business strategy, set the cost for financial plans, chose his own clients, and was free to conduct other business activities in addition to his sales business, within the bounds of regulatory requirements. W & R did not set financial advisor schedules or office hours. Although Jaeger alleges that W & R held "mandatory" meetings and exercised some oversight over his activities, Jaeger testified that he was only required to attend training in his first year pursuant to the NFATP, a program he voluntarily joined and for which he signed an agreement stating he would do certain reporting and attend training as an independent contractor. [24] Apart from the NFATP, W & R does not require financial advisors to attend training or use the resources W & R offers. [25] Even if Jaeger's managers did perform some supervision and monitoring to help improve sales performance, this is not enough to convert Jaeger from an independent contractor to an employee. [26] Importantly, allegations of "control" pursuant to legal requirements are not employment indicia, [27] and in any event, Jaeger's deposition testimony regarding his voluntary participation in NFATP belies any such alleged "control" exercised by W & R.

24 *See* Jaeger Depo Tr., Doc. No. 172–3 at 54:6–55:8, 59:24–60:6.

25 *See* Jaeger Depo. Tr., Doc. No. 172–3 at 103:1–5.

26 *E.g., Fireman's Fund Ins. Co. v. Davis,* 37 Cal.App.4th 1432, 1442–43, 44 Cal.Rptr.2d 546 (Cal.Ct.App.1995) (principal "may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect, the right to stop the work, the right to make suggestions

or recommendations as to details of the work, the right to prescribe alterations or deviations in the work"—without converting the relationship from an independent contractor to an employment relationship) (citations and quotations omitted).

27 As members of the Financial Industry Regulatory Authority, Inc. ("FINRA"), W & R and financial advisors are subject to FINRA regulations, as well as a variety of other securities requirements. Jaeger argues the alleged "control" that W & R exercised over him is indicative of an employment relationship. However, the vast majority of Jaeger's misclassification allegations relate to W & R's conduct mandated by FINRA and SEC requirements, including licensing requirements and other regulations. As Judge Sabraw previously recognized in this case, terms of a putative "employment" relationship imposed by legal requirements do not suggest control by W & R. (*See* Order Denying Motion to Dismiss, Doc. No. 48 at 5:4–6 (generally, "compliance with legal requirements is not indicative of control for purposes of establishing an employer-employee relationship.").)

Taken together, the Court agrees that these facts demonstrate Jaeger was an independent contractor and not an employee under the common law standard. Jaeger asserts that there are triable questions of fact, especially with regard to W & R's alleged control over Advisors; however, the record indicates otherwise. For example, Jaeger claims the Advisors were given regular work schedules proposed by W & R. [28] However, as discussed above, the record shows Jaeger set his own schedules and hours and was frequently away from the office during business hours. [29] Similarly, Jaeger asserts that the alleged "control" W & R exercised far exceeded that required by applicable insurance and securities regulations. [30] The evidence presented by Jaeger, however, suggests minimal control in light of the totality of the factors. As held in *Arnold,* "... all the factors [must be] weighed and considered as a whole ..." 202 Cal.App.4th at 590, 135 Cal.Rptr.3d 213 (citations omitted). When weighed as a whole, the fact that W & R requires their financial advisors to purchase business cards from their broker/dealer, prohibits the personal use of email, and allows for the fining of brokers/dealers in connection with trading errors does not outweigh the numerous factors that weigh in favor of Jaeger being classified as an independent contractor. Thus, upon an examination of the totality of the evidence, Jaeger has not provided proof sufficient to create a genuine issue of material fact as to his employment status.

28 SAC, Doc. No. 170 at ¶ 2.

29 *Supra* note 22.

30 *Supra* note 27; Am. Pl's Opp., Doc. No. 180 at 13:9–27.

***7** As further support for Jaeger having been correctly classified as an independent contractor, W & R points to the recent *Arnold* case in which the California Court of Appeal affirmed the district court's conclusion that an insurance agent was an independent contractor in accordance with the *Borello* factors. [31] *Arnold v. Mut. of Omaha Ins. Co.,* 202 Cal.App.4th 580, 135 Cal.Rptr.3d 213 (Cal.Ct.App.2011). Jaeger contends that *Arnold* is distinguishable because the agents could sell products from different companies in *Arnold,* whereas here, Jaeger could sell only W & R-approved products. However, the Court notes that Jaeger was nonetheless permitted to pursue other business opportunities outside of W & R (subject to certain regulatory requirements), which weakens Jaeger's distinction. [32] In fact, *Arnold* appears to be analogous as W & R's relationship with its Advisors shares many of the same characteristics as Mutual of Omaha's relationship with its insurance agents in that case. Consequently, the Court concludes that under *Martinez's* test of employment, Jaeger was an independent contractors and not an employee.

31 In *Arnold,* Kimbly Arnold was an insurance agent who sued Mutual of Omaha for unpaid wages and reimbursements under the California Labor Code based on her purported misclassification as an independent contractor. *Arnold,* 202 Cal.App.4th at 582–83, 135 Cal.Rptr.3d 213. Summary judgment evidence showed that Arnold was licensed by the Department of Insurance as an independent agent or broker who was authorized to offer products from different companies. *Id.* at 584, 135 Cal.Rptr.3d 213. She had a contract with Mutual of Omaha stating that she was "an independent contractor and not an employee," that no terms of the contract "shall be construed as creating an employer-employee relationship," and that she was "free to exercise [her] own judgment as to the persons from whom [she] will solicit and the time, place and manner, and amount of such solicitation."

Id. at 584–85, 135 Cal.Rptr.3d 213. Pursuant to the agreement, Arnold used her own judgment in determining whom she would solicit, when and where she would do so, and the amount of time she spent doing it. *Id.* at 585, 135 Cal.Rptr.3d 213. The evidence also showed that agents were invited to attend sales meetings and training sessions. *Id.* Mutual of Omaha managers made themselves available to assist agents, and training was "offered chiefly for the guidance of 'new' agents" and was "required only with respect to compliance with state law directives ." *Id.* at 588, 135 Cal.Rptr.3d 213. Agents were required to pay for their own business expenses, and they could, but were not required to, work out of Mutual of Omaha's local office. *Id.* at 585, 135 Cal.Rptr.3d 213. If they did work from the office, they were required to pay monthly fees to cover

> telephone service and associated fees. *Id.* Arnold was paid through commissions on the insurance products she sold and received 1099 tax forms documenting that income. *Id.* at 584, 135 Cal.Rptr.3d 213. Either party could terminate the contract at will, and Arnold had to meet minimum performance requirements to avoid automatic termination. *Id.* at 589, 135 Cal.Rptr.3d 213. The California Court of Appeal held that, even though some of the factors pointed to an employment relationship, "all the factors weighed and considered as a whole establish that Arnold was an independent contractor and not an employee." *Id.* at 590, 135 Cal.Rptr.3d 213.

[32] *See* Jaeger Depo. Tr., Doc. No. 172–3 at 31:21–32:3; SAC, Doc. No. 170 at ¶ 56.

Insomuch as Jaeger has not established employee status under *Martinez,* he is appropriately deemed an independent contractor. Thus, the Court need not address Jaeger's additional state law claims regarding timely payment of wages and benefits, minimum wage, failure to pay overtime, meal periods, reimbursement of losses and expenditures incurred, and wage statements as these claims are conditioned upon Jaeger being properly classified as an employee. Accordingly, the Court grants W & R's summary judgment motion as to Jaeger's state law claims as well. [33]

[33] As noted above, Jaeger was not included in the SAC's FLSA claim. Regardless, in light of Jaeger's status as an independent contractor, FLSA would be inapplicable as it only applies to employment relationships. (*See* Previous Order, Doc. No. 167.)

Conclusion

For the reasons set forth above, the Court **GRANTS** W & R's motion for summary judgment as to Plaintiff Jaeger. The Clerk of the Court is instructed to enter judgment and close the case accordingly.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 435907

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78c

§ 78c. Definitions and application

Effective: July 21, 2012
Currentness

(a)Definitions

When used in this chapter, unless the context otherwise requires--

(1) The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(2) The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

(3)(A) The term "member" when used with respect to a national securities exchange means (i) any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, (ii) any registered broker or dealer with which such a natural person is associated, (iii) any registered broker or dealer permitted to designate as a representative such a natural person, and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with the provisions of this chapter, the rules and regulations thereunder, and its own rules. For purposes of sections 78f(b)(1), 78f(b)(4), 78f(b)(6), 78f(b)(7), 78f(d), 78q(d), 78s(d), 78s(e), 78s(g), 78s(h), and 78u of this title, the term "member" when used with respect to a national securities exchange also means, to the extent of the rules of the exchange specified by the Commission, any person required by the Commission to comply with such rules pursuant to section 78f(f) of this title.

(B) The term "member" when used with respect to a registered securities association means any broker or dealer who agrees to be regulated by such association and with respect to whom the association undertakes to enforce compliance with the provisions of this chapter, the rules and regulations thereunder, and its own rules.

(4)Broker

(A)In general

The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others.

(B)Exception for certain bank activities

A bank shall not be considered to be a broker because the bank engages in any one or more of the following activities under the conditions described:

(i)Third party brokerage arrangements

The bank enters into a contractual or other written arrangement with a broker or dealer registered under this chapter under which the broker or dealer offers brokerage services on or off the premises of the bank if--

(I) such broker or dealer is clearly identified as the person performing the brokerage services;

(II) the broker or dealer performs brokerage services in an area that is clearly marked and, to the extent practicable, physically separate from the routine deposit-taking activities of the bank;

(III) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement clearly indicate that the brokerage services are being provided by the broker or dealer and not by the bank;

(IV) any materials used by the bank to advertise or promote generally the availability of brokerage services under the arrangement are in compliance with the Federal securities laws before distribution;

(V) bank employees (other than associated persons of a broker or dealer who are qualified pursuant to the rules of a self-regulatory organization) perform only clerical or ministerial functions in connection with brokerage transactions including scheduling appointments with the associated persons of a broker or dealer, except that bank employees may forward customer funds or securities and may describe in general terms the types of investment vehicles available from the bank and the broker or dealer under the arrangement;

(VI) bank employees do not receive incentive compensation for any brokerage transaction unless such employees are associated persons of a broker or dealer and are qualified pursuant to the rules of a self-regulatory organization, except that the bank employees may receive compensation for the referral of any customer if the compensation is a nominal one-time cash fee of a fixed dollar amount and the payment of the fee is not contingent on whether the referral results in a transaction;

(VII) such services are provided by the broker or dealer on a basis in which all customers that receive any services are fully disclosed to the broker or dealer;

(VIII) the bank does not carry a securities account of the customer except as permitted under clause (ii) or (viii) of this subparagraph; and

(IX) the bank, broker, or dealer informs each customer that the brokerage services are provided by the broker or dealer and not by the bank and that the securities are not deposits or other obligations of the bank, are not guaranteed by the bank, and are not insured by the Federal Deposit Insurance Corporation.

(ii)Trust activities

The bank effects transactions in a trustee capacity, or effects transactions in a fiduciary capacity in its trust department or other department that is regularly examined by bank examiners for compliance with fiduciary principles and standards, and--

(I) is chiefly compensated for such transactions, consistent with fiduciary principles and standards, on the basis of an administration or annual fee (payable on a monthly, quarterly, or other basis), a percentage of assets under management, or a flat or capped per order processing fee equal to not more than the cost incurred by the bank in connection with executing securities transactions for trustee and fiduciary customers, or any combination of such fees; and

(II) does not publicly solicit brokerage business, other than by advertising that it effects transactions in securities in conjunction with advertising its other trust activities.

(iii)Permissible securities transactions

The bank effects transactions in--

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 24 of Title 12, in conformity with section 78*o*-5 of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(iv)Certain stock purchase plans

(I)Employee benefit plans

The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of any pension, retirement, profit-sharing, bonus, thrift, savings, incentive, or other similar benefit plan for the employees of that issuer or its affiliates (as defined in section 1841 of Title 12), if the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan.

(II)Dividend reinvestment plans

The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of that issuer's dividend reinvestment plan, if--

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(III)Issuer plans

The bank effects transactions, as part of its transfer agency activities, in the securities of an issuer as part of a plan or program for the purchase or sale of that issuer's shares, if--

(aa) the bank does not solicit transactions or provide investment advice with respect to the purchase or sale of securities in connection with the plan or program; and

(bb) the bank does not net shareholders' buy and sell orders, other than for programs for odd-lot holders or plans registered with the Commission.

(IV)Permissible delivery of materials

The exception to being considered a broker for a bank engaged in activities described in subclauses (I), (II), and (III) will not be affected by delivery of written or electronic plan materials by a bank to employees of the issuer, shareholders of the issuer, or members of affinity groups of the issuer, so long as such materials are--

(aa) comparable in scope or nature to that permitted by the Commission as of November 12, 1999; or

(bb) otherwise permitted by the Commission.

(v)Sweep accounts

The bank effects transactions as part of a program for the investment or reinvestment of deposit funds into any no-load, open-end management investment company registered under the Investment Company Act of 1940 that holds itself out as a money market fund.

(vi)Affiliate transactions

The bank effects transactions for the account of any affiliate of the bank (as defined in section 1841 of Title 12) other than--

(I) a registered broker or dealer; or

(II) an affiliate that is engaged in merchant banking, as described in section 1843(k)(4)(H) of Title 12.

(vii)Private securities offerings

The bank--

(I) effects sales as part of a primary offering of securities not involving a public offering, pursuant to section 3(b), 4(2), or 4(5) of the Securities Act of 1933 or the rules and regulations issued thereunder;

(II) at any time after the date that is 1 year after November 12, 1999, is not affiliated with a broker or dealer that has been registered for more than 1 year in accordance with this chapter, and engages in dealing, market making, or underwriting activities, other than with respect to exempted securities; and

(III) if the bank is not affiliated with a broker or dealer, does not effect any primary offering described in subclause (I) the aggregate amount of which exceeds 25 percent of the capital of the bank, except that the limitation of this subclause shall not apply with respect to any sale of government securities or municipal securities.

(viii)Safekeeping and custody activities

(I)In general

The bank, as part of customary banking activities--

(aa) provides safekeeping or custody services with respect to securities, including the exercise of warrants and other rights on behalf of customers;

(bb) facilitates the transfer of funds or securities, as a custodian or a clearing agency, in connection with the clearance and settlement of its customers' transactions in securities;

(cc) effects securities lending or borrowing transactions with or on behalf of customers as part of services provided to customers pursuant to division (aa) or (bb) or invests cash collateral pledged in connection with such transactions;

(dd) holds securities pledged by a customer to another person or securities subject to purchase or resale agreements involving a customer, or facilitates the pledging or transfer of such securities by book entry or as otherwise provided under applicable law, if the bank maintains records separately identifying the securities and the customer; or

(ee) serves as a custodian or provider of other related administrative services to any individual retirement account, pension, retirement, profit sharing, bonus, thrift savings, incentive, or other similar benefit plan.

(II)Exception for carrying broker activities

The exception to being considered a broker for a bank engaged in activities described in subclause (I) shall not apply if the bank, in connection with such activities, acts in the United States as a carrying broker (as such term, and different formulations thereof, are used in section 78*o*(c)(3) of this title and the rules and regulations thereunder) for any broker or dealer, unless such carrying broker activities are engaged in with respect to government securities (as defined in paragraph (42) of this subsection).

(ix)Identified banking products

The bank effects transactions in identified banking products as defined in section 206 of the Gramm-Leach-Bliley Act.

(x)Municipal securities

The bank effects transactions in municipal securities.

(xi)De minimis exception

The bank effects, other than in transactions referred to in clauses (i) through (x), not more than 500 transactions in securities in any calendar year, and such transactions are not effected by an employee of the bank who is also an employee of a broker or dealer.

(C)Execution by broker or dealer

The exception to being considered a broker for a bank engaged in activities described in clauses (ii), (iv), and (viii) of subparagraph (B) shall not apply if the activities described in such provisions result in the trade in the United States of any security that is a publicly traded security in the United States, unless--

(i) the bank directs such trade to a registered broker or dealer for execution;

(ii) the trade is a cross trade or other substantially similar trade of a security that--

(I) is made by the bank or between the bank and an affiliated fiduciary; and

(II) is not in contravention of fiduciary principles established under applicable Federal or State law; or

(iii) the trade is conducted in some other manner permitted under rules, regulations, or orders as the Commission may prescribe or issue.

(D)Fiduciary capacity

For purposes of subparagraph (B)(ii), the term "fiduciary capacity" means--

(i) in the capacity as trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gift to minor act, or as an investment adviser if the bank receives a fee for its investment advice;

(ii) in any capacity in which the bank possesses investment discretion on behalf of another; or

(iii) in any other similar capacity.

(E) Exception for entities subject to section 78*o*(e)

The term "broker" does not include a bank that--

(i) was, on the day before November 12, 1999, subject to section 78*o*(e) of this title; and

(ii) is subject to such restrictions and requirements as the Commission considers appropriate.

(F)Joint rulemaking required

The Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).

(5)Dealer

(A)In general

The term "dealer" means any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account through a broker or otherwise.

(B)Exception for person not engaged in the business of dealing

The term "dealer" does not include a person that buys or sells securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person's own account, either individually or in a fiduciary capacity, but not as a part of a regular business.

(C)Exception for certain bank activities

A bank shall not be considered to be a dealer because the bank engages in any of the following activities under the conditions described:

(i)Permissible securities transactions

The bank buys or sells--

(I) commercial paper, bankers acceptances, or commercial bills;

(II) exempted securities;

(III) qualified Canadian government obligations as defined in section 24 of Title 12, in conformity with section 78*o*-5 of this title and the rules and regulations thereunder, or obligations of the North American Development Bank; or

(IV) any standardized, credit enhanced debt security issued by a foreign government pursuant to the March 1989 plan of then Secretary of the Treasury Brady, used by such foreign government to retire outstanding commercial bank loans.

(ii)Investment, trustee, and fiduciary transactions

The bank buys or sells securities for investment purposes--

(I) for the bank; or

(II) for accounts for which the bank acts as a trustee or fiduciary.

(iii)Asset-backed transactions

The bank engages in the issuance or sale to qualified investors, through a grantor trust or other separate entity, of securities backed by or representing an interest in notes, drafts, acceptances, loans, leases, receivables, other obligations (other than securities of which the bank is not the issuer), or pools of any such obligations predominantly originated by--

(I) the bank;

(II) an affiliate of any such bank other than a broker or dealer; or

(III) a syndicate of banks of which the bank is a member, if the obligations or pool of obligations consists of mortgage obligations or consumer-related receivables.

(iv)Identified banking products

The bank buys or sells identified banking products, as defined in section 206 of the Gramm-Leach-Bliley Act.

(6) The term "bank" means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 1462(5) of Title 12, (B) a member bank of the Federal Reserve System, (C) any other banking institution or savings association, as defined in section 1462(4) of Title 12, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to section 92a of Title 12, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this chapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(7) The term "director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(8) The term "issuer" means any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

(9) The term "person" means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

(10) The term "security" means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term "equity security" means any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12)(A) The term "exempted security" or "exempted securities" includes--

(i) government securities, as defined in paragraph (42) of this subsection;

(ii) municipal securities, as defined in paragraph (29) of this subsection;

(iii) any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940;

(iv) any interest or participation in a single trust fund, or a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with a qualified plan as defined in subparagraph (C) of this paragraph;

(v) any security issued by or any interest or participation in any pooled income fund, collective trust fund, collective investment fund, or similar fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;

(vi) solely for purposes of sections 78*l*, 78m, 78n, and 78p of this title, any security issued by or any interest or participation in any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and

(vii) such other securities (which may include, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an "exempted security" or to "exempted securities".

(B)(i) Notwithstanding subparagraph (A)(i) of this paragraph, government securities shall not be deemed to be "exempted securities" for the purposes of section 78q-1 of this title.

(ii) Notwithstanding subparagraph (A)(ii) of this paragraph, municipal securities shall not be deemed to be "exempted securities" for the purposes of sections 78*o* and 78q-1 of this title.

(C) For purposes of subparagraph (A)(iv) of this paragraph, the term "qualified plan" means (i) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, (ii) an annuity plan

which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of Title 26, (iii) a governmental plan as defined in section 414(d) of Title 26 which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, or (iv) a church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, other than any plan described in clause (i), (ii), or (iii) of this subparagraph which (I) covers employees some or all of whom are employees within the meaning of section 401(c) of Title 26, or (II) is a plan funded by an annuity contract described in section 403(b) of Title 26.

(13) The terms “buy” and “purchase” each include any contract to buy, purchase, or otherwise acquire. For security futures products, such term includes any contract, agreement, or transaction for future delivery. For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(14) The terms “sale” and “sell” each include any contract to sell or otherwise dispose of. For security futures products, such term includes any contract, agreement, or transaction for future delivery. For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require.

(15) The term “Commission” means the Securities and Exchange Commission established by section 78d of this title.

(16) The term “State” means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(17) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

(18) The term “person associated with a broker or dealer” or “associated person of a broker or dealer” means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 78*o*(b) of this title (other than paragraph (6) thereof).

(19) The terms “investment company”, “affiliated person”, “insurance company”, “separate account”, and “company” have the same meanings as in the Investment Company Act of 1940.

(20) The terms “investment adviser” and “underwriter” have the same meanings as in the Investment Advisers Act of 1940.

(21) The term "person associated with a member" or "associated person of a member" when used with respect to a member of a national securities exchange or registered securities association means any partner, officer, director, or branch manager of such member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member, or any employee of such member.

(22)(A) The term "securities information processor" means any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations. The term "securities information processor" does not include any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, any self-regulatory organizations, any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank, if such bank, broker, dealer, association, or cooperative bank would be deemed to be a securities information processor solely by reason of functions performed by such institutions as part of customary banking, brokerage, dealing, association, or cooperative bank activities, or any common carrier, as defined in section 153 of Title 47, subject to the jurisdiction of the Federal Communications Commission or a State commission, as defined in section 153 of Title 47, unless the Commission determines that such carrier is engaged in the business of collecting, processing, or preparing for distribution or publication, information with respect to transactions in or quotations for any security.

(B) The term "exclusive processor" means any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.

(23)(A) The term "clearing agency" means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

(B) The term "clearing agency" does not include (i) any Federal Reserve bank, Federal home loan bank, or Federal land bank; (ii) any national securities exchange or registered securities association solely by reason of its providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such exchange or by means of any electronic system operated or controlled by such association; (iii) any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank if such bank, broker, dealer, association, or cooperative bank would be deemed to be a clearing agency solely by reason of functions performed by such institution as part of customary banking, brokerage, dealing, association, or cooperative banking activities, or solely by reason of acting on behalf of a clearing agency or a participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants, unless the Commission, by rule, otherwise provides as necessary or appropriate to assure the prompt and accurate clearance and settlement of securities transactions or to prevent evasion of this chapter; (iv) any life insurance company, its registered separate accounts, or a subsidiary of such insurance company solely

by reason of functions commonly performed by such entities in connection with variable annuity contracts or variable life policies issued by such insurance company or its separate accounts; (v) any registered open-end investment company or unit investment trust solely by reason of functions commonly performed by it in connection with shares in such registered open-end investment company or unit investment trust, or (vi) any person solely by reason of its performing functions described in paragraph (25)(E) of this subsection.

(24) The term "participant" when used with respect to a clearing agency means any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities. Such term does not include a person whose only use of a clearing agency is (A) through another person who is a participant or (B) as a pledgee of securities.

(25) The term "transfer agent" means any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term "transfer agent" does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues.

(26) The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s(b), 78s(c), and 78w(b) of this title) the Municipal Securities Rulemaking Board established by section 78*o*-4 of this title.

(27) The term "rules of an exchange", "rules of an association", or "rules of a clearing agency" means the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, association of brokers and dealers, or clearing agency, respectively, and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.

(28) The term "rules of a self-regulatory organization" means the rules of an exchange which is a national securities exchange, the rules of an association of brokers and dealers which is a registered securities association, the rules of a clearing agency which is a registered clearing agency, or the rules of the Municipal Securities Rulemaking Board.

(29) The term "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in section 103(c)(2) of Title 26) the interest on which is excludable from gross income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) of Title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security.

(30) The term "municipal securities dealer" means any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, but does not include--

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business; or

(B) a bank, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, through a broker or otherwise: *Provided, however*, That if the bank is engaged in such business through a separately identifiable department or division (as defined by the Municipal Securities Rulemaking Board in accordance with section 78*o*-4(b)(2)(H) of this title), the department or division and not the bank itself shall be deemed to be the municipal securities dealer.

(31) The term "municipal securities broker" means a broker engaged in the business of effecting transactions in municipal securities for the account of others.

(32) The term "person associated with a municipal securities dealer" when used with respect to a municipal securities dealer which is a bank or a division or department of a bank means any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer's activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities.

(33) The term "municipal securities investment portfolio" means all municipal securities held for investment and not for sale as part of a regular business by a municipal securities dealer or by a person, directly or indirectly, controlling, controlled by, or under common control with a municipal securities dealer.

(34) The term "appropriate regulatory agency" means--

(A) When used with respect to a municipal securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a subsidiary or a department or division of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or department or division of any such Federal savings association;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary or a department or division thereof, a bank holding company, a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i), (iii), or (iv) of this subparagraph, a subsidiary or a department or division of such subsidiary, or a savings and loan holding company;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), a subsidiary or department or division of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary or a department or division of any such State savings association; and

(iv) the Commission in the case of all other municipal securities dealers.

(B) When used with respect to a clearing agency or transfer agent:

(i) the Comptroller of the Currency, in the case of a national bank, a subsidiary of any such bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such Federal savings association;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary thereof, a bank holding company, a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), a subsidiary of any such bank, a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a subsidiary of any such State savings association; and

(iv) the Commission in the case of all other clearing agencies and transfer agents.

(C) When used with respect to a participant or applicant to become a participant in a clearing agency or a person requesting or having access to services offered by a clearing agency:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation [1] when the appropriate regulatory agency for such clearing agency is not the Commission;

(ii) the Board of Governors of the Federal Reserve System in the case of a State member bank of the Federal Reserve System, a bank holding company, or a subsidiary of a bank holding company, a subsidiary of a bank holding company that is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a savings and loan holding company when the appropriate regulatory agency for such clearing agency is not the Commission;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and [2] when the appropriate regulatory agency for such clearing agency is not the Commission; [3]

(iv) the Commission in all other cases.

(D) When used with respect to an institutional investment manager which is a bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act:

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation;

(ii) the Board of Governors of the Federal Reserve System, in the case of any other member bank of the Federal Reserve System; and

(iii) the Federal Deposit Insurance Corporation, in the case of any other insured bank or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation.

(E) When used with respect to a national securities exchange or registered securities association, member thereof, person associated with a member thereof, applicant to become a member thereof or to become associated with a member thereof, or person requesting or having access to services offered by such exchange or association or member thereof, or the Municipal Securities Rulemaking Board, the Commission.

(F) When used with respect to a person exercising investment discretion with respect to an account; [4]

(i) the Comptroller of the Currency, in the case of a national bank or a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(2))), the deposits of which are insured by the Federal Deposit Insurance Corporation;

(ii) the Board of Governors of the Federal Reserve System in the case of any other member bank of the Federal Reserve System;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act or a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(3))), the deposits of which are insured by the Federal Deposit Insurance Corporation; and

(iv) the Commission in the case of all other such persons.

(G) When used with respect to a government securities broker or government securities dealer, or person associated with a government securities broker or government securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a Federal savings association (as defined in section 3(b)(2) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation, or a Federal branch or Federal agency of a foreign bank (as such terms are used in the International Banking Act of 1978);

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a foreign bank, an uninsured State branch or State agency of a foreign bank, a commercial lending company owned or controlled by a foreign bank (as such terms are used in the International Banking Act of 1978), or a corporation organized or having an agreement with the Board of Governors of the Federal Reserve System pursuant to section 25 or section 25A of the Federal Reserve Act;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System or a Federal savings bank), a State savings association (as defined in section 3(b)(3) of the Federal Deposit Insurance Act), the deposits of which are insured by the Federal Deposit Insurance Corporation, or an insured State branch of a foreign bank (as such terms are used in the International Banking Act of 1978); and

(iv) the Commission, in the case of all other government securities brokers and government securities dealers.

(H) When used with respect to an institution described in subparagraph (D), (F), or (G) of section 1841(c)(2), or held under section 1843(f) of Title 12--

(i) the Comptroller of the Currency, in the case of a national bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System or any corporation chartered under section 25A of the Federal Reserve Act;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act; or

(iv) the Commission in the case of all other such institutions.

As used in this paragraph, the terms “bank holding company” and “subsidiary of a bank holding company” have the meanings given them in section 1841 of Title 12. As used in this paragraph, the term “savings and loan holding company” has the same meaning as in section 1467a(a) of Title 12.

(35) A person exercises “investment discretion” with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for

the protection of investors, should be subject to the operation of the provisions of this chapter and the rules and regulations thereunder.

(36) A class of persons or markets is subject to "equal regulation" if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under this chapter which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this chapter.

(37) The term "records" means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

(38) The term "market maker" means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self-regulatory organization, if such person--

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(B) is subject to--

(i) an order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority--

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, or major security-based swap participant or limiting his activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, or major security-based swap participant, or while associated with an entity or person required to be registered under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or

(F) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (D), (E), (H), or (G)[5] of paragraph (4) of section 78*o*(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

(40) The term "financial responsibility rules" means the rules and regulations of the Commission or the rules and regulations prescribed by any self-regulatory organization relating to financial responsibility and related practices which are designated by the Commission, by rule or regulation, to be financial responsibility rules.

(41) The term "mortgage related security" means a security that meets standards of credit-worthiness as established by the Commission, and either:

(A) represents ownership of one or more promissory notes or certificates of interest or participation in such notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of such notes, certificates, or participations of amounts payable under, such notes, certificates, or participations), which notes:

(i) are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, on a residential manufactured home as defined in section 5402(6) of Title 42, whether such manufactured home is considered real or personal property under the laws of the State in which it is to be located, or on one or more parcels of real estate upon which is located one or more commercial structures; and

(ii) were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 1709 and 1715b of Title 12, or, where such notes involve a lien on the manufactured home, by any such institution or by any financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to section 1703 of Title 12; or

(B) is secured by one or more promissory notes or certificates of interest or participations in such notes (with or without recourse to the issuer thereof) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, on notes meeting the requirements of subparagraphs (A)(i) and (ii) or certificates of interest or participations in promissory notes meeting such requirements.

For the purpose of this paragraph, the term "promissory note", when used in connection with a manufactured home, shall also include a loan, advance, or credit sale as evidence [6] by a retail installment sales contract or other instrument.

(42) The term "government securities" means--

(A) securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;

(B) securities which are issued or guaranteed by the Tennessee Valley Authority or by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(C) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the Commission;

(D) for purposes of sections 78*o*-5 and 78q-1 of this title, any put, call, straddle, option, or privilege on a security described in subparagraph (A), (B), or (C) other than a put, call, straddle, option, or privilege--

(i) that is traded on one or more national securities exchanges; or

(ii) for which quotations are disseminated through an automated quotation system operated by a registered securities association; or

(E) for purposes of sections 78*o*, 78*o*-5, and 78q-1 of this title as applied to a bank, a qualified Canadian government obligation as defined in section 24 of Title 12.

(43) The term "government securities broker" means any person regularly engaged in the business of effecting transactions in government securities for the account of others, but does not include--

(A) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection; or

(B) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(44) The term "government securities dealer" means any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise, but does not include--

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business;

(B) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection;

(C) any bank, unless the bank is engaged in the business of buying and selling government securities for its own account other than in a fiduciary capacity, through a broker or otherwise; or

(D) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(45) The term "person associated with a government securities broker or government securities dealer" means any partner, officer, director, or branch manager of such government securities broker or government securities dealer (or any person occupying a similar status or performing similar functions), and any other employee of such government securities broker or government securities dealer who is engaged in the management, direction, supervision, or performance of any activities relating to government securities, and any person directly or indirectly controlling, controlled by, or under common control with such government securities broker or government securities dealer.

(46) The term "financial institution" means--

(A) a bank (as defined in paragraph (6) of this subsection);

(B) a foreign bank (as such term is used in the International Banking Act of 1978); and

(C) a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act the deposits of which are insured by the Federal Deposit Insurance Corporation.

(47) The term "securities laws" means the Securities Act of 1933 (15 U.S.C. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Sarbanes-Oxley Act of 2002, the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

(48) The term "registered broker or dealer" means a broker or dealer registered or required to register pursuant to section 78*o* or 78*o*-4 of this title, except that in paragraph (3) of this subsection and sections 78f and 78*o*-3 of this title the term means such a broker or dealer and a government securities broker or government securities dealer registered or required to register pursuant to section 78*o*-5(a)(1)(A) of this title.

(49) The term "person associated with a transfer agent" and "associated person of a transfer agent" mean any person (except an employee whose functions are solely clerical or ministerial) directly engaged in the management, direction, supervision, or performance of any of the transfer agent's activities with respect to transfer agent functions, and any person directly or indirectly controlling such activities or controlled by the transfer agent in connection with such activities.

(50) The term "foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(51)(A) The term "penny stock" means any equity security other than a security that is--

(i) registered or approved for registration and traded on a national securities exchange that meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(ii) authorized for quotation on an automated quotation system sponsored by a registered securities association, if such system (I) was established and in operation before January 1, 1990, and (II) meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(iii) issued by an investment company registered under the Investment Company Act of 1940;

(iv) excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by rule or regulation which the Commission shall prescribe for purposes of this paragraph; or

(v) exempted, in whole or in part, conditionally or unconditionally, from the definition of such term by rule, regulation, or order prescribed by the Commission.

(B) The Commission may, by rule, regulation, or order, designate any equity security or class of equity securities described in clause (i) or (ii) of subparagraph (A) as within the meaning of the term "penny stock" if such security or class of securities is traded other than on a national securities exchange or through an automated quotation system described in clause (ii) of subparagraph (A).

(C) In exercising its authority under this paragraph to prescribe rules, regulations, and orders, the Commission shall determine that such rule, regulation, or order is consistent with the public interest and the protection of investors.

(52) The term "foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

(53)(A) The term "small business related security" means a security that meets standards of credit-worthiness as established by the Commission, and either--

(i) represents an interest in 1 or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company; or

(ii) is secured by an interest in 1 or more promissory notes or leases of personal property (with or without recourse to the issuer or lessee) and provides for payments of principal in relation to payments, or reasonable projections of payments, on notes or leases described in clause (i).

(B) For purposes of this paragraph--

(i) an "interest in a promissory note or a lease of personal property" includes ownership rights, certificates of interest or participation in such notes or leases, and rights designed to assure servicing of such notes or leases, or the receipt or timely receipt of amounts payable under such notes or leases;

(ii) the term "small business concern" means a business that meets the criteria for a small business concern established by the Small Business Administration under section 632(a) of this title;

(iii) the term "insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act; and

(iv) the term "insured credit union" has the same meaning as in section 1752 of Title 12.

(54)Qualified investor

(A)Definition

Except as provided in subparagraph (B), for purposes of this chapter, the term "qualified investor" means--

(i) any investment company registered with the Commission under section 8 of the Investment Company Act of 1940;

(ii) any issuer eligible for an exclusion from the definition of investment company pursuant to section 3(c)(7) of the Investment Company Act of 1940;

(iii) any bank (as defined in paragraph (6) of this subsection), savings association (as defined in section 3(b) of the Federal Deposit Insurance Act, broker, dealer, insurance company (as defined in section 2(a)(13) of the Securities Act of 1933), or business development company (as defined in section 2(a)(48) of the Investment Company Act of 1940);

(iv) any small business investment company licensed by the United States Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958;

(v) any State sponsored employee benefit plan, or any other employee benefit plan, within the meaning of the Employee Retirement Income Security Act of 1974, other than an individual retirement account, if the investment decisions are made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser;

(vi) any trust whose purchases of securities are directed by a person described in clauses (i) through (v) of this subparagraph;

(vii) any market intermediary exempt under section 3(c)(2) of the Investment Company Act of 1940;

(viii) any associated person of a broker or dealer other than a natural person;

(ix) any foreign bank (as defined in section 1(b)(7) of the International Banking Act of 1978);

(x) the government of any foreign country;

(xi) any corporation, company, or partnership that owns and invests on a discretionary basis, not less than $25,000,000 in investments;

(xii) any natural person who owns and invests on a discretionary basis, not less than $25,000,000 in investments;

(xiii) any government or political subdivision, agency, or instrumentality of a government who owns and invests on a discretionary basis not less than $50,000,000 in investments; or

(xiv) any multinational or supranational entity or any agency or instrumentality thereof.

(B)Altered thresholds for asset-backed securities and loan participations

For purposes of subsection (a)(5)(C)(iii) of this section and section 206(a)(5) of the Gramm-Leach-Bliley Act, the term "qualified investor" has the meaning given such term by subparagraph (A) of this paragraph except that clauses (xi) and (xii) shall be applied by substituting "$10,000,000" for "$25,000,000".

(C)Additional authority

The Commission may, by rule or order, define a "qualified investor" as any other person, taking into consideration such factors as the financial sophistication of the person, net worth, and knowledge and experience in financial matters.

(55)(A) The term "security future" means a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under paragraph (12) of this subsection as in effect on January 11, 1983 (other than any municipal security as defined in paragraph (29) of this subsection as in effect on January 11, 1983). The term "security future" does not include any agreement, contract, or transaction excluded from the Commodity Exchange Act under section 2(c), 2(d), 2(f), or 2(g) of the Commodity Exchange Act (as in effect on December 21, 2000) or sections 27 to 27f of Title 7.

(B) The term "narrow-based security index" means an index--

(i) that has 9 or fewer component securities;

(ii) in which a component security comprises more than 30 percent of the index's weighting;

(iii) in which the five highest weighted component securities in the aggregate comprise more than 60 percent of the index's weighting; or

(iv) in which the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting have an aggregate dollar value of average daily trading volume of less than $50,000,000 (or in the case of an index with 15 or more component securities, $30,000,000), except that if there are two or more securities with equal weighting that could be included in the calculation of the lowest weighted component securities comprising, in the aggregate, 25 percent of the index's weighting, such securities shall be ranked from lowest to highest dollar value of average daily trading volume and shall be included in the calculation based on their ranking starting with the lowest ranked security.

(C) Notwithstanding subparagraph (B), an index is not a narrow-based security index if--

(i)(I) it has at least nine component securities;

(II) no component security comprises more than 30 percent of the index's weighting; and

(III) each component security is--

(aa) registered pursuant to section 78*l* of this title;

(bb) one of 750 securities with the largest market capitalization; and

(cc) one of 675 securities with the largest dollar value of average daily trading volume;

(ii) a board of trade was designated as a contract market by the Commodity Futures Trading Commission with respect to a contract of sale for future delivery on the index, before December 21, 2000;

(iii)(I) a contract of sale for future delivery on the index traded on a designated contract market or registered derivatives transaction execution facility for at least 30 days as a contract of sale for future delivery on an index that was not a narrow-based security index; and

(II) it has been a narrow-based security index for no more than 45 business days over 3 consecutive calendar months;

(iv) a contract of sale for future delivery on the index is traded on or subject to the rules of a foreign board of trade and meets such requirements as are jointly established by rule or regulation by the Commission and the Commodity Futures Trading Commission;

(v) no more than 18 months have passed since December 21, 2000, and--

(I) it is traded on or subject to the rules of a foreign board of trade;

(II) the offer and sale in the United States of a contract of sale for future delivery on the index was authorized before December 21, 2000; and

(III) the conditions of such authorization continue to be met; or

(vi) a contract of sale for future delivery on the index is traded on or subject to the rules of a board of trade and meets such requirements as are jointly established by rule, regulation, or order by the Commission and the Commodity Futures Trading Commission.

(D) Within 1 year after December 21, 2000, the Commission and the Commodity Futures Trading Commission jointly shall adopt rules or regulations that set forth the requirements under clause (iv) of subparagraph (C).

(E) An index that is a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over 3 consecutive calendar months pursuant to clause (iii) of subparagraph (C) shall not be a narrow-based security index for the 3 following calendar months.

(F) For purposes of subparagraphs (B) and (C) of this paragraph--

(i) the dollar value of average daily trading volume and the market capitalization shall be calculated as of the preceding 6 full calendar months; and

(ii) the Commission and the Commodity Futures Trading Commission shall, by rule or regulation, jointly specify the method to be used to determine market capitalization and dollar value of average daily trading volume.

(56) The term "security futures product" means a security future or any put, call, straddle, option, or privilege on any security future.

(57)(A) The term "margin", when used with respect to a security futures product, means the amount, type, and form of collateral required to secure any extension or maintenance of credit, or the amount, type, and form of collateral required as a performance bond related to the purchase, sale, or carrying of a security futures product.

(B) The terms "margin level" and "level of margin", when used with respect to a security futures product, mean the amount of margin required to secure any extension or maintenance of credit, or the amount of margin required as a performance bond related to the purchase, sale, or carrying of a security futures product.

(C) The terms "higher margin level" and "higher level of margin", when used with respect to a security futures product, mean a margin level established by a national securities exchange registered pursuant to section 78f(g) of this title that is higher than the minimum amount established and in effect pursuant to section 78g(c)(2)(B) of this title.

(58)Audit committee

The term "audit committee" means--

(A) a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and

(B) if no such committee exists with respect to an issuer, the entire board of directors of the issuer.

(59)Registered public accounting firm

The term "registered public accounting firm" has the same meaning as in section 2 of the Sarbanes-Oxley Act of 2002.

(60)Credit rating

The term "credit rating" means an assessment of the creditworthiness of an obligor as an entity or with respect to specific securities or money market instruments.

(61)Credit rating agency

The term "credit rating agency" means any person--

(A) engaged in the business of issuing credit ratings on the Internet or through another readily accessible means, for free or for a reasonable fee, but does not include a commercial credit reporting company;

(B) employing either a quantitative or qualitative model, or both, to determine credit ratings; and

(C) receiving fees from either issuers, investors, or other market participants, or a combination thereof.

(62)Nationally recognized statistical rating organization

The term "nationally recognized statistical rating organization" means a credit rating agency that--

(A) issues credit ratings certified by qualified institutional buyers, in accordance with section 78*o*-7(a)(1)(B)(ix) of this title, with respect to--

(i) financial institutions, brokers, or dealers;

(ii) insurance companies;

(iii) corporate issuers;

(iv) issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on September 29, 2006);

(v) issuers of government securities, municipal securities, or securities issued by a foreign government; or

(vi) a combination of one or more categories of obligors described in any of clauses (i) through (v); and

(B) is registered under section 78*o*-7 of this title.

(63)Person associated with a nationally recognized statistical rating organization

The term "person associated with" a nationally recognized statistical rating organization means any partner, officer, director, or branch manager of a nationally recognized statistical rating organization (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with a nationally recognized statistical rating organization, or any employee of a nationally recognized statistical rating organization.

(64)Qualified institutional buyer

The term "qualified institutional buyer" has the meaning given such term in section 230.144A(a) of title 17, Code of Federal Regulations, or any successor thereto.

(65)Eligible contract participant

The term "eligible contract participant" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(66)Major swap participant

The term "major swap participant" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(67)Major security-based swap participant

(A)In general

The term "major security-based swap participant" means any person--

(i) who is not a security-based swap dealer; and

(ii)(I) who maintains a substantial position in security-based swaps for any of the major security-based swap categories, as such categories are determined by the Commission, excluding both positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(II) whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(III) that is a financial entity that--

(aa) is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and

(bb) maintains a substantial position in outstanding security-based swaps in any major security-based swap category, as such categories are determined by the Commission.

(B)Definition of substantial position

For purposes of subparagraph (A), the Commission shall define, by rule or regulation, the term "substantial position" at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. In setting the definition under this subparagraph, the Commission shall consider the person's relative position in uncleared as opposed to cleared security-based swaps and may take into consideration the value and quality of collateral held against counterparty exposures.

(C)Scope of designation

For purposes of subparagraph (A), a person may be designated as a major security-based swap participant for 1 or more categories of security-based swaps without being classified as a major security-based swap participant for all classes of security-based swaps.

(68)Security-based swap

(A)In general

Except as provided in subparagraph (B), the term "security-based swap" means any agreement, contract, or transaction that--

(i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act (without regard to paragraph (47)(B)(x) of such section); and

(ii) is based on--

(I) an index that is a narrow-based security index, including any interest therein or on the value thereof;

(II) a single security or loan, including any interest therein or on the value thereof; or

(III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

(B)Rule of construction regarding master agreements

The term "security-based swap" shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a security-based swap pursuant to subparagraph (A), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a security-based swap pursuant to subparagraph (A), except that the master agreement shall be considered to be a security-based swap only with respect to each agreement, contract, or transaction under the master agreement that is a security-based swap pursuant to subparagraph (A).

(C)Exclusions

The term "security-based swap" does not include any agreement, contract, or transaction that meets the definition of a security-based swap only because such agreement, contract, or transaction references, is based upon, or settles through the transfer, delivery, or receipt of an exempted security under paragraph (12), as in effect on January 11, 1983 (other than any municipal security as defined in paragraph (29) as in effect on January 11, 1983), unless such agreement, contract, or transaction is of the character of, or is commonly known in the trade as, a put, call, or other option.

(D)Mixed swap

The term "security-based swap" includes any agreement, contract, or transaction that is as described in subparagraph (A) and also is based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence (other than an event described in subparagraph (A)(ii)(III)).

(E)Rule of construction regarding use of the term index

The term "index" means an index or group of securities, including any interest therein or based on the value thereof.

(69)Swap

The term "swap" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(70)Person associated with a security-based swap dealer or major security-based swap participant

(A)In general

The term "person associated with a security-based swap dealer or major security-based swap participant" or "associated person of a security-based swap dealer or major security-based swap participant" means--

(i) any partner, officer, director, or branch manager of such security-based swap dealer or major security-based swap participant (or any person occupying a similar status or performing similar functions);

(ii) any person directly or indirectly controlling, controlled by, or under common control with such security-based swap dealer or major security-based swap participant; or

(iii) any employee of such security-based swap dealer or major security-based swap participant.

(B)Exclusion

Other than for purposes of section 78*o*-10(l)(2) of this title, the term "person associated with a security-based swap dealer or major security-based swap participant" or "associated person of a security-based swap dealer or major security-based swap participant" does not include any person associated with a security-based swap dealer or major security-based swap participant whose functions are solely clerical or ministerial.

(71)Security-based swap dealer

(A)In general

The term "security-based swap dealer" means any person who--

(i) holds themself out as a dealer in security-based swaps;

(ii) makes a market in security-based swaps;

(iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(B)Designation by type or class

A person may be designated as a security-based swap dealer for a single type or single class or category of security-based swap or activities and considered not to be a security-based swap dealer for other types, classes, or categories of security-based swaps or activities.

(C)Exception

The term "security-based swap dealer" does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(D)De minimis exception

The Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to establish factors with respect to the making of any determination to exempt.

(72)Appropriate Federal banking agency

The term "appropriate Federal banking agency" has the same meaning as in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(73)Board

The term "Board" means the Board of Governors of the Federal Reserve System.

(74)Prudential regulator

The term "prudential regulator" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(75)Security-based swap data repository

The term "security-based swap data repository" means any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.

(76)Swap dealer

The term "swap dealer" has the same meaning as in section 1a of the Commodity Exchange Act (7 U.S.C. 1a).

(77)Security-based swap execution facility

The term "security-based swap execution facility" means a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that--

(A) facilitates the execution of security-based swaps between persons; and

(B) is not a national securities exchange.

(78)Security-based swap agreement

(A)In general

For purposes of sections 78i, 78j, 78p, 78t, and 78u-1 of this title, and section 17 of the Securities Act of 1933 (15 U.S.C. 77q), the term "security-based swap agreement" means a swap agreement as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

(B)Exclusions

The term "security-based swap agreement" does not include any security-based swap.

(79)Asset-backed security

The term "asset-backed security"--

(A) means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including--

(i) a collateralized mortgage obligation;

(ii) a collateralized debt obligation;

(iii) a collateralized bond obligation;

(iv) a collateralized debt obligation of asset-backed securities;

(v) a collateralized debt obligation of collateralized debt obligations; and

(vi) a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and

(B) does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

(80) [7] **Emerging growth company**

The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its

most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of--

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b-2 of title 17, Code of Federal Regulations, or any successor thereto.

(80) [7] **Funding portal**

The term "funding portal" means any person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others, solely pursuant to section 4(6) of the Securities Act of 1933 (15 U.S.C. 77d(6)), that does not--

(A) offer investment advice or recommendations;

(B) solicit purchases, sales, or offers to buy the securities offered or displayed on its website or portal;

(C) compensate employees, agents, or other persons for such solicitation or based on the sale of securities displayed or referenced on its website or portal;

(D) hold, manage, possess, or otherwise handle investor funds or securities; or

(E) engage in such other activities as the Commission, by rule, determines appropriate.

(b)Power to define technical, trade, accounting, and other terms

The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.

(c)Application to governmental departments or agencies

No provision of this chapter shall apply to, or be deemed to include, any executive department or independent establishment of the United States, or any lending agency which is wholly owned, directly or indirectly, by the United States, or any officer, agent, or employee of any such department, establishment, or agency, acting in the course of his official duty as such, unless such provision makes specific reference to such department, establishment, or agency.

(d)Issuers of municipal securities

No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a "broker", "dealer", or "municipal securities dealer" solely by reason of buying, selling, or effecting transactions in the issuer's securities.

(e)Charitable organizations

(1)Exemption

Notwithstanding any other provision of this chapter, but subject to paragraph (2) of this subsection, a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940, or any trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, shall not be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", or "government securities dealer" for purposes of this chapter solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of--

(A) such a charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940, or the settlors (or potential settlors) or beneficiaries of any such trust or other instrument.

(2)Limitation on compensation

The exemption provided under paragraph (1) shall not be available to any charitable organization, or any trustee, director, officer, employee, or volunteer of such a charitable organization, unless each person who, on or after 90 days after December 8, 1995, solicits donations on behalf of such charitable organization from any donor to a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940, is either a volunteer or is engaged in the overall fund raising activities of a charitable organization and receives no commission or other special compensation based on the number or the value of donations collected for the fund.

(f)Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(g)Church plans

No church plan described in section 414(e) of Title 26, no person or entity eligible to establish and maintain such a plan under Title 26, no company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940, and no trustee, director, officer or employee of or volunteer for such plan, company, account, person, or entity, acting within the scope of that person's employment or activities with respect to such plan, shall be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", "government securities dealer", "clearing agency", or "transfer agent" for purposes of this chapter--

(1) solely because such plan, company, person, or entity buys, holds, sells, trades in, or transfers securities or acts as an intermediary in making payments in connection with transactions in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of, or for the account of, any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and

(2) if no such person or entity receives a commission or other transaction-related sales compensation in connection with any activities conducted in reliance on the exemption provided by this subsection.

(h)Limited exemption for funding portals

(1)In general

The Commission shall, by rule, exempt, conditionally or unconditionally, a registered funding portal from the requirement to register as a broker or dealer under section 78*o*(a)(1) of this title, provided that such funding portal--

(A) remains subject to the examination, enforcement, and other rulemaking authority of the Commission;

(B) is a member of a national securities association registered under section 78*o*-3 of this title; and

(C) is subject to such other requirements under this chapter as the Commission determines appropriate under such rule.

(2)National securities association membership

For purposes of sections 78*o*(b)(8) and 78*o*-3 of this title, the term "broker or dealer" includes a funding portal and the term "registered broker or dealer" includes a registered funding portal, except to the extent that the Commission, by rule, determines otherwise, provided that a national securities association shall only examine for and enforce against a registered funding portal rules of such national securities association written specifically for registered funding portals.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 3, 48 Stat. 882; Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Pub.L. 86-70, § 12(b), June 25, 1959, 73 Stat. 143; Pub.L. 86-624, § 7(b), July 12, 1960, 74 Stat. 412; Pub.L. 88-467, § 2, Aug. 20, 1964, 78 Stat. 565; Pub.L. 91-373, Title IV, § 401(b), Aug. 10, 1970, 84 Stat. 718; Pub.L. 91-547, § 28(a), (b), Dec. 14, 1970, 84 Stat. 1435; Pub.L. 91-567, § 6(b), Dec. 22, 1970, 84 Stat. 1499; Pub.L. 94-29, § 3, June 4, 1975, 89 Stat. 97; Pub.L. 95-283, § 16, May 21, 1978, 92 Stat. 274; Pub.L. 96-477, Title VII, § 702, Oct. 21, 1980, 94 Stat. 2295; Pub.L. 97-303, § 2, Oct. 13, 1982, 96 Stat. 1409; Pub.L. 98-376, § 6(a), Aug. 10, 1984, 98 Stat. 1265; Pub.L. 98-440, Title I, § 101, Oct. 3, 1984, 98 Stat. 1689; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-571, Title I, § 102(a) to (d), Oct. 28, 1986, 100 Stat. 3214 to 3216; Pub.L. 100-181, Title III, §§ 301 to 306, Dec. 4, 1987, 101 Stat. 1253, 1254; Pub.L. 100-704, § 6(a), Nov. 19, 1988, 102 Stat. 4681; Pub.L. 101-73, Title VII, § 744(u)(1), Aug. 9, 1989, 103 Stat. 441; Pub.L. 101-429, Title V, § 503, Oct. 15, 1990, 104 Stat. 952; Pub.L. 101-550, Title II, §§ 203(b), 204, Nov. 15, 1990, 104 Stat. 2717, 2718; Pub.L. 103-202, Title I, §§ 106(b)(2)(A), 109(a), Dec. 17, 1993, 107 Stat. 2350, 2352; Pub.L. 103-325, Title II, § 202, Title III, § 347(a), Sept. 23, 1994, 108 Stat. 2198, 2241; Pub.L. 104-62, § 4(a), (b), Dec. 8, 1995, 109 Stat. 684; Pub.L. 104-290, Title I, § 106(b), Title V, § 508(c), Oct. 11, 1996, 110 Stat. 3425, 3447; Pub.L. 105-353, Title III, § 301(b)(1) to (4), Nov. 3, 1998, 112 Stat. 3235; Pub.L. 106-102, Title II, §§ 201, 202, 207, 208, 221(b), 231(b)(1), Nov. 12, 1999, 113 Stat. 1385, 1390, 1394, 1395, 1401, 1406; Pub.L. 106-554, § 1(a)(5) [Title II, § 201], Dec. 21, 2000, 114 Stat. 2763, 2763A-413; Pub.L. 107-204, § 2(b), Title II, § 205(a), Title VI, § 604(c)(1)(A), July 30, 2002, 116 Stat. 749, 773, 796; Pub.L. 108-359, § 1(c)(1), Oct. 25, 2004, 118 Stat. 1666; Pub.L. 108-386, § 8(f)(1) to (3), Oct. 30, 2004, 118 Stat. 2232; Pub.L. 108-447, Div. H, Title V, § 520(1), Dec. 8, 2004, 118 Stat. 3267; Pub.L. 109-291, § 3(a), Sept. 29, 2006, 120 Stat. 1328; Pub.L. 109-351, Title I, § 101(a)(1), Title IV, § 401(a)(1), (2), Oct. 13, 2006, 120 Stat. 1968, 1971, 1972; Pub.L. 111-203, Title III, § 376(1), Title VII, § 761(a), Title IX, §§ 932(b), 939(e), 941(a), 944(b), 985(b)(2), 986(a)(1), July 21, 2010, 124 Stat. 1566, 1754, 1883, 1886, 1890, 1898, 1933, 1935; Pub.L. 112-106, Title I, § 101(b), Title III, § 304(a)(1), (b), Apr. 5, 2012, 126 Stat. 307, 321, 322.)

Footnotes

1 So in original. Probably should be followed by a comma.
2 So in original. The "; and" probably should be a comma.
3 So in original. Probably should be followed by "and".
4 So in original. The semicolon probably should be a colon.
5 So in original. Probably should be "(G), or (H)".
6 So in original. Probably should be "evidenced".
7 So in original. Two pars. (80) have been enacted.

15 U.S.C.A. § 78c, 15 USCA § 78c
Current through PL 117-55.

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78*o*

§ 78*o*. Registration and regulation of brokers and dealers

Effective: December 4, 2015
Currentness

(a)Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b)Manner of registration of brokers and dealers

(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall--

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to

ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The order granting registration shall not be effective until such broker or dealer has become a member of a registered securities association, or until such broker or dealer has become a member of a national securities exchange, if such broker or dealer effects transactions solely on that exchange, unless the Commission has exempted such broker or dealer, by rule or order, from such membership. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this subsection.

(2)(A) An application for registration of a broker or dealer to be formed or organized may be made by a broker or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application, in such form as the Commission, by rule, may prescribe, shall contain such information and documents concerning the applicant, the successor, and any persons associated with the applicant or the successor, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The grant or denial of registration to such an applicant shall be in accordance with the procedures set forth in paragraph (1) of this subsection. If the Commission grants such registration, the registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt the application for registration as its own.

(B) Any person who is a broker or dealer solely by reason of acting as a municipal securities dealer or municipal securities broker, who so acts through a separately identifiable department or division, and who so acted in such a manner on June 4, 1975, may, in accordance with such terms and conditions as the Commission, by rule, prescribes as necessary and appropriate in the public interest and for the protection of investors, register such separately identifiable department or division in accordance with this subsection. If any such department or division is so registered, the department or division and not such person himself shall be the broker or dealer for purposes of this chapter.

(C) Within six months of the date of the granting of registration to a broker or dealer, the Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange of which such broker or dealer is a member, shall conduct an inspection of the broker or dealer to determine whether it is operating in conformity with the provisions of this chapter and the rules and regulations thereunder: *Provided, however*, That the Commission may delay such inspection of any class of brokers or dealers for a period not to exceed six months.

(3) Any provision of this chapter (other than section 78e of this title and subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered broker or dealer or any person acting on behalf of such a broker or dealer, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated--

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds--

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer municipal advisor,, [1] government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act (7 U.S.C. 1 et seq.) or any substantially equivalent foreign statute or regulation;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18 or a violation of a substantially equivalent foreign statute.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer municipal advisor,, [1] government securities broker, government securities dealer, security-based swap dealer, major security-based swap participant, transfer agent, nationally recognized statistical rating organization, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if--

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to any order of the Commission barring or suspending the right of the person to be associated with a broker, dealer, security-based swap dealer, or a major security-based swap participant;

(G) has been found by a foreign financial regulatory authority to have--

(i) made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(ii) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade;

(iii) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision; or

(H) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that--

(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(5) Pending final determination whether any registration under this subsection shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer.

(6)(A) With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person--

(i) has committed or omitted any act, or is subject to an order or finding, enumerated in subparagraph (A), (D), (E), (H), or (G) of paragraph (4) of this subsection;

(ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph; or

(iii) is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4).

(B) It shall be unlawful--

(i) for any person as to whom an order under subparagraph (A) is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order, or to participate in an offering of penny stock in contravention of such order;

(ii) for any broker or dealer to permit such a person, without the consent of the Commission, to become or remain, a person associated with the broker or dealer in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order; or

(iii) for any broker or dealer to permit such a person, without the consent of the Commission, to participate in an offering of penny stock in contravention of such order, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order and of such participation.

(C) For purposes of this paragraph, the term "person participating in an offering of penny stock" includes any person acting as any promoter, finder, consultant, agent, or other person who engages in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from such term.

(7) No registered broker or dealer or government securities broker or government securities dealer registered (or required to register) under section 78*o*-5(a)(1)(A) of this title shall effect any transaction in, or induce the purchase or sale of, any security unless such broker or dealer meets such standards of operational capability and such broker or dealer and all natural persons associated with such broker or dealer meet such standards of training, experience, competence, and such other qualifications as the Commission finds necessary or appropriate in the public interest or for the protection of investors. The Commission shall establish such standards by rules and regulations, which may--

(A) specify that all or any portion of such standards shall be applicable to any class of brokers and dealers and persons associated with brokers and dealers;

(B) require persons in any such class to pass tests prescribed in accordance with such rules and regulations, which tests shall, with respect to any class of partners, officers, or supervisory employees (which latter term may be defined by the Commission's rules and regulations and as so defined shall include branch managers of brokers or dealers) engaged in the management of the broker or dealer, include questions relating to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matters; and

(C) provide that persons in any such class other than brokers and dealers and partners, officers, and supervisory employees of brokers or dealers, may be qualified solely on the basis of compliance with such standards of training and such other qualifications as the Commission finds appropriate.

The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this paragraph, including, but not limited to, fees for any test administered by it or under its direction. The Commission may cooperate with registered securities associations and national securities exchanges in devising and administering tests and may require registered brokers and dealers and persons associated with such brokers and dealers to pass tests administered by or on behalf of any such association or exchange and to pay such association or exchange reasonable fees or charges to defray the costs incurred by such association or exchange in administering such tests.

(8) It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than or[2] commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78*o*-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member.

(9) The Commission by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (8) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(10) For the purposes of determining whether a person is subject to a statutory disqualification under section 78f(c)(2), 78*o*-3(g)(2), or 78q-1(b)(4)(A) of this title, the term "Commission" in paragraph (4)(B) of this subsection shall mean "exchange", "association", or "clearing agency", respectively.

(11)Broker/dealer registration with respect to transactions in security futures products

(A)Notice registration

(i)Contents of notice

Notwithstanding paragraphs (1) and (2), a broker or dealer required to register only because it effects transactions in security futures products on an exchange registered pursuant to section 78f(g) of this title may register for purposes of this section by filing with the Commission a written notice in such form and containing such information concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. A broker or dealer may not register under this paragraph unless that broker or dealer is a member of a national securities association registered under section 78*o*-3(k) of this title.

(ii)Immediate effectiveness

Such registration shall be effective contemporaneously with the submission of notice, in written or electronic form, to the Commission, except that such registration shall not be effective if the registration would be subject to suspension or revocation under paragraph (4).

(iii)Suspension

Such registration shall be suspended immediately if a national securities association registered pursuant to section 78*o*-3(k) of this title suspends the membership of that broker or dealer.

(iv)Termination

Such registration shall be terminated immediately if any of the above stated conditions for registration set forth in this paragraph are no longer satisfied.

(B)Exemptions for registered brokers and dealers

A broker or dealer registered pursuant to the requirements of subparagraph (A) shall be exempt from the following provisions of this chapter and the rules thereunder with respect to transactions in security futures products:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3) and (c)(5) of this section.

(iv) Section 78*o*-4 of this title.

(v) Section 78*o*-5 of this title.

(vi) Subsections (d), (e), (f), (g), (h), and (i) of section 78q of this title.

(12)Exemption for security futures product exchange members

(A)Registration exemption

A natural person shall be exempt from the registration requirements of this section if such person--

(i) is a member of a designated contract market registered with the Commission as an exchange pursuant to section 78f(g) of this title;

(ii) effects transactions only in securities on the exchange of which such person is a member; and

(iii) does not directly accept or solicit orders from public customers or provide advice to public customers in connection with the trading of security futures products.

(B)Other exemptions

A natural person exempt from registration pursuant to subparagraph (A) shall also be exempt from the following provisions of this chapter and the rules thereunder:

(i) Section 78h of this title.

(ii) Section 78k of this title.

(iii) Subsections (c)(3), (c)(5), and (e) of this section.

(iv) Section 78*o*-4 of this title.

(v) Section 78*o*-5 of this title.

(vi) Subsections (d), (e), (f), (g), (h), and (i) of section 78q of this title.

(c)Use of manipulative or deceptive devices; contravention of rules and regulations

(1)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), or any security-based swap agreement by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security or any security-based swap agreement involving a municipal security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or to attempt to induce the purchase or sale of, any government security or any security-based swap agreement involving a government security by means of any manipulative, deceptive, or other fraudulent device or contrivance.

(2)(A) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(B) No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such broker, dealer, or municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(C) No government securities broker or government securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or induce or attempt to induce the purchase or sale of, any government security in connection with which such government securities broker or government securities dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation.

(D) The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

(E) The Commission shall, prior to adopting any rule or regulation under subparagraph (C), consult with and consider the views of the Secretary of the Treasury and each appropriate regulatory agency. If the Secretary of the Treasury or any appropriate regulatory agency comments in writing on a proposed rule or regulation of the Commission under such subparagraph (C) that has been published for comment, the Commission shall respond in writing to such written comment before adopting the proposed

rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule or regulation, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule or regulation, find that such rule or regulation is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(3)(A) No broker or dealer (other than a government securities broker or government securities dealer, except a registered broker or dealer) shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security (except a government security) or commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers including, but not limited to, the acceptance of custody and use of customers' securities and the carrying and use of customers' deposits or credit balances. Such rules and regulations shall (A) require the maintenance of reserves with respect to customers' deposits or credit balances, and (B) no later than September 1, 1975, establish minimum financial responsibility requirements for all brokers and dealers.

(B) Consistent with this chapter, the Commission, in consultation with the Commodity Futures Trading Commission, shall issue such rules, regulations, or orders as are necessary to avoid duplicative or conflicting regulations applicable to any broker or dealer registered with the Commission pursuant to subsection (b) (except paragraph (11) thereof), that is also registered with the Commodity Futures Trading Commission pursuant to section 4f(a) of the Commodity Exchange Act (except paragraph (2) thereof), with respect to the application of: (i) the provisions of section 78h of this title, subsection (c)(3), and section 78q of this title and the rules and regulations thereunder related to the treatment of customer funds, securities, or property, maintenance of books and records, financial reporting, or other financial responsibility rules, involving security futures products; and (ii) similar provisions of the Commodity Exchange Act and rules and regulations thereunder involving security futures products.

(C) Notwithstanding any provision of sections 2(a)(1)(C)(i) or 4d(a)(2) of the Commodity Exchange Act and the rules and regulations thereunder, and pursuant to an exemption granted by the Commission under section 78mm of this title or pursuant to a rule or regulation, cash and securities may be held by a broker or dealer registered pursuant to subsection (b)(1) and also registered as a futures commission merchant pursuant to section 4f(a)(1) of the Commodity Exchange Act, in a portfolio margining account carried as a futures account subject to section 4d of the Commodity Exchange Act and the rules and regulations thereunder, pursuant to a portfolio margining program approved by the Commodity Futures Trading Commission, and subject to subchapter IV of chapter 7 of Title 11 and the rules and regulations thereunder. The Commission shall consult with the Commodity Futures Trading Commission to adopt rules to ensure that such transactions and accounts are subject to comparable requirements to the extent practicable for similar products.

(4) If the Commission finds, after notice and opportunity for a hearing, that any person subject to the provisions of section 78*l*, 78m, 78n of this title, or subsection (d) or any rule or regulation thereunder has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person, and any person who was a cause of the failure to comply due to an act or omission the person knew or should have known would contribute to the failure to comply, to comply, or to take steps to effect compliance, with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

(5) No dealer (other than a specialist registered on a national securities exchange) acting in the capacity of market maker or otherwise shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or a municipal security) in contravention of such specified and appropriate standards with respect to dealing as the Commission, by rule, shall prescribe

as necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to remove impediments to and perfect the mechanism of a national market system. Under the rules of the Commission a dealer in a security may be prohibited from acting as a broker in that security.

(6) No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security, municipal security, commercial paper, bankers' acceptances, or commercial bills) in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors or to perfect or remove impediments to a national system for the prompt and accurate clearance and settlement of securities transactions, with respect to the time and method of, and the form and format of documents used in connection with, making settlements of and payments for transactions in securities, making transfers and deliveries of securities, and closing accounts. Nothing in this paragraph shall be construed (A) to affect the authority of the Board of Governors of the Federal Reserve System, pursuant to section 78g of this title, to prescribe rules and regulations for the purpose of preventing the excessive use of credit for the purchase or carrying of securities, or (B) to authorize the Commission to prescribe rules or regulations for such purpose.

(7) In connection with any bid for or purchase of a government security related to an offering of government securities by or on behalf of an issuer, no government securities broker, government securities dealer, or bidder for or purchaser of securities in such offering shall knowingly or willfully make any false or misleading written statement or omit any fact necessary to make any written statement made not misleading.

(8) Prohibition of referral fees

No broker or dealer, or person associated with a broker or dealer, may solicit or accept, directly or indirectly, remuneration for assisting an attorney in obtaining the representation of any person in any private action arising under this chapter or under the Securities Act of 1933.

(d)Supplementary and periodic information

(1)In general

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78*l* of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78*l* of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than 300 persons, or, in the case of a bank, a savings and loan holding company (as defined in section 1467a of Title 12), or a bank holding company, as such term is defined in section 1841 of Title 12, 1,200 persons persons [3] . For the purposes of this subsection, the term “class” shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term “held of record” as it deems necessary or appropriate in

the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

(2)Asset-backed securities

(A)Suspension of duty to file

The Commission may, by rule or regulation, provide for the suspension or termination of the duty to file under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(B)Classification of issuers

The Commission may, for purposes of this subsection, classify issuers and prescribe requirements appropriate for each class of issuers of asset-backed securities.

(e)Notices to customers regarding securities lending

Every registered broker or dealer shall provide notice to its customers that they may elect not to allow their fully paid securities to be used in connection with short sales. If a broker or dealer uses a customer's securities in connection with short sales, the broker or dealer shall provide notice to its customer that the broker or dealer may receive compensation in connection with lending the customer's securities. The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors, may prescribe the form, content, time, and manner of delivery of any notice required under this paragraph.

(f)Compliance with this chapter by members not required to be registered

The Commission, by rule, as it deems necessary or appropriate in the public interest and for the protection of investors or to assure equal regulation, may require any member of a national securities exchange not required to register under this section and any person associated with any such member to comply with any provision of this chapter (other than subsection (a)) or the rules or regulations thereunder which by its terms regulates or prohibits any act, practice, or course of business by a “broker or dealer” or “registered broker or dealer” or a “person associated with a broker or dealer,” respectively.

(g)Prevention of misuse of material, nonpublic information

Every registered broker or dealer shall establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse in violation of this chapter, or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, shall adopt rules or regulations to require specific policies or procedures reasonably designed to prevent misuse in violation of this chapter (or the rules or regulations thereunder) of material, nonpublic information.

(h)Requirements for transactions in penny stocks

(1)In general

No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any penny stock by any customer except in accordance with the requirements of this subsection and the rules and regulations prescribed under this subsection.

(2)Risk disclosure with respect to penny stocks

Prior to effecting any transaction in any penny stock, a broker or dealer shall give the customer a risk disclosure document that--

(A) contains a description of the nature and level of risk in the market for penny stocks in both public offerings and secondary trading;

(B) contains a description of the broker's or dealer's duties to the customer and of the rights and remedies available to the customer with respect to violations of such duties or other requirements of Federal securities laws;

(C) contains a brief, clear, narrative description of a dealer market, including "bid" and "ask" prices for penny stocks and the significance of the spread between the bid and ask prices;

(D) contains the toll free telephone number for inquiries on disciplinary actions established pursuant to section 78*o*-3(i) of this title;

(E) defines significant terms used in the disclosure document or in the conduct of trading in penny stocks; and

(F) contains such other information, and is in such form (including language, type size, and format), as the Commission shall require by rule or regulation.

(3)Commission rules relating to disclosure

The Commission shall adopt rules setting forth additional standards for the disclosure by brokers and dealers to customers of information concerning transactions in penny stocks. Such rules--

(A) shall require brokers and dealers to disclose to each customer, prior to effecting any transaction in, and at the time of confirming any transaction with respect to any penny stock, in accordance with such procedures and methods as the Commission may require consistent with the public interest and the protection of investors--

(i) the bid and ask prices for penny stock, or such other information as the Commission may, by rule, require to provide customers with more useful and reliable information relating to the price of such stock;

(ii) the number of shares to which such bid and ask prices apply, or other comparable information relating to the depth and liquidity of the market for such stock; and

(iii) the amount and a description of any compensation that the broker or dealer and the associated person thereof will receive or has received in connection with such transaction;

(B) shall require brokers and dealers to provide, to each customer whose account with the broker or dealer contains penny stocks, a monthly statement indicating the market value of the penny stocks in that account or indicating that the market value of such stock cannot be determined because of the unavailability of firm quotes; and

(C) may, as the Commission finds necessary or appropriate in the public interest or for the protection of investors, require brokers and dealers to disclose to customers additional information concerning transactions in penny stocks.

(4)Exemptions

The Commission, as it determines consistent with the public interest and the protection of investors, may by rule, regulation, or order exempt in whole or in part, conditionally or unconditionally, any person or class of persons, or any transaction or class of transactions, from the requirements of this subsection. Such exemptions shall include an exemption for brokers and dealers based on the minimal percentage of the broker's or dealer's commissions, commission-equivalents, and markups received from transactions in penny stocks.

(5)Regulations

It shall be unlawful for any person to violate such rules and regulations as the Commission shall prescribe in the public interest or for the protection of investors or to maintain fair and orderly markets--

(A) as necessary or appropriate to carry out this subsection; or

(B) as reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices with respect to penny stocks.

(i)Limitations on State law

(1)Capital, margin, books and records, bonding, and reports

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof shall establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this chapter. The Commission shall consult periodically the securities commissions (or any agency or office performing like functions) of the States concerning the adequacy of such requirements as established under this chapter.

(2) Funding portals

(A) Limitation on State laws

Except as provided in subparagraph (B), no State or political subdivision thereof may enforce any law, rule, regulation, or other administrative action against a registered funding portal with respect to its business as such.

(B) Examination and enforcement authority

Subparagraph (A) does not apply with respect to the examination and enforcement of any law, rule, regulation, or administrative action of a State or political subdivision thereof in which the principal place of business of a registered funding portal is located, provided that such law, rule, regulation, or administrative action is not in addition to or different from the requirements for registered funding portals established by the Commission.

(C) Definition

For purposes of this paragraph, the term "State" includes the District of Columbia and the territories of the United States.

(3) De minimis transactions by associated persons

No law, rule, regulation, or order, or other administrative action of any State or political subdivision thereof may prohibit an associated person of a broker or dealer from effecting a transaction described in paragraph (3) for a customer in such State if--

(A) such associated person is not ineligible to register with such State for any reason other than such a transaction;

(B) such associated person is registered with a registered securities association and at least one State; and

(C) the broker or dealer with which such person is associated is registered with such State.

(4) Described transactions

(A)In general

A transaction is described in this paragraph if--

(i) such transaction is effected--

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) by an associated person of the broker or dealer--

(aa) to which the customer was assigned for 14 days prior to the day of the transaction; and

(bb) who is registered with a State in which the customer was a resident or was present for at least 30 consecutive days during the 1-year period prior to the day of the transaction; or

(ii) the transaction is effected--

(I) on behalf of a customer that, for 30 days prior to the day of the transaction, maintained an account with the broker or dealer; and

(II) during the period beginning on the date on which such associated person files an application for registration with the State in which the transaction is effected and ending on the earlier of--

(aa) 60 days after the date on which the application is filed; or

(bb) the date on which such State notifies the associated person that it has denied the application for registration or has stayed the pendency of the application for cause.

(B)Rules of construction

For purposes of subparagraph (A)(i)(II)--

(i) each of up to 3 associated persons of a broker or dealer who are designated to effect transactions during the absence or unavailability of the principal associated person for a customer may be treated as an associated person to which such customer is assigned; and

(ii) if the customer is present in another State for 30 or more consecutive days or has permanently changed his or her residence to another State, a transaction is not described in this paragraph, unless the associated person of the broker or dealer files an application for registration with such State not later than 10 business days after the later of the date of the transaction, or the date of the discovery of the presence of the customer in the other State for 30 or more consecutive days or the change in the customer's residence.

(j) [4] **Rulemaking to extend requirements to new hybrid products**

(1)Consultation

Prior to commencing a rulemaking under this subsection, the Commission shall consult with and seek the concurrence of the Board concerning the imposition of broker or dealer registration requirements with respect to any new hybrid product. In

developing and promulgating rules under this subsection, the Commission shall consider the views of the Board, including views with respect to the nature of the new hybrid product; the history, purpose, extent, and appropriateness of the regulation of the new product under the Federal banking laws; and the impact of the proposed rule on the banking industry.

(2)Limitation

The Commission shall not--

(A) require a bank to register as a broker or dealer under this section because the bank engages in any transaction in, or buys or sells, a new hybrid product; or

(B) bring an action against a bank for a failure to comply with a requirement described in subparagraph (A),

unless the Commission has imposed such requirement by rule or regulation issued in accordance with this section.

(3)Criteria for rulemaking

The Commission shall not impose a requirement under paragraph (2) of this subsection with respect to any new hybrid product unless the Commission determines that--

(A) the new hybrid product is a security; and

(B) imposing such requirement is necessary and appropriate in the public interest and for the protection of investors.

(4)Considerations

In making a determination under paragraph (3), the Commission shall consider--

(A) the nature of the new hybrid product; and

(B) the history, purpose, extent, and appropriateness of the regulation of the new hybrid product under the Federal securities laws and under the Federal banking laws.

(5)Objection to Commission regulation

(A)Filing of petition for review

The Board may obtain review of any final regulation described in paragraph (2) in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, not later than 60 days after the date of publication of the final regulation, a written petition requesting that the regulation be set aside. Any proceeding to challenge any such rule shall be expedited by the Court of Appeals.

(B)Transmittal of petition and record

A copy of a petition described in subparagraph (A) shall be transmitted as soon as possible by the Clerk of the Court to an officer or employee of the Commission designated for that purpose. Upon receipt of the petition, the Commission shall file with the court the regulation under review and any documents referred to therein, and any other relevant materials prescribed by the court.

(C)Exclusive jurisdiction

On the date of the filing of the petition under subparagraph (A), the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in subparagraph (B), to affirm and enforce or to set aside the regulation at issue.

(D)Standard of review

The court shall determine to affirm and enforce or set aside a regulation of the Commission under this subsection, based on the determination of the court as to whether--

(i) the subject product is a new hybrid product, as defined in this subsection;

(ii) the subject product is a security; and

(iii) imposing a requirement to register as a broker or dealer for banks engaging in transactions in such product is appropriate in light of the history, purpose, and extent of regulation under the Federal securities laws and under the Federal banking laws, giving deference neither to the views of the Commission nor the Board.

(E)Judicial stay

The filing of a petition by the Board pursuant to subparagraph (A) shall operate as a judicial stay, until the date on which the determination of the court is final (including any appeal of such determination).

(F)Other authority to challenge

Any aggrieved party may seek judicial review of the Commission's rulemaking under this subsection pursuant to section 78y of this title.

(6)Definitions

For purposes of this subsection:

(A)New hybrid product

The term "new hybrid product" means a product that--

(i) was not subjected to regulation by the Commission as a security prior to the date of the enactment of the Gramm-Leach-Bliley Act;

(ii) is not an identified banking product as such term is defined in section 206 of such Act; and

(iii) is not an equity swap within the meaning of section 206(a)(6) of such Act.

(B)Board

The term "Board" means the Board of Governors of the Federal Reserve System.

(j) [4] **Limitation on Commission authority**

The authority of the Commission under this section with respect to security-based swap agreements shall be subject to the restrictions and limitations of section 78c-1(b) of this title.

(k) [5] **Registration or succession to a United States broker or dealer**

In determining whether to permit a foreign person or an affiliate of a foreign person to register as a United States broker or dealer, or succeed to the registration of a United States broker or dealer, the Commission may consider whether, for a foreign person, or an affiliate of a foreign person that presents a risk to the stability of the United States financial system, the home country of the foreign person has adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(l) [6] **Termination of a United States broker or dealer**

For a foreign person or an affiliate of a foreign person that presents such a risk to the stability of the United States financial system, the Commission may determine to terminate the registration of such foreign person or an affiliate of such foreign person as a broker or dealer in the United States, if the Commission determines that the home country of the foreign person has not adopted, or made demonstrable progress toward adopting, an appropriate system of financial regulation to mitigate such risk.

(k) [7] **Standard of conduct**

(1)In general

Notwithstanding any other provision of this chapter or the Investment Advisers Act of 1940, the Commission may promulgate rules to provide that, with respect to a broker or dealer, when providing personalized investment advice about securities to a retail customer (and such other customers as the Commission may by rule provide), the standard of conduct for such broker or dealer with respect to such customer shall be the same as the standard of conduct applicable to an investment adviser under section 211 of the Investment Advisers Act of 1940. The receipt of compensation based on commission or other standard

compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer. Nothing in this section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.

(2)Disclosure of range of products offered

Where a broker or dealer sells only proprietary or other limited range of products, as determined by the Commission, the Commission may by rule require that such broker or dealer provide notice to each retail customer and obtain the consent or acknowledgment of the customer. The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).

(l) [8] **Other matters**

The Commission shall--

(1) facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.

(m)Harmonization of enforcement

The enforcement authority of the Commission with respect to violations of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer shall include--

(1) the enforcement authority of the Commission with respect to such violations provided under this chapter; and

(2) the enforcement authority of the Commission with respect to violations of the standard of conduct applicable to an investment adviser under the Investment Advisers Act of 1940, including the authority to impose sanctions for such violations, and

the Commission shall seek to prosecute and sanction violators of the standard of conduct applicable to a broker or dealer providing personalized investment advice about securities to a retail customer under this chapter to [9] same extent as the Commission prosecutes and sanctions violators of the standard of conduct applicable to an investment advisor under the Investment Advisers Act of 1940.

(n)Disclosures to retail investors

(1)In general

Notwithstanding any other provision of the securities laws, the Commission may issue rules designating documents or information that shall be provided by a broker or dealer to a retail investor before the purchase of an investment product or service by the retail investor.

(2)Considerations

In developing any rules under paragraph (1), the Commission shall consider whether the rules will promote investor protection, efficiency, competition, and capital formation.

(3)Form and contents of documents and information

Any documents or information designated under a rule promulgated under paragraph (1) shall--

(A) be in a summary format; and

(B) contain clear and concise information about--

(i) investment objectives, strategies, costs, and risks; and

(ii) any compensation or other financial incentive received by a broker, dealer, or other intermediary in connection with the purchase of retail investment products.

(o)Authority to restrict mandatory pre-dispute arbitration

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 15, 48 Stat. 895; May 27, 1936, c. 462, § 3, 49 Stat. 1377; June 25, 1938, c. 677, § 2, 52 Stat. 1075; Pub.L. 88-467, § 6, Aug. 20, 1964, 78 Stat. 570; Pub.L. 91-598, § 11(d), formerly § 7(d), Dec. 30, 1970, 84 Stat. 1653, renumbered § 11(d), Pub.L. 95-283, § 9, May 21, 1978, 92 Stat. 260; Pub.L. 94-29, § 11, June 4, 1975, 89 Stat. 121; Pub.L. 95-213, Title II, § 204, Dec. 19, 1977, 91 Stat. 1500; Pub.L. 98-38, § 3(a), June 6, 1983, 97 Stat. 206; Pub.L. 98-376, §§ 4, 6(b), Aug. 10, 1984, 98 Stat. 1265; Pub.L. 99-571, Title I, § 102(e), (f), Oct. 28, 1986, 100 Stat. 3218; Pub.L. 100-181, Title III, § 317, Dec. 4, 1987, 101 Stat. 1256; Pub.L. 100-704, § 3(b)(1), Nov. 19, 1988, 102 Stat. 4679; Pub.L. 101-429, Title V, §§ 504(a), 505, Oct. 15, 1990, 104 Stat. 952, 953; Pub.L. 101-550, Title II, § 203(a), (c)(1), Nov. 15, 1990, 104 Stat. 2715, 2718; Pub.L. 103-202, Title I, §§ 105, 106(b)(2)(B), 109(b)(2), 110, Dec. 17, 1993, 107 Stat. 2348, 2350, 2353; Pub.L. 104-67, Title I, § 103(a), Dec. 22, 1995, 109 Stat. 756; Pub.L. 104-290, Title I, § 103(a), Oct. 11, 1996, 110 Stat. 3420; Pub.L. 105-353, Title III, § 301(b)(8), Nov. 3, 1998, 112 Stat. 3236; Pub.L. 106-102, Title II, § 205, Nov. 12, 1999, 113 Stat. 1391; Pub.L. 106-554, § 1(a)(5) [Title II, §§ 203(a)(1), (b), 206(h), Title III, § 303(e), (f)], Dec. 21, 2000, 114 Stat. 2763, 2763A-421, 2763A-422, 2763A-432, 2763A-454, 2763A-455; Pub.L. 107-204, Title VI, § 604(a), (c)(1)(B), July 30, 2002, 116 Stat. 795, 796; Pub.L. 109-291, § 4(b)(1)(A), Sept. 29, 2006, 120 Stat. 1337; Pub.L. 111-203, Title I, § 173(c), Title VII, §§ 713(a), 762(d)(4), 766(d), Title IX, §§

913(g)(1), (h)(1), 919, 921(a), 925(a)(1), 929L(3), 929X(c), 942(a), 975(g), 985(b)(5)(A), July 21, 2010, 124 Stat. 1440, 1646, 1761, 1799, 1828, 1829, 1837, 1841, 1850, 1861, 1870, 1896, 1923, 1933; Pub.L. 112-106, Title III, § 305(d)(1), Title VI, § 601(b), Apr. 5, 2012, 126 Stat. 323, 326; Pub.L. 114-94, Div. G, Title LXXXV, § 85001(2), Dec. 4, 2015, 129 Stat. 1797.)

Footnotes

1 So in original. Duplicate comma probably should follow "municipal securities dealer".
2 So in original. The word "or" probably should not appear.
3 So in original. The second "persons" probably should not appear.
4 So in original. Two subsecs. (j) have been enacted.
5 Another subsec. (k) is set out after the first subsec. (l).
6 Another subsec. (l) is set out after the second subsec. (k).
7 Another subsec. (k) is set out after the second subsec. (j).
8 Another subsec. (l) is set out after the first subsec. (k).
9 So in original. Probably should be followed by "the".

15 U.S.C.A. § 78***o***, 15 USCA § 78o
Current through PL 117-55.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2D. Investment Companies and Advisers
Subchapter II. Investment Advisers (Refs & Annos)

15 U.S.C.A. § 80b-2

§ 80b-2. Definitions

Currentness

(a) In general

When used in this subchapter, unless the context otherwise requires, the following definitions shall apply:

(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract shall be deemed to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(2) "Bank" means (A) a banking institution organized under the laws of the United States or a Federal savings association, as defined in section 1462(5) of Title 12, (B) a member bank of the Federal Reserve System, (C) any other banking institution, savings association, as defined in section 1462(4) of Title 12, or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks or savings associations, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(3) The term "broker" has the same meaning as given in section 3 of the Securities Act of 1934.

(4) "Commission" means the Securities and Exchange Commission.

(5) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under Title 11, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such.

(6) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendere, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(7) The term "dealer" has the same meaning as given in section 3 of the Securities Act of 1934, but does not include an insurance company or investment company.

(8) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(9) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(10) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company, except that the term "investment adviser" includes any bank or bank holding company to the extent that such bank or bank holding company serves or acts as an investment adviser to a registered investment company, but if, in the case of a bank, such services or actions are performed through a separately identifiable department or division, the department or division, and not the bank itself, shall be deemed to be the investment adviser; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; (F) any nationally recognized statistical rating organization, as that term is defined in section 3(a)(62) of the Securities Exchange Act of 1934, unless such organization engages in issuing recommendations as to purchasing, selling, or holding securities or in managing assets, consisting in whole or in part of securities, on behalf of others;;[1] (G) any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this subchapter; or (H) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

(12) "Investment company", affiliated person, and "insurance company" have the same meanings as in the Investment Company Act of 1940. "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

(13) "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.

(14) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(15) "National securities exchange" means an exchange registered under section 6 of the Securities Exchange Act of 1934.

(16) "Person" means a natural person or a company.

(17) The term "person associated with an investment adviser" means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that for the purposes of section 80b-3 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may by rules and regulations classify, for the purposes of any portion or portions of this subchapter, persons, including employees controlled by an investment adviser.

(18) "Security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing.

(19) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(20) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(21) "Securities Act of 1933", "Securities Exchange Act of 1934", and "Trust Indenture Act of 1939", mean those Acts, respectively, as heretofore or hereafter amended.

(22) "Business development company" means any company which is a business development company as defined in section 80a-2(a)(48) of this title and which complies with section 80a-54 of this title, except that--

(A) the 70 per centum of the value of the total assets condition referred to in sections 80a-2(a)(48) and 80a-54 of this title shall be 60 per centum for purposes of determining compliance therewith;

(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 80a-54 through 80a-64 of this title; and

(C) the securities which may be purchased pursuant to section 80a-54(a) of this title may be purchased from any person.

For purposes of this paragraph, all terms in sections 80a-2(a)(48) and 80a-54 of this title shall have the same meaning set forth in subchapter I as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 80a-54 through 80a-64 of this title shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities, and shall be determined no less frequently than annually.

(23) "Foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(24) "Foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(25) "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.

(26) The term "separately identifiable department or division" of a bank means a unit--

(A) that is under the direct supervision of an officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's investment adviser activities for one or more investment companies, including the supervision of all bank employees engaged in the performance of such activities; and

(B) for which all of the records relating to its investment adviser activities are separately maintained in or extractable from such unit's own facilities or the facilities of the bank, and such records are so maintained or otherwise accessible as to permit independent examination and enforcement by the Commission of this subchapter or the Investment Company Act of 1940 and rules and regulations promulgated under this subchapter or the Investment Company Act of 1940.

(27) The terms "security future" and "narrow-based security index" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934.

(28) The term "credit rating agency" has the same meaning as in section 3 of the Securities Exchange Act of 1934.

(29) [2] The term "private fund" means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), but for section 3(c)(1) or 3(c)(7) of that Act.

(30) The term "foreign private adviser" means any investment adviser who--

(A) has no place of business in the United States;

(B) has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser;

(C) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this subchapter; and

(D) neither--

(i) holds itself out generally to the public in the United States as an investment adviser; nor

(ii) acts as--

(I) an investment adviser to any investment company registered under the Investment Company Act of 1940; or

(II) a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53), and has not withdrawn its election.

(29) [3] The terms "commodity pool", "commodity pool operator", "commodity trading advisor", "major swap participant", "swap", "swap dealer", and "swap execution facility" have the same meanings as in section 1a of Title 7.

(b) Applicability to Federal or State government, agency, or instrumentality, or to officers, agents, or employees thereof

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(c) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

CREDIT(S)

(Aug. 22, 1940, c. 686, Title II, § 202, 54 Stat. 847; Pub.L. 86-70, § 12(c), June 25, 1959, 73 Stat. 143; Pub.L. 86-624, § 7(d), July 12, 1960, 74 Stat. 412; Pub.L. 86-750, § 1, Sept. 13, 1960, 74 Stat. 885; Pub.L. 89-485, § 13(j), July 1, 1966, 80 Stat. 243; Pub.L. 91-547, § 23, Dec. 14, 1970, 84 Stat. 1430; Pub.L. 95-598, Title III, § 311, Nov. 6, 1978, 92 Stat. 2676; Pub.L. 96-477, Title II, § 201, Oct. 21, 1980, 94 Stat. 2289; Pub.L. 97-303, § 6, Oct. 13, 1982, 96 Stat. 1410; Pub.L. 100-181, Title VII, § 701, Dec. 4, 1987, 101 Stat. 1263; Pub.L. 101-550, Title II, § 206(b), Nov. 15, 1990, 104 Stat. 2720; Pub.L. 104-290, Title III, § 303(c), Oct. 11, 1996, 110 Stat. 3438; Pub.L. 106-102, Title II, §§ 217 to 219, 224, Nov. 12, 1999, 113 Stat. 1399, 1400, 1402; Pub.L. 106-554, § 1(a)(5) [Title II, § 209(a)(2), (4)], Dec. 21, 2000, 114 Stat. 2763, 2763A-435, 2763A-436; Pub.L. 109-291, § 4(b)(3)(A), (B), Sept. 29, 2006, 120 Stat. 1337; Pub.L. 109-351, Title IV, § 401(b)(1), Oct. 13, 2006, 120 Stat. 1973; Pub.L. 111-203, Title IV, §§ 402(a), 409(a), Title VII, § 770, Title IX, § 986(d), July 21, 2010, 124 Stat. 1570, 1575, 1801, 1936.)

Footnotes

1 So in original.
2 So in original. Another par. (29) is set out after par. (30).
3 So in original. Another par. (29) is set out preceding par. (30).

15 U.S.C.A. § 80b-2, 15 USCA § 80b-2
Current through PL 117-55.

End of Document

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2D. Investment Companies and Advisers
Subchapter II. Investment Advisers (Refs & Annos)

15 U.S.C.A. § 80b-3

§ 80b-3. Registration of investment advisers

Effective: January 3, 2019
Currentness

(a) Necessity of registration

Except as provided in subsection (b) and section 80b-3a of this title, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) Investment advisers who need not be registered

The provisions of subsection (a) shall not apply to--

(1) any investment adviser, other than an investment adviser who acts as an investment adviser to any private fund, all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies;

(3) any investment adviser that is a foreign private adviser;

(4) any investment adviser that is a charitable organization, as defined in section 80a-3(c)(10)(D) of this title, or is a trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, whose advice, analyses, or reports are provided only to one or more of the following:

(A) any such charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 80a-3(c)(10)(B) of this title; or

(C) a trust or other donative instrument described in section 80a-3(c)(10)(B) of this title, or the trustees, administrators, settlors (or potential settlors), or beneficiaries of any such trust or other instrument;

(5) any plan described in section 414(e) of Title 26, any person or entity eligible to establish and maintain such a plan under Title 26, or any trustee, director, officer, or employee of or volunteer for any such plan or person, if such person or entity, acting in such capacity, provides investment advice exclusively to, or with respect to, any plan, person, or entity or any company, account, or fund that is excluded from the definition of an investment company under section 80a-3(c)(14) of this title;

(6)(A) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor whose business does not consist primarily of acting as an investment adviser, as defined in section 80b-2(a)(11) of this title, and that does not act as an investment adviser to--

(i) an investment company registered under subchapter I of this chapter; or

(ii) a company which has elected to be a business development company pursuant to section 80a-53 of this title and has not withdrawn its election; or

(B) any investment adviser that is registered with the Commodity Futures Trading Commission as a commodity trading advisor and advises a private fund, provided that, if after July 21, 2010, the business of the advisor should become predominately the provision of securities-related advice, then such adviser shall register with the Commission;

(7) any investment adviser, other than any entity that has elected to be regulated or is regulated as a business development company pursuant to section 80a-53 of this title, who solely advises--

(A) small business investment companies that are licensees under the Small Business Investment Act of 1958;

(B) entities that have received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company under the Small Business Investment Act of 1958, which notice or license has not been revoked; or

(C) applicants that are affiliated with 1 or more licensed small business investment companies described in subparagraph (A) and that have applied for another license under the Small Business Investment Act of 1958, which application remains pending; or

(8) any investment adviser, other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 80a-53 of this title, who solely advises--

(A) rural business investment companies (as defined in section 2009cc of Title 7); or

(B) companies that have submitted to the Secretary of Agriculture an application in accordance with section 2009cc-3(b) of Title 7 that--

(i) have received from the Secretary of Agriculture a letter of conditions, which has not been revoked; or

(ii) are affiliated with 1 or more rural business investment companies described in subparagraph (A).

(c) Procedure for registration; filing of application; effective date of registration; amendment of registration

(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal office, principal place of business, and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall--

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied and that the applicant is not prohibited from registering as an investment adviser under section 80b-3a of this title. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

(d) Other acts prohibited by subchapter

Any provision of this subchapter (other than subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce are used in connection therewith shall also prohibit any such act, practice, or course of business by any investment adviser registered pursuant to this section or any person acting on behalf of such an investment adviser, irrespective of any use of the mails or any means or instrumentality of interstate commerce in connection therewith.

(e) Censure, denial, or suspension of registration; notice and hearing

The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated--

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds--

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, government securities broker, government securities dealer, fiduciary, transfer agent, credit rating agency, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18, or a violation of [1] substantially equivalent foreign statute.

(3) has been convicted during the 10-year period preceding the date of filing of any application for registration, or at any time thereafter, of--

(A) any crime that is punishable by imprisonment for 1 or more years, and that is not described in paragraph (2); or

(B) a substantially equivalent crime by a foreign court of competent jurisdiction.

(4) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction, including any foreign court of competent jurisdiction, from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, credit rating agency, foreign person performing a function substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(5) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, the Commodity Exchange Act, or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(6) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, the Commodity Exchange Act, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph no person shall be deemed to have failed reasonably to supervise any person, if--

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(7) is subject to any order of the Commission barring or suspending the right of the person to be associated with an investment adviser;

(8) has been found by a foreign financial regulatory authority to have--

(A) made or caused to be made in any application for registration or report required to be filed with a foreign securities authority, or in any proceeding before a foreign securities authority with respect to registration, any statement that was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to a foreign securities authority any material fact that is required to be stated therein;

(B) violated any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade; or

(C) aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any foreign statute or regulation regarding transactions in securities or contracts of sale of a commodity for future delivery traded on or subject to the rules of a contract market or any board of trade, or has been found, by the foreign finanical[2] regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of statutory provisions, and rules and regulations promulgated thereunder, another person who commits such a violation, if such other person is subject to his supervision; or

(9) is subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 1813(q) of Title 12), or the National Credit Union Administration, that--

(A) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(B) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.

(f) Bar or suspension from association with investment adviser; notice and hearing

The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), (8), or (9) of subsection (e) or has been convicted of any offense specified in paragraph (2) or (3) of subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (4) of subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

(g) Registration of successor to business of investment adviser

Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (c) or subsection (e) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(h) Withdrawal of registration

Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from registering as an investment adviser under section 80b-3a of this title, the Commission shall by order cancel the registration of such person.

(i) Money penalties in administrative proceedings

(1) Authority of Commission

(A) In general

In any proceeding instituted pursuant to subsection (e) or (f) against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person--

(i) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, or this subchapter, or the rules or regulations thereunder;

(ii) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

(iii) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein; or

(iv) has failed reasonably to supervise, within the meaning of subsection (e)(6), with a view to preventing violations of the provisions of this subchapter and the rules and regulations thereunder, another person who commits such a violation, if such other person is subject to his supervision; [3]

(B) Cease-and-desist proceedings

In any proceeding instituted pursuant to subsection (k) against any person, the Commission may impose a civil penalty if the Commission finds, on the record, after notice and opportunity for hearing, that such person--

(i) is violating or has violated any provision of this subchapter, or any rule or regulation issued under this subchapter; or

(ii) is or was a cause of the violation of any provision of this subchapter, or any rule or regulation issued under this subchapter.

(2) Maximum amount of penalty

(A) First tier

The maximum amount of penalty for each act or omission described in paragraph (1) shall be $5,000 for a natural person or $50,000 for any other person.

(B) Second tier

Notwithstanding subparagraph (A), the maximum amount of penalty for each such act or omission shall be $50,000 for a natural person or $250,000 for any other person if the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the maximum amount of penalty for each such act or omission shall be $100,000 for a natural person or $500,000 for any other person if--

(i) the act or omission described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(ii) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(3) Determination of public interest

In considering under this section whether a penalty is in the public interest, the Commission may consider--

(A) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;

(B) the harm to other persons resulting either directly or indirectly from such act or omission;

(C) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;

(D) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in subsection (e)(2);

(E) the need to deter such person and other persons from committing such acts or omissions; and

(F) such other matters as justice may require.

(4) Evidence concerning ability to pay

In any proceeding in which the Commission may impose a penalty under this section, a respondent may present evidence of the respondent's ability to pay such penalty. The Commission may, in its discretion, consider such evidence in determining whether such penalty is in the public interest. Such evidence may relate to the extent of such person's ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets.

(j) Authority to enter order requiring accounting and disgorgement

In any proceeding in which the Commission may impose a penalty under this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(k) Cease-and-desist proceedings

(1) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this subchapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(2) Hearing

The notice instituting proceedings pursuant to paragraph (1) shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served.

(3) Temporary order

(A) In general

Whenever the Commission determines that the alleged violation or threatened violation specified in the notice instituting proceedings pursuant to paragraph (1), or the continuation thereof, is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest, including, but not limited to, losses to the Securities Investor Protection Corporation, prior to the completion of the proceedings, the Commission may enter a temporary order requiring the respondent to cease and desist from the violation or threatened violation and to take such action to prevent the violation or threatened violation and to prevent dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest as the Commission deems appropriate pending completion of such proceedings. Such an order shall be entered only after notice and opportunity for a hearing, unless the Commission, notwithstanding section 80b-11(c) of this title, determines that notice and hearing prior to entry would be impracticable or contrary to the public interest. A temporary order shall become effective upon service upon the respondent and, unless set aside, limited, or suspended by the Commission or a court of competent jurisdiction, shall remain effective and enforceable pending the completion of the proceedings.

(B) Applicability

This paragraph shall apply only to a respondent that acts, or, at the time of the alleged misconduct acted, as a broker, dealer, investment adviser, investment company, municipal securities dealer, government securities broker, government securities dealer, or transfer agent, or is, or was at the time of the alleged misconduct, an associated person of, or a person seeking to become associated with, any of the foregoing.

(4) Review of temporary orders

(A) Commission review

At any time after the respondent has been served with a temporary cease-and-desist order pursuant to paragraph (3), the respondent may apply to the Commission to have the order set aside, limited, or suspended. If the respondent has been served with a temporary cease-and-desist order entered without a prior Commission hearing, the respondent may, within 10 days after the date on which the order was served, request a hearing on such application and the Commission shall hold a hearing and render a decision on such application at the earliest possible time.

(B) Judicial review

Within--

(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or

(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,

the respondent may apply to the United States district court for the district in which the respondent resides or has its principal office or place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.

(C) No automatic stay of temporary order

The commencement of proceedings under subparagraph (B) of this paragraph shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(D) Exclusive review

Section 80b-13 of this title shall not apply to a temporary order entered pursuant to this section.

(5) Authority to enter order requiring accounting and disgorgement

In any cease-and-desist proceeding under paragraph (1), the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

(l) Exemption of venture capital fund advisers

(1) In general

No investment adviser that acts as an investment adviser solely to 1 or more venture capital funds shall be subject to the registration requirements of this subchapter with respect to the provision of investment advice relating to a venture capital fund. Not later than 1 year after July 21, 2010, the Commission shall issue final rules to define the term "venture capital fund" for purposes of this subsection. The Commission shall require such advisers to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

(2) Advisers of SBICS

For purposes of this subsection, a venture capital fund includes an entity described in subparagraph (A), (B), or (C) of subsection (b)(7) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 80a-53 of this title).

(3) Advisers of RBICS

For purposes of this subsection, a venture capital fund includes an entity described in subparagraph (A) or (B) of subsection (b)(8) (other than an entity that has elected to be regulated as a business development company pursuant to section 80a-53 of this title).

(m) Exemption of and reporting by certain private fund advisers

(1) In general

The Commission shall provide an exemption from the registration requirements under this section to any investment adviser of private funds, if each of[4] such investment adviser acts solely as an adviser to private funds and has assets under management in the United States of less than $150,000,000.

(2) Reporting

The Commission shall require investment advisers exempted by reason of this subsection to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.

(3) Advisers of SBICS

For purposes of this subsection, the assets under management of a private fund that is an entity described in subparagraph (A), (B), or (C) of subsection (b)(7) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 80a-53 of this title) shall be excluded from the limit set forth in paragraph (1).

(4) Advisers of RBICS

For purposes of this subsection, the assets under management of a private fund that is an entity described in subparagraph (A) or (B) of subsection (b)(8) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 80a-53 of this title) shall be excluded from the limit set forth in paragraph (1).

(n) Registration and examination of mid-sized private fund advisers

In prescribing regulations to carry out the requirements of this section with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.

CREDIT(S)

(Aug. 22, 1940, c. 686, Title II, § 203, 54 Stat. 850; Pub.L. 86-750, §§ 2 to 5, Sept. 13, 1960, 74 Stat. 885, 886; Pub.L. 91-547, § 24, Dec. 14, 1970, 84 Stat. 1430; Pub.L. 94-29, § 29(1) to (4), June 4, 1975, 89 Stat. 166 to 169; Pub.L. 96-477, Title II, § 202, Oct. 21, 1980, 94 Stat. 2290; Pub.L. 99-571, Title I, § 102(m), Oct. 28, 1986, 100 Stat. 3220; Pub.L. 100-181, Title VII, § 702, Dec. 4, 1987, 101 Stat. 1263; Pub.L. 101-429, Title IV, § 401, Oct. 15, 1990, 104 Stat. 946; Pub.L. 101-550, Title II, § 205(b), (c), Nov. 15, 1990, 104 Stat. 2719, 2720; Pub.L. 104-62, § 5, Dec. 8, 1995, 109 Stat. 685; Pub.L. 104-290, Title III, §§ 303(b), (d), 305, Title V, § 508(d), Oct. 11, 1996, 110 Stat. 3438, 3439, 3448; Pub.L. 105-353, Title III, § 301(d)(1), Nov. 3, 1998, 112 Stat. 3237; Pub.L. 106-554, § 1(a)(5) [Title II, § 209(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A-436; Pub.L. 107-204, Title VI, § 604(b), (c)(2), July 30, 2002, 116 Stat. 796; Pub.L. 109-291, § 4(b)(3)(C), Sept. 29, 2006, 120 Stat. 1337; Pub.L. 111-203, Title IV, §§ 403, 407, 408, Title IX, §§ 925(b), 929P(a)(4), 985(e)(1), July 21, 2010, 124 Stat. 1571, 1574, 1575, 1851, 1864, 1935; Pub.L. 114-94, Div. G, Title LXXIV, §§ 74001, 74002, Dec. 4, 2015, 129 Stat. 1786; Pub.L. 115-417, § 2, Jan. 3, 2019, 132 Stat. 5438.)

Footnotes

1 So in original. Probably should be “of a”.
2 So in original. Probably should be “financial”.
3 So in original. The semicolon probably should be a period.
4 So in original. The word “of” probably should not appear.

15 U.S.C.A. § 80b-3, 15 USCA § 80b-3
Current through PL 117-55.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle C. Employment Taxes (Refs & Annos)
Chapter 21. Federal Insurance Contributions Act (Refs & Annos)
Subchapter C. General Provisions

26 U.S.C.A. § 3121, I.R.C. § 3121

§ 3121. Definitions

Effective: December 20, 2019
Currentness

(a) Wages.--For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include--

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of--

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[**(3)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary--

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)--

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless--

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500,

except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[**(9)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid--

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than $100;

[**(17)** Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of--

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section section [1] 139B(a).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment.--For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include--

(1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) domestic service performed in a local college club, or local chapter of a college fraternity or sorority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) service performed by a child under the age of 18 in the employ of his father or mother;

(B) service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if--

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B)(i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;

(5) service performed in the employ of the United States or any instrumentality of the United States, if such service--

(A) would be excluded from the term “employment” for purposes of this title if the provisions of paragraphs (5) and (6) of this subsection as in effect in January 1983 had remained in effect, and

(B) is performed by an individual who--

(i) has been continuously performing service described in subparagraph (A) since December 31, 1983, and for purposes of this clause--

(I) if an individual performing service described in subparagraph (A) returns to the performance of such service after being separated therefrom for a period of less than 366 consecutive days, regardless of whether the period began before, on, or after December 31, 1983, then such service shall be considered continuous,

(II) if an individual performing service described in subparagraph (A) returns to the performance of such service after being detailed or transferred to an international organization as described under section 3343 of subchapter III of chapter 33 of title 5, United States Code, or under section 3581 of chapter 35 of such title, then the service performed for that organization shall be considered service described in subparagraph (A),

(III) if an individual performing service described in subparagraph (A) is reemployed or reinstated after being separated from such service for the purpose of accepting employment with the American Institute in Taiwan as provided under section 3310 of chapter 48 of title 22, United States Code, then the service performed for that Institute shall be considered service described in subparagraph (A),

(IV) if an individual performing service described in subparagraph (A) returns to the performance of such service after performing service as a member of a uniformed service (including, for purposes of this clause, service in the National Guard and temporary service in the Coast Guard Reserve) and after exercising restoration or reemployment rights as provided under chapter 43 of title 38, United States Code, then the service so performed as a member of a uniformed service shall be considered service described in subparagraph (A), and

(V) if an individual performing service described in subparagraph (A) returns to the performance of such service after employment (by a tribal organization) to which section 104(e)(2) of the Indian Self-Determination Act applies, then the service performed for that tribal organization shall be considered service described in subparagraph (A); or

(ii) is receiving an annuity from the Civil Service Retirement and Disability Fund, or benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed service);

except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs--

(C) service performed as the President or Vice President of the United States,

(D) service performed--

(i) in a position placed in the Executive Schedule under sections 5312 through 5317 of title 5, United States Code,

(ii) as a noncareer appointee in the Senior Executive Service or a noncareer member of the Senior Foreign Service, or

(iii) in a position to which the individual is appointed by the President (or his designee) or the Vice President under section 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of title 3, United States Code, if the maximum rate of basic pay for such position is at or above the rate for level V of the Executive Schedule,

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate judge, or a referee in bankruptcy or United States bankruptcy judge,

(F) service performed as a Member, Delegate, or Resident Commissioner of or to the Congress,

(G) any other service in the legislative branch of the Federal Government if such service--

(i) is performed by an individual who was not subject to subchapter III of chapter 83 of title 5, United States Code, or to another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), on December 31, 1983, or

(ii) is performed by an individual who has, at any time after December 31, 1983, received a lump-sum payment under section 8342(a) of title 5, United States Code, or under the corresponding provision of the law establishing the other retirement system described in clause (i), or

(iii) is performed by an individual after such individual has otherwise ceased to be subject to subchapter III of chapter 83 of title 5, United States Code (without having an application pending for coverage under such subchapter), while performing service in the legislative branch (determined without regard to the provisions of subparagraph (B) relating to continuity of employment), for any period of time after December 31, 1983,

and for purposes of this subparagraph (G) an individual is subject to such subchapter III or to any such other retirement system at any time only if (a) such individual's pay is subject to deductions, contributions, or similar payments (concurrent with the service being performed at that time) under section 8334(a) of such title 5 or the corresponding provision of the law establishing such other system, or (in a case to which section 8332(k)(1) of such title applies) such individual is making payments of amounts equivalent to such deductions, contributions, or similar payments while on leave without pay, or (b) such individual is receiving an annuity from the Civil Service Retirement and Disability Fund, or is receiving benefits (for service as an employee) under another retirement system established by a law of the United States for employees of the Federal Government (other than for members of the uniformed services), or

(H) service performed by an individual--

(i) on or after the effective date of an election by such individual, under section 301 of the Federal Employees' Retirement System Act of 1986, section 307 of the Central Intelligence Agency Retirement Act (50 U.S.C. 2157), or the Federal Employees' Retirement System Open Enrollment Act of 1997, to become subject to the Federal Employees' Retirement System provided in chapter 84 of title 5, United States Code, or

(ii) on or after the effective date of an election by such individual, under regulations issued under section 860 of the Foreign Service Act of 1980, to become subject to the Foreign Service Pension System provided in subchapter II of chapter 8 of title I of such Act;

(6) service performed in the employ of the United States or any instrumentality of the United States if such service is performed--

(A) in a penal institution of the United States by an inmate thereof;

(B) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the Federal Government), other than as a medical or dental intern or a medical or dental resident in training; or

(C) by any individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned thereby, except that this paragraph shall not apply in the case of--

(A) service which, under subsection (j), constitutes covered transportation service,

(B) service in the employ of the Government of Guam or the Government of American Samoa or any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of any such Government or political subdivision), and, for purposes of this title with respect to the taxes imposed by this chapter--

(i) any person whose service as such an officer or employee is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(ii) the remuneration for service described in clause (i) (including fees paid to a public official) shall be deemed to have been paid by the Government of Guam or the Government of American Samoa or by a political subdivision thereof or an instrumentality of any one or more of the foregoing which is wholly owned thereby, whichever is appropriate,

(C) service performed in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States (other than the Federal Employees Retirement System provided in chapter 84 of title 5, United States Code); except that the provisions of this subparagraph shall not be applicable to service performed--

(i) in a hospital or penal institution by a patient or inmate thereof;

(ii) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or as a medical or dental resident in training;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency; or

(iv) by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis,

(D) service performed in the employ of the Government of Guam (or any instrumentality which is wholly owned by such Government) by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam; except that (i) the provisions of this subparagraph shall not be applicable to services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof, and (ii) for purposes of this subparagraph, clauses (i) and (ii) of subparagraph (B) shall apply,

(E) service included under an agreement entered into pursuant to section 218 of the Social Security Act, or

(F) service in the employ of a State (other than the District of Columbia, Guam, or American Samoa), of any political subdivision thereof, or of any instrumentality of any one or more of the foregoing which is wholly owned thereby, by an individual who is not a member of a retirement system of such State, political subdivision, or instrumentality, except that the provisions of this subparagraph shall not be applicable to service performed--

(i) by an individual who is employed to relieve such individual from unemployment;

(ii) in a hospital, home, or other institution by a patient or inmate thereof;

(iii) by any individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency;

(iv) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year; or

(v) by an employee in a position compensated solely on a fee basis which is treated pursuant to section 1402(c)(2)(E) as a trade or business for purposes of inclusion of such fees in net earnings from self-employment;

for purposes of this subparagraph, except as provided in regulations prescribed by the Secretary, the term "retirement system" has the meaning given such term by section 218(b)(4) of the Social Security Act;

(8)(A) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, except that this subparagraph shall not apply to service performed by a member of such an order in the exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomous subdivision thereof to which such member belongs;

(B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a));

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

(10) service performed in the employ of--

(A) a school, college, or university, or

(B) an organization described in section 509(a)(3) if the organization is organized, and at all times thereafter is operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university and is operated, supervised, or controlled by or in connection with such school, college, or university, unless it is a school, college, or university of a State or a political subdivision thereof and the services performed in its employ by a student referred to in section 218(c)(5) of the Social Security Act are covered under the agreement between the Commissioner of Social Security and such State entered into pursuant to section 218 of such Act;

if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university;

(11) service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

(12) service performed in the employ of an instrumentality wholly owned by a foreign government--

(A) if the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) if the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law;

(14)(A) service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

(15) service performed in the employ of an international organization, except service which constitutes "employment" under subsection (y);

(16) service performed by an individual under an arrangement with the owner or tenant of land pursuant to which--

(A) such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(B) the agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(C) the amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced;

[**(17)** Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(99)(C)(i), Dec. 19, 2014, 128 Stat. 4052]

(18) service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii));

(19) Service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;

(20) service (other than service described in paragraph (3)(A)) performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under an arrangement with the owner or operator of such boat pursuant to which--

(A) such individual does not receive any cash remuneration other than as provided in subparagraph (B) and other than cash remuneration--

(i) which does not exceed $100 per trip;

(ii) which is contingent on a minimum catch; and

(iii) which is paid solely for additional duties (such as mate, engineer, or cook) for which additional cash remuneration is traditional in the industry,

(B) such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) the amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals;

(21) domestic service in a private home of the employer which--

(A) is performed in any year by an individual under the age of 18 during any portion of such year; and

(B) is not the principal occupation of such employee; or

(22) service performed by members of Indian tribal councils as tribal council members in the employ of an Indian tribal government, except that this paragraph shall not apply in the case of service included under an agreement under section 218A of the Social Security Act.

For purposes of paragraph (20), the operating crew of a boat shall be treated as normally made up of fewer than 10 individuals if the average size of the operating crew on trips made during the preceding 4 calendar quarters consisted of fewer than 10 individuals.

(c) Included and excluded service.--For purposes of this chapter, if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term “pay period” means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (b)(9).

(d) Employee.--For purposes of this chapter, the term “employee” means--

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person--

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(B) as a full-time life insurance salesman;

(C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed; or

(4) any individual who performs services that are included under an agreement entered into pursuant to section 218 or 218A of the Social Security Act.

(e) State, United States, and citizen.--For purposes of this chapter--

(1) State.--The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) United States.--The term "United States" when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

An individual who is a citizen of the Commonwealth of Puerto Rico (but not otherwise a citizen of the United States) shall be considered, for purposes of this section, as a citizen of the United States.

(f) American vessel and aircraft.--For purposes of this chapter, the term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State; and the term "American aircraft" means an aircraft registered under the laws of the United States.

(g) Agricultural labor.--For purposes of this chapter, the term "agricultural labor" includes all service performed--

(1) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(3) in connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(B) in the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in subparagraph (A), but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this subparagraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(C) the provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(5) on a farm operated for profit if such service is not in the course of the employer's trade or business.

As used in this subsection, the term “farm” includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(h) American employer.--For purposes of this chapter, the term “American employer” means an employer which is--

(1) the United States or any instrumentality thereof,

(2) an individual who is a resident of the United States,

(3) a partnership, if two-thirds or more of the partners are residents of the United States,

(4) a trust, if all of the trustees are residents of the United States, or

(5) a corporation organized under the laws of the United States or of any State.

(i) Computation of wages in certain cases.--

(1) Domestic service.--For purposes of this chapter, in the case of domestic service described in subsection (a)(7)(B), any payment of cash remuneration for such service which is more or less than a whole-dollar amount shall, under such conditions and to such extent as may be prescribed by regulations made under this chapter, be computed to the nearest dollar. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to $1. The amount of any payment of cash remuneration so computed to the nearest dollar shall, in lieu of the amount actually paid, be deemed to constitute the amount of cash remuneration for purposes of subsection (a)(7)(B).

(2) Service in the uniformed services.--For purposes of this chapter, in the case of an individual performing service, as a member of a uniformed service, to which the provisions of subsection (m)(1) are applicable, the term "wages" shall, subject to the provisions of subsection (a)(1) of this section, include as such individual's remuneration for such service only (A) his basic pay as described in chapter 3 and section 1009 of title 37, United States Code, in the case of an individual performing service to which subparagraph (A) of such subsection (m)(1) applies, or (B) his compensation for such service as determined under section 206(a) of title 37, United States Code, in the case of an individual performing service to which subparagraph (B) of such subsection (m)(1) applies.

(3) Peace Corps volunteer service.--For purposes of this chapter, in the case of an individual performing service, as a volunteer or volunteer leader within the meaning of the Peace Corps Act, to which the provisions of section 3121(p) are applicable, the term "wages" shall, subject to the provisions of subsection (a)(1) of this section, include as such individual's remuneration for such service only amounts paid pursuant to section 5(c) or 6(1) of the Peace Corps Act.

(4) Service performed by certain members of religious orders.--For purposes of this chapter, in any case where an individual is a member of a religious order (as defined in subsection (r)(2)) performing service in the exercise of duties required by such order, and an election of coverage under subsection (r) is in effect with respect to such order or with respect to the autonomous subdivision thereof to which such member belongs, the term "wages" shall, subject to the provisions of subsection (a)(1), include as such individual's remuneration for such service the fair market value of any board, lodging, clothing, and other perquisites furnished to such member by such order or subdivision thereof or by any other person or organization pursuant to an agreement with such order or subdivision, except that the amount included as such individual's remuneration under this paragraph shall not be less than $100 a month.

(5) Service performed by certain retired justices and judges.--For purposes of this chapter, in the case of an individual performing service under the provisions of section 294 of title 28, United States Code (relating to assignment of retired justices and judges to active duty), the term "wages" shall not include any payment under section 371(b) of such title 28 which is received during the period of such service.

(j) Covered transportation service.--For purposes of this chapter--

(1) Existing transportation systems--General rule.--Except as provided in paragraph (2), all service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system shall constitute covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and prior to 1951.

(2) Existing transportation systems--Cases in which no transportation employees, or only certain employees, are covered.--Service performed in the employ of a State or political subdivision in connection with the operation of its public transportation system shall not constitute covered transportation service if--

(A) any part of the transportation system was acquired from private ownership after 1936 and prior to 1951, and substantially all service in connection with the operation of the transportation system was, on December 31, 1950, covered under a general retirement system providing benefits which, by reason of a provision of the State constitution dealing specifically with retirement systems of the State or political subdivisions thereof, cannot be diminished or impaired; or

(B) no part of the transportation system operated by the State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and prior to 1951;

except that if such State or political subdivision makes an acquisition after 1950 from private ownership of any part of its transportation system, then, in the case of any employee who--

(C) became an employee of such State or political subdivision in connection with and at the time of its acquisition after 1950 of such part, and

(D) prior to such acquisition rendered service in employment (including as employment service covered by an agreement under section 218 of the Social Security Act) in connection with the operation of such part of the transportation system acquired by the State or political subdivision,

the service of such employee in connection with the operation of the transportation system shall constitute covered transportation service, commencing with the first day of the third calendar quarter following the calendar quarter in which the acquisition of such part took place, unless on such first day such service of such employee is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees described in subparagraph (C).

(3) Transportation systems acquired after 1950.--All service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system shall constitute covered transportation service if the transportation system was not operated by the State or political subdivision prior to 1951 and, at the time of its first acquisition (after 1950) from private ownership of any part of its transportation system, the State or political subdivision did not have a general retirement system covering substantially all service performed in connection with the operation of the transportation system.

(4) Definitions.--For purposes of this subsection--

(A) The term "general retirement system" means any pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof for employees of the State, political subdivision, or both; but such term shall not include such a fund or system which covers only service performed in positions connected with the operation of its public transportation system.

(B) A transportation system or a part thereof shall be considered to have been acquired by a State or political subdivision from private ownership if prior to the acquisition service performed by employees in connection with the operation of the system or part thereof acquired constituted employment under this chapter or subchapter A of chapter 9 of the Internal Revenue Code of 1939 or was covered by an agreement made pursuant to section 218 of the Social Security Act and some of such employees became employees of the State or political subdivision in connection with and at the time of such acquisition.

(C) The term "political subdivision" includes an instrumentality of--

(i) a State,

(ii) one or more political subdivisions of a State, or

(iii) a State and one or more of its political subdivisions.

[(k) Repealed. Pub.L. 98-21, Title I, § 102(b)(2), Apr. 20, 1983, 97 Stat. 71]

(l) Agreements entered into by American employers with respect to foreign affiliates.--

(1) Agreement with respect to certain employees of foreign affiliate.--The Secretary shall, at the American employer's request, enter into an agreement (in such manner and form as may be prescribed by the Secretary) with any American employer (as defined in subsection (h)) who desires to have the insurance system established by title II of the Social Security Act extended to service performed outside the United States in the employ of any 1 or more of such employer's foreign affiliates (as defined in paragraph (6)) by all employees who are citizens or residents of the United States, except that the agreement shall not apply to any service performed by, or remuneration paid to, an employee if such service or remuneration would be excluded from the term "employment" or "wages", as defined in this section, had the service been performed in the United States. Such agreement may be amended at any time so as to be made applicable, in the same manner and under the same conditions, with respect to any other foreign affiliate of such American employer. Such agreement shall be applicable with respect to citizens or residents of the United States who, on or after the effective date of the agreement, are employees of and perform services outside the United States for any foreign affiliate specified in the agreement. Such agreement shall provide--

(A) that the American employer shall pay to the Secretary, at such time or times as the Secretary may by regulations prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 3101 and 3111 (including amounts equivalent to the interest, additions to the taxes, additional amounts, and penalties which would be applicable) with respect to the remuneration which would be wages if the services covered by the agreement constituted employment as defined in this section; and

(B) that the American employer will comply with such regulations relating to payments and reports as the Secretary may prescribe to carry out the purposes of this subsection.

(2) Effective period of agreement.--An agreement entered into pursuant to paragraph (1) shall be in effect for the period beginning with the first day of the calendar quarter in which such agreement is entered into or the first day of the succeeding calendar quarter, as may be specified in the agreement; except that in case such agreement is amended to include the services performed for any other affiliate and such amendment is executed after the first month following the first calendar quarter for which the agreement is in effect, the agreement shall be in effect with respect to service performed for such other affiliate only after the calendar quarter in which such amendment is executed. Notwithstanding any other provision of this subsection, the period for which any such agreement is effective with respect to any foreign entity shall terminate at the end of any calendar quarter in which the foreign entity, at any time in such quarter, ceases to be a foreign affiliate as defined in paragraph (6).

(3) No termination of agreement.--No agreement under this subsection may be terminated, either in its entirety or with respect to any foreign affiliate, on or after June 15, 1989.

(4) Deposits in trust funds.--For purposes of section 201 of the Social Security Act, relating to appropriations to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, such remuneration--

(A) paid for services covered by an agreement entered into pursuant to paragraph (1) as would be wages if the services constituted employment, and

(B) as is reported to the Secretary pursuant to the provisions of such agreement or of the regulations issued under this subsection,

shall be considered wages subject to the taxes imposed by this chapter.

(5) Overpayments and underpayments.--

(A) If more or less than the correct amount due under an agreement entered into pursuant to this subsection is paid with respect to any payment of remuneration, proper adjustments with respect to the amounts due under such agreement shall be made, without interest, in such manner and at such times as may be required by regulations prescribed by the Secretary.

(B) If an overpayment cannot be adjusted under subparagraph (A), the amount thereof shall be paid by the Secretary, through the Fiscal Service of the Treasury Department, but only if a claim for such overpayment is filed with the Secretary within two years from the time such overpayment was made.

(6) Foreign affiliate defined.--For purposes of this subsection and section 210(a) of the Social Security Act--

(A) In general.--A foreign affiliate of an American employer is any foreign entity in which such American employer has not less than a 10-percent interest.

(B) Determination of 10-percent interest.--For purposes of subparagraph (A), an American employer has a 10-percent interest in any entity if such employer has such an interest directly (or through one or more entities)--

(i) in the case of a corporation, in the voting stock thereof, and

(ii) in the case of any other entity, in the profits thereof.

(7) American employer as separate entity.--Each American employer which enters into an agreement pursuant to paragraph (1) of this subsection shall, for purposes of this subsection and section 6413(c)(2)(C), relating to special refunds in the case of employees of certain foreign entities, be considered an employer in its capacity as a party to such agreement separate and distinct from its identity as a person employing individuals on its own account.

(8) Regulations.--Regulations of the Secretary to carry out the purposes of this subsection shall be designed to make the requirements imposed on American employers with respect to services covered by an agreement entered into pursuant to this subsection the same, so far as practicable, as those imposed upon employers pursuant to this title with respect to the taxes imposed by this chapter.

(m) Service in the uniformed services.--For purposes of this chapter--

(1) Inclusion of service.--The term "employment" shall, notwithstanding the provisions of subsection (b) of this section, include--

(A) service performed by an individual as a member of a uniformed service on active duty, but such term shall not include any such service which is performed while on leave without pay, and

(B) service performed by an individual as a member of a uniformed service on inactive duty training.

(2) Active duty.--The term "active duty" means "active duty" as described in paragraph (21) of section 101 of title 38, United States Code, except that it shall also include "active duty for training" as described in paragraph (22) of such section.

(3) Inactive duty training.--The term "inactive duty training" means "inactive duty training" as described in paragraph (23) of such section 101.

(n) Member of a uniformed service.--For purposes of this chapter, the term "member of a uniformed service" means any person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard (including a reserve component as defined in section 101(27) of title 38, United States Code), or in one of those services without specification of component, or as a commissioned officer of the Coast and Geodetic Survey, the National Oceanic and Atmospheric Administration Corps, or the Regular or Reserve Corps of the Public Health Service, and any person serving in the Army or Air Force under call or conscription. The term includes--

(1) a retired member of any of those services;

(2) a member of the Fleet Reserve or Fleet Marine Corps Reserve;

(3) a cadet at the United States Military Academy, a midshipman at the United States Naval Academy, and a cadet at the United States Coast Guard Academy or United States Air Force Academy;

(4) a member of the Reserve Officers' Training Corps, the Naval Reserve Officers' Training Corps, or the Air Force Reserve Officers' Training Corps, when ordered to annual training duty for fourteen days or more, and while performing authorized travel to and from that duty; and

(5) any person while en route to or from, or at, a place for final acceptance or for entry upon active duty in the military, naval, or air service--

(A) who has been provisionally accepted for such duty; or

(B) who, under the Military Selective Service Act, has been selected for active military, naval, or air service;

and has been ordered or directed to proceed to such place.

The term does not include a temporary member of the Coast Guard Reserve.

(o) Crew leader.--For purposes of this chapter, the term "crew leader" means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person; and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader. For purposes of this chapter and chapter 2, a crew leader shall, with respect to service performed in furnishing individuals to perform agricultural labor for another person and service performed as a member of the crew, be deemed not to be an employee of such other person.

(p) Peace Corps volunteer service.--For purposes of this chapter, the term "employment" shall, notwithstanding the provisions of subsection (b) of this section, include service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act.

(q) Tips included for both employee and employer taxes.--For purposes of this chapter, tips received by an employee in the course of his employment shall be considered remuneration for such employment (and deemed to have been paid by the employer for purposes of subsections (a) and (b) of section 3111). Such remuneration shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) or (if no statement including such tips is so furnished) at the time received; except that, in determining the employer's liability in connection with the taxes imposed by section 3111 with respect to such tips in any case where no statement including such tips was so furnished (or to

the extent that the statement so furnished was inaccurate or incomplete), such remuneration shall be deemed for purposes of subtitle F to be paid on the date on which notice and demand for such taxes is made to the employer by the Secretary.

(r) Election of coverage by religious orders.--

(1) Certificate of election by order.--A religious order whose members are required to take a vow of poverty, or any autonomous subdivision of such order, may file a certificate (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) electing to have the insurance system established by title II of the Social Security Act extended to services performed by its members in the exercise of duties required by such order or such subdivision thereof. Such certificate of election shall provide that--

(A) such election of coverage by such order or subdivision shall be irrevocable;

(B) such election shall apply to all current and future members of such order, or in the case of a subdivision thereof to all current and future members of such order who belong to such subdivision;

(C) all services performed by a member of such an order or subdivision in the exercise of duties required by such order or subdivision shall be deemed to have been performed by such member as an employee of such order or subdivision; and

(D) the wages of each member, upon which such order or subdivision shall pay the taxes imposed by sections 3101 and 3111, will be determined as provided in subsection (i)(4).

(2) Definition of member.--For purposes of this subsection, a member of a religious order means any individual who is subject to a vow of poverty as a member of such order and who performs tasks usually required (and to the extent usually required) of an active member of such order and who is not considered retired because of old age or total disability.

(3) Effective date for election.--

(A) A certificate of election of coverage shall be in effect, for purposes of subsection (b)(8) and for purposes of section 210(a)(8) of the Social Security Act, for the period beginning with whichever of the following may be designated by the order or subdivision thereof:

(i) the first day of the calendar quarter in which the certificate is filed,

(ii) the first day of the calendar quarter succeeding such quarter, or

(iii) the first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the twentieth calendar quarter preceding the quarter in which such certificate is filed.

Whenever a date is designated under clause (iii), the election shall apply to services performed before the quarter in which the certificate is filed only if the member performing such services was a member at the time such services were performed and is living on the first day of the quarter in which such certificate is filed.

(B) If a certificate of election filed pursuant to this subsection is effective for one or more calendar quarters prior to the quarter in which such certificate is filed, then--

(i) for purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for such prior calendar quarters resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed; and

(ii) the statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

(s) Concurrent employment by two or more employers.--For purposes of sections 3102, 3111, and 3121(a)(1), if two or more related corporations concurrently employ the same individual and compensate such individual through a common paymaster which is one of such corporations, each such corporation shall be considered to have paid as remuneration to such individual only the amounts actually disbursed by it to such individual and shall not be considered to have paid as remuneration to such individual amounts actually disbursed to such individual by another of such corporations.

[(t) Repealed. Pub.L. 100-203, Title IX, § 9006(b)(2), Dec. 22, 1987, 101 Stat. 1330-289]

(u) Application of hospital insurance tax to Federal, State, and local employment.--

(1) Federal employment.--For purposes of the taxes imposed by sections 3101(b) and 3111(b), subsection (b) shall be applied without regard to paragraph (5) thereof.

(2) State and local employment.--For purposes of the taxes imposed by sections 3101(b) and 3111(b)--

(A) In general.--Except as provided in subparagraphs (B) and (C), subsection (b) shall be applied without regard to paragraph (7) thereof.

(B) Exception for certain services.--Service shall not be treated as employment by reason of subparagraph (A) if--

(i) the service is included under an agreement under section 218 of the Social Security Act, or

(ii) the service is performed--

(I) by an individual who is employed by a State or political subdivision thereof to relieve him from unemployment,

(II) in a hospital, home, or other institution by a patient or inmate thereof as an employee of a State or political subdivision thereof or of the District of Columbia,

(III) by an individual, as an employee of a State or political subdivision thereof or of the District of Columbia, serving on a temporary basis in case of fire, storm, snow, earthquake, flood or other similar emergency,

(IV) by any individual as an employee included under section 5351(2) of title 5, United States Code (relating to certain interns, student nurses, and other student employees of hospitals of the District of Columbia Government), other than as a medical or dental intern or a medical or dental resident in training,

(V) by an election official or election worker if the remuneration paid in a calendar year for such service is less than $1,000 with respect to service performed during any calendar year commencing on or after January 1, 1995, ending on or before December 31, 1999, and the adjusted amount determined under section 218(c)(8)(B) of the Social Security Act for any calendar year commencing on or after January 1, 2000, with respect to service performed during such calendar year, or

(VI) by an individual in a position described in section 1402(c)(2)(E).

As used in this subparagraph, the terms “State” and “political subdivision” have the meanings given those terms in section 218(b) of the Social Security Act.

(C) Exception for current employment which continues.--Service performed for an employer shall not be treated as employment by reason of subparagraph (A) if--

(i) such service would be excluded from the term “employment” for purposes of this chapter if subparagraph (A) did not apply;

(ii) such service is performed by an individual--

(I) who was performing substantial and regular service for remuneration for that employer before April 1, 1986,

(II) who is a bona fide employee of that employer on March 31, 1986, and

(III) whose employment relationship with that employer was not entered into for purposes of meeting the requirements of this subparagraph; and

(iii) the employment relationship with that employer has not been terminated after March 31, 1986.

(D) Treatment of agencies and instrumentalities.--For purposes of subparagraph (C), under regulations--

(i) All agencies and instrumentalities of a State (as defined in section 218(b) of the Social Security Act) or of the District of Columbia shall be treated as a single employer.

(ii) All agencies and instrumentalities of a political subdivision of a State (as so defined) shall be treated as a single employer and shall not be treated as described in clause (i).

(3) Medicare qualified government employment.--For purposes of this chapter, the term "medicare qualified government employment" means service which--

(A) is employment (as defined in subsection (b)) with the application of paragraphs (1) and (2), but

(B) would not be employment (as so defined) without the application of such paragraphs.

(v) Treatment of certain deferred compensation and salary reduction arrangements.--

(1) Certain employer contributions treated as wages.--Nothing in any paragraph of subsection (a) (other than paragraph (1)) shall exclude from the term "wages"--

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not included in gross income by reason of section 402(e)(3) or consisting of designated Roth contributions (as defined in section 402A(c)), or

(B) any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

(2) Treatment of certain nonqualified deferred compensation plans.--

(A) In general.--Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter as of the later of--

(i) when the services are performed, or

(ii) when there is no substantial risk of forfeiture of the rights to such amount.

The preceding sentence shall not apply to any excess parachute payment (as defined in section 280G(b)) or to any specified stock compensation (as defined in section 4985) on which tax is imposed by section 4985.

(B) Taxed only once.--Any amount taken into account as wages by reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter.

(C) Nonqualified deferred compensation plan.--For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (a)(5).

(3) Exempt governmental deferred compensation plan.--For purposes of subsection (a)(5), the term "exempt governmental deferred compensation plan" means any plan providing for deferral of compensation established and maintained for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing. Such term shall not include--

(A) any plan to which section 83, 402(b), 403(c), 457(a), or 457(f)(1) applies,

(B) any annuity contract described in section 403(b), and

(C) the Thrift Savings Fund (within the meaning of subchapter III of chapter 84 of title 5, United States Code).

(w) Exemption of churches and qualified church-controlled organizations.--

(1) General rule.--Any church or qualified church-controlled organization (as defined in paragraph (3)) may make an election within the time period described in paragraph (2), in accordance with such procedures as the Secretary determines to be appropriate, that services performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act and this chapter. An election may be made under this subsection only if the church or qualified church-controlled organization states that such church or organization is opposed for religious reasons to the payment of the tax imposed under section 3111.

(2) Timing and duration of election.--An election under this subsection must be made prior to the first date, more than 90 days after July 18, 1984, on which a quarterly employment tax return for the tax imposed under section 3111 is due, or would be due but for the election, from such church or organization. An election under this subsection shall apply to current and future employees, and shall apply to service performed after December 31, 1983. The election may be revoked by the church or organization under regulations prescribed by the Secretary. The election shall be revoked by the Secretary if such church or organization fails to furnish the information required under section 6051 to the Secretary for a period of 2 years or more with respect to remuneration paid for such services by such church or organization, and, upon request by the Secretary, fails to furnish all such previously unfurnished information for the period covered by the election. Any revocation under the preceding sentence shall apply retroactively to the beginning of the 2-year period for which the information was not furnished.

(3) Definitions.--

(A) For purposes of this subsection, the term "church" means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.

(B) For purposes of this subsection, the term "qualified church-controlled organization" means any church-controlled tax-exempt organization described in section 501(c)(3), other than an organization which--

(i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and

(ii) normally receives more than 25 percent of its support from either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

(x) Applicable dollar threshold.--For purposes of subsection (a)(7)(B), the term "applicable dollar threshold" means $1,000. In the case of calendar years after 1995, the Commissioner of Social Security shall adjust such $1,000 amount at the same time and in the same manner as under section 215(a)(1)(B)(ii) of the Social Security Act with respect to the amounts referred to in section 215(a)(1)(B)(i) of such Act, except that, for purposes of this paragraph, 1993 shall be substituted for the calendar year referred to in section 215(a)(1)(B)(ii)(II) of such Act. If any amount as adjusted under the preceding sentence is not a multiple of $100, such amount shall be rounded to the next lowest multiple of $100.

(y) Service in the employ of international organizations by certain transferred Federal employees.--

(1) In general.--For purposes of this chapter, service performed in the employ of an international organization by an individual pursuant to a transfer of such individual to such international organization pursuant to section 3582 of title 5, United States Code, shall constitute "employment" if--

(A) immediately before such transfer, such individual performed service with a Federal agency which constituted "employment" under subsection (b) for purposes of the taxes imposed by sections 3101(a) and 3111(a), and

(B) such individual would be entitled, upon separation from such international organization and proper application, to reemployment with such Federal agency under such section 3582.

(2) Definitions.--For purposes of this subsection--

(A) Federal agency.--The term "Federal agency" means an agency, as defined in section 3581(1) of title 5, United States Code.

(B) International organization.--The term "international organization" has the meaning provided such term by section 3581(3) of title 5, United States Code.

(z) Treatment of certain foreign persons as American employers.--

(1) In general.--If any employee of a foreign person is performing services in connection with a contract between the United States Government (or any instrumentality thereof) and any member of any domestically controlled group of entities which includes such foreign person, such foreign person shall be treated for purposes of this chapter as an American employer with respect to such services performed by such employee.

(2) Domestically controlled group of entities.--For purposes of this subsection--

(A) In general.--The term "domestically controlled group of entities" means a controlled group of entities the common parent of which is a domestic corporation.

(B) Controlled group of entities.--The term "controlled group of entities" means a controlled group of corporations as defined in section 1563(a)(1), except that--

(i) "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears therein, and

(ii) the determination shall be made without regard to subsections (a)(4) and (b)(2) of section 1563.

A partnership or any other entity (other than a corporation) shall be treated as a member of a controlled group of entities if such entity is controlled (within the meaning of section 954(d)(3)) by members of such group (including any entity treated as a member of such group by reason of this sentence).

(3) Liability of common parent.--In the case of a foreign person who is a member of any domestically controlled group of entities, the common parent of such group shall be jointly and severally liable for any tax under this chapter for which such foreign person is liable by reason of this subsection, and for any penalty imposed on such person by this title with respect to any failure to pay such tax or to file any return or statement with respect to such tax or wages subject to such tax. No deduction shall be allowed under this title for any liability imposed by the preceding sentence.

(4) Provisions preventing double taxation.--

(A) Agreements.--Paragraph (1) shall not apply to any services which are covered by an agreement under subsection (l).

(B) Equivalent foreign taxation.--Paragraph (1) shall not apply to any services if the employer establishes to the satisfaction of the Secretary that the remuneration paid by such employer for such services is subject to a tax imposed by a foreign country which is substantially equivalent to the taxes imposed by this chapter.

(5) Cross reference.--For relief from taxes in cases covered by certain international agreements, see sections 3101(c) and 3111(c).

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 417; Sept. 1, 1954, c. 1206, Title II, §§ 204(a), (b), 205(a) to (e), 206(a), 207, 209, 68 Stat. 1091 to 1094; Aug. 1, 1956, c. 836, Title I, §§ 103(j), 121(d), Title II, § 201(b) to (d), (e)(1), (h)(1), (2), (j) to (l), 70 Stat. 824, 839 to 841, 843; Aug. 1, 1956, c. 837, Title IV, §§ 410, 411(a), 70 Stat. 878; Pub.L. 85-840, Title IV, §§ 402(b), 404(a), 405(a), (b), Aug. 28, 1958, 72 Stat. 1042, 1044 to 1046; Pub.L. 85-866, Title I, § 69, Sept. 2, 1958, 72 Stat. 1659; Pub.L. 86-70, § 22(a), June 25, 1959, 73 Stat. 146; Pub.L. 86-168, Title I, § 104(h), Title II, § 202(a), Aug. 18, 1959, 73 Stat. 387, 389; Pub.L. 86-624, § 18(c), July 12, 1960, 74 Stat. 416; Pub.L. 86-778, Title I, §§ 103(n) to (p), 104(b), 105(a), Sept. 13, 1960, 74 Stat. 938, 939, 942; Pub.L. 87-256, § 110(e)(1), Sept. 21, 1961, 75 Stat. 536; Pub.L. 87-293, Title II, § 202(a)(1), (2), Sept. 22, 1961, 75 Stat. 626; Pub.L. 88-272, Title II, § 220(c)(2), Feb. 26, 1964, 78 Stat. 62; Pub.L. 88-650, § 4(b), Oct. 13, 1964, 78 Stat. 1077; Pub.L. 89-97, Title III, §§ 311(b)(4), (5), 313(c)(3), (4), 316(a)(1), (b), 317(b), 320(b)(2), July 30, 1965, 79 Stat. 381, 383, 386, 388, 393; Pub.L. 90-248, Title I, §§ 108(b)(2), 123(b), Title IV, § 403(i), Title V, § 504(a), Jan. 2, 1968, 81 Stat. 835, 845, 932, 934; Pub.L. 91-172, Title IX, § 943(c)(1) to (3), Dec. 30, 1969, 83 Stat. 728; Pub.L. 92-5, Title II, § 203(b)(2), Mar. 17, 1971, 85 Stat. 11; Pub.L. 92-336, Title II, § 203(b)(2), July 1, 1972, 86 Stat. 419; Pub.L. 92-603, Title I, §§ 104(i), 122(b), 123(a)(2), (b), (c)(2), 128(b), 129(a)(2), 138(b), Oct. 30, 1972, 86 Stat. 1341, 1354, 1356, 1358, 1359, 1365; Pub.L. 93-66, Title II, § 203(b)(2), (d), July 9, 1973, 87 Stat. 153; Pub.L. 93-233, § 5(b)(2), (d), Dec. 31, 1973, 87 Stat. 954; Pub.L. 94-455, Title XII, § 1207(e)(1)(A), Title XIX, §§ 1903(a)(3), 1906(b)(13)(A), (C), Oct. 4, 1976, 90 Stat. 1706, 1807, 1834; Pub.L. 94-563, § 1(b), (c), Oct. 19, 1976, 90 Stat. 2655; Pub.L. 95-216, Title III, §§ 312(a), (b), (d), (f), (g), 314(a), 315(a), 356(a) to (d), Dec. 20, 1977, 91 Stat. 1532 to 1536, 1555; Pub.L. 95-472, § 3(b), Oct. 17, 1978, 92 Stat. 1333; Pub.L. 95-600, Title I, § 164(b)(3), Nov. 6, 1978, 92 Stat. 2814; Pub.L. 96-222, Title I, § 101(a)(10)(B)(i), Apr. 1, 1980, 94 Stat. 201; Pub.L. 96-499, Title XI, § 1141(a)(1), Dec. 5, 1980, 94 Stat. 2693; Pub.L. 97-34, Title I, § 124(e)(2)(A), Aug. 13, 1981, 95 Stat. 200; Pub.L. 97-123, § 3(b), Dec. 29, 1981, 95 Stat. 1662; Pub.L. 97-248, Title II, § 278(a)(1), Sept. 3, 1982, 96 Stat. 559; Pub.L. 98-21, Title I, §§ 101(b), (c)(2), 102(b), Title III, §§ 321(a), (e)(1), 322(a)(2), 323(a)(1), 324(a), 327(a)(1), (b)(1), 328(a), Apr. 20, 1983, 97 Stat. 69, 70, 118, 119, 121, 122, 126, 127, 128; Pub.L. 98-369, Div. A, Title I, § 67(c), Title IV, § 491(d)(36), Title V, § 531(d)(1)(A), Div. B, Title VI, §§ 2601(b), 2603(a)(2), (b), 2661(o)(3), 2663(i), (j)(5)(C), July 18, 1984, 98 Stat. 587, 851, 884, 1124, 1128, 1159, 1169, 1171; Pub.L. 99-221, § 3(b), Dec. 26, 1985, 99 Stat. 1735; Pub.L. 99-272, Title XII, § 12112(b), Title XIII, §§ 13205(a)(1), 13303(c)(2), Apr. 7, 1986, 100 Stat. 288, 313, 327; Pub.L. 99-335, Title III, § 304(b), June 6, 1986, 100 Stat. 606; Pub.L. 99-509, Title IX, § 9002(b)(1)(A), (2)(A), Oct. 21, 1986, 100 Stat. 1971; Pub.L. 99-514, Title I, § 122(e)(1), Title XI, §§ 1108(g)(7), 1147(b), 1151(d)(2)(A), Title XVIII, §§ 1882(c), 1883(a)(11)(B), 1895(b)(18)(A), 1899A(38) to (40), Oct. 22, 1986, 100 Stat. 2112, 2435, 2494, 2505, 2915, 2916, 2935, 2960; Pub.L. 100-203, Title IX, §§ 9001(b), 9002(b), 9003(a)(2), 9004(b), 9005(b), 9006(a), (b)(2), 9023(d), Dec. 22, 1987, 101 Stat. 1330-286 to 1330-289, 1330-296; Pub.L. 100-647, Title I, §§ 1001(d)(2)(C)(i), (g)(4)(B)(i), 1011(e)(8), 1011B(a)(22)(A), (23)(A), 1018(r)(2)(A), (u)(35), Title III, § 3043(c)(2), Title VIII, §§ 8015(b)(2), (c)(2), 8016(a)(3)(A), (4)(A), (C), 8017(b), Nov. 10, 1988, 102 Stat. 3351, 3352, 3461, 3485, 3486, 3586, 3592, 3642, 3791, 3792, 3793; Pub.L. 101-140, Title II, § 203(a)(2), Nov. 8, 1989, 103 Stat. 830; Pub.L. 101-239, Title X, § 10201(a), (b)(3), Dec. 19, 1989, 103 Stat. 2472; Pub.L. 101-508, Title XI, §§ 11331(a), 11332(b), Nov. 5, 1990, 104 Stat. 1388-467, 1388-469; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 102-318, Title V, § 521(b)(34), July 3, 1992, 106 Stat. 312; Pub.L. 103-66, Title XIII, § 13207(a), Aug. 10, 1993, 107 Stat. 467; Pub.L. 103-178, Title II, § 204(c), Dec. 3, 1993, 107 Stat. 2033; Pub.L. 103-296, Title I, § 108(h)(2), Title III, §§ 303(a)(2), (b)(2), 319(a)(1), (5), 320(a)(1)(C), Aug. 15, 1994, 108 Stat. 1487, 1519, 1533, 1534, 1535; Pub.L. 103-387, § 2(a)(1)(A) to (C), Oct. 22, 1994, 108 Stat. 4071; Pub.L. 104-188, Title I, §§ 1116(a)(1)(A), (B), 1421(b)(8)(A), 1458(b)(1), Aug. 20, 1996, 110 Stat. 1762, 1798, 1819; Pub.L. 105-33, Title XI, § 11246(b)(2)(A), as added Pub.L. 105-277, Div. 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Footnotes

1 So in original.

26 U.S.C.A. § 3121, 26 USCA § 3121
Current through PL 117-55.

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Proposed Legislation

United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 79. Definitions (Refs & Annos)

26 U.S.C.A. § 7701, I.R.C. § 7701

§ 7701. Definitions

Effective: March 23, 2018
Currentness

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--

(1) Person.--The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

(2) Partnership and partner.--The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation.--The term "corporation" includes associations, joint-stock companies, and insurance companies.

(4) Domestic.--The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign.--The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) Fiduciary.--The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock.--The term "stock" includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder.--The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

(9) United States.--The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

(10) State.--The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

(11) Secretary of the Treasury and Secretary.--

(A) Secretary of the Treasury.--The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary.--The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate.--

(A) In general.--The term "or his delegate"--

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii) when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa.--The term "delegate", in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2, and 21, also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

(13) Commissioner.--The term "Commissioner" means the Commissioner of Internal Revenue.

(14) Taxpayer.--The term "taxpayer" means any person subject to any internal revenue tax.

(15) Military or naval forces and Armed Forces of the United States.--The term "military or naval forces of the United States" and the term "Armed Forces of the United States" each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent.--The term "withholding agent" means any person required to deduct and withhold any tax under the provisions of section 1441, 1442, 1443, or 1461.

(17) Husband and wife.--As used in section 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such section, the term "wife" shall be read "former wife" and the term "husband" shall be read "former husband"; and, if the payments described in such section are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such section, the term "husband" shall be read "wife" and the term "wife" shall be read "husband."

(18) International organization.--The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f).

(19) Domestic building and loan association.--The term "domestic building and loan association" means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association--

(A) which is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B) the business of which consists principally of acquiring the savings of the public and investing in loans; and

(C) at least 60 percent of the amount of the total assets of which (at the close of the taxable year) consists of--

(i) cash,

(ii) obligations of the United States or of a State or political subdivision thereof, and stock or obligations of a corporation which is an instrumentality of the United States or of a State or political subdivision thereof, but not including obligations the interest on which is excludable from gross income under section 103,

(iii) certificates of deposit in, or obligations of, a corporation organized under a State law which specifically authorizes such corporation to insure the deposits or share accounts of member associations,

(iv) loans secured by a deposit or share of a member,

(v) loans (including redeemable ground rents, as defined in section 1055) secured by an interest in real property which is (or, from the proceeds of the loan, will become) residential real property or real property used primarily for church purposes, loans made for the improvement of residential real property or real property used primarily for church purposes, provided that for purposes of this clause, residential real property shall include single or multifamily dwellings, facilities in residential developments dedicated to public use or property used on a nonprofit basis for residents, and mobile homes not used on a transient basis,

(vi) loans secured by an interest in real property located within an urban renewal area to be developed for predominantly residential use under an urban renewal plan approved by the Secretary of Housing and Urban Development under part A or part B of title I of the Housing Act of 1949, as amended, or located within any area covered by a program eligible for assistance under section 103 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended, and loans made for the improvement of any such real property,

(vii) loans secured by an interest in educational, health, or welfare institutions or facilities, including structures designed or used primarily for residential purposes for students, residents, and persons under care, employees, or members of the staff of such institutions or facilities,

(viii) property acquired through the liquidation of defaulted loans described in clause (v), (vi), or (vii),

(ix) loans made for the payment of expenses of college or university education or vocational training, in accordance with such regulations as may be prescribed by the Secretary,

(x) property used by the association in the conduct of the business described in subparagraph (B), and

(xi) any regular or residual interest in a REMIC, but only in the proportion which the assets of such REMIC consist of property described in any of the preceding clauses of this subparagraph; except that if 95 percent or more of the assets of such REMIC are assets described in clauses (i) through (x), the entire interest in the REMIC shall qualify.

At the election of the taxpayer, the percentage specified in this subparagraph shall be applied on the basis of the average assets outstanding during the taxable year, in lieu of the close of the taxable year, computed under regulations prescribed by the Secretary. For purposes of clause (v), if a multifamily structure securing a loan is used in part for nonresidential purposes, the entire loan is deemed a residential real property loan if the planned residential use exceeds 80 percent of the property's planned use (determined as of the time the loan is made). For purposes of clause (v), loans made to finance the acquisition or development of land shall be deemed to be loans secured by an interest in residential real property if, under regulations prescribed by the Secretary, there is reasonable assurance that the property will become residential real property within a period of 3 years from the date of acquisition of such land; but this sentence shall not apply for any taxable year unless, within such 3-year period, such land becomes residential real property. For purposes of determining whether any interest in a REMIC qualifies under clause (xi), any regular interest in another REMIC held by such REMIC shall be treated as a loan described in a preceding clause under principles similar to the principles of clause (xi); except that, if such REMIC's are part of a tiered structure, they shall be treated as 1 REMIC for purposes of clause (xi).

(20) Employee.--For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, and 106 with respect to accident and health insurance or accident and health plans, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, and for purposes of applying section 125 with respect to cafeteria plans, the term “employee” shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21.

(21) Levy.--The term “levy” includes the power of distraint and seizure by any means.

(22) Attorney General.--The term "Attorney General" means the Attorney General of the United States.

(23) Taxable year.--The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. "Taxable year" means, in the case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year.--The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued.--The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business.--The term "trade or business" includes the performance of the functions of a public office.

(27) Tax Court.--The term "Tax Court" means the United States Tax Court.

(28) Other terms.--Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code.--The term "Internal Revenue Code of 1986" means this title, and the term "Internal Revenue Code of 1939" means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person.--The term "United States person" means--

(A) a citizen or resident of the United States,

(B) a domestic partnership,

(C) a domestic corporation,

(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E) any trust if--

(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and

(ii) one or more United States persons have the authority to control all substantial decisions of the trust.

(31) Foreign estate or trust.--

(A) Foreign estate.--The term "foreign estate" means an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States, is not includible in gross income under subtitle A.

(B) Foreign trust.--The term "foreign trust" means any trust other than a trust described in subparagraph (E) of paragraph (30).

(32) Cooperative bank.--The term "cooperative bank" means an institution without capital stock organized and operated for mutual purposes and without profit, which--

(A) is subject by law to supervision and examination by State or Federal authority having supervision over such institutions, and

(B) meets the requirements of subparagraphs (B) and (C) of paragraph (19) of this subsection (relating to definition of domestic building and loan association).

In determining whether an institution meets the requirements referred to in subparagraph (B) of this paragraph, any reference to an association or to a domestic building and loan association contained in paragraph (19) shall be deemed to be a reference to such institution.

(33) Regulated public utility.--The term "regulated public utility" means--

(A) A corporation engaged in the furnishing or sale of--

(i) electric energy, gas, water, or sewerage disposal services, or

(ii) transportation (not included in subparagraph (C)) on an intrastate, suburban, municipal, or interurban electric railroad, on an intrastate, municipal, or suburban trackless trolley system, or on a municipal or suburban bus system, or

(iii) transportation (not included in clause (ii)) by motor vehicle--

if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by an agency or instrumentality of the United States, by a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or by a foreign country or an agency or instrumentality or political subdivision thereof.

(B) A corporation engaged as a common carrier in the furnishing or sale of transportation of gas by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission.

(C) A corporation engaged as a common carrier (i) in the furnishing or sale of transportation by railroad, if subject to the jurisdiction of the Surface Transportation Board, or (ii) in the furnishing or sale of transportation of oil or other petroleum products (including shale oil) by pipe line, if subject to the jurisdiction of the Federal Energy Regulatory Commission or if the rates for such furnishing or sale are subject to the jurisdiction of a public service or public utility commission or other similar body of the District of Columbia or of any State.

(D) A corporation engaged in the furnishing or sale of telephone or telegraph service, if the rates for such furnishing or sale meet the requirements of subparagraph (A).

(E) A corporation engaged in the furnishing or sale of transportation as a common carrier by air, subject to the jurisdiction of the Secretary of Transportation.

(F) A corporation engaged in the furnishing or sale of transportation by a water carrier subject to jurisdiction under subchapter II of chapter 135 of title 49.

(G) A rail carrier subject to part A of subtitle IV of title 49, if (i) substantially all of its railroad properties have been leased to another such railroad corporation or corporations by an agreement or agreements entered into before January 1, 1954, (ii) each lease is for a term of more than 20 years, and (iii) at least 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from such leases and from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, an agreement for lease of railroad properties entered into before January 1, 1954, shall be considered to be a lease including such term as the total number of years of such agreement may, unless sooner terminated, be renewed or continued under the terms of the agreement, and any such renewal or continuance under such agreement shall be considered part of the lease entered into before January 1, 1954.

(H) A common parent corporation which is a common carrier by railroad subject to part A of subtitle IV of title 49 if at least 80 percent of its gross income (computed without regard to capital gains or losses) is derived directly or indirectly from sources described in subparagraphs (A) through (F), inclusive. For purposes of the preceding sentence, dividends and interest, and income from leases described in subparagraph (G), received from a regulated public utility shall be considered as derived from sources described in subparagraphs (A) through (F), inclusive, if the regulated public utility is a member of an affiliated group (as defined in section 1504) which includes the common parent corporation.

The term "regulated public utility" does not (except as provided in subparagraphs (G) and (H)) include a corporation described in subparagraphs (A) through (F), inclusive, unless 80 percent or more of its gross income (computed without regard to dividends and capital gains and losses) for the taxable year is derived from sources described in subparagraphs (A) through (F), inclusive. If the taxpayer establishes to the satisfaction of the Secretary that (i) its revenue from regulated rates described in subparagraph (A) or (D) and its revenue derived from unregulated rates are derived from the operation of a single interconnected and coordinated system or from the operation of more than one such system, and (ii) the unregulated rates have been and are substantially as favorable to users and consumers as are the regulated rates, then such revenue from such unregulated rates shall be considered, for purposes of the preceding sentence, as income derived from sources described in subparagraph (A) or (D).

[(34) Repealed. Pub.L. 98-369, Div. A, Title IV, § 412(b)(11), July 18, 1984, 98 Stat. 792]

(35) Enrolled actuary.--The term "enrolled actuary" means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.

(36) Tax return preparer.--

(A) In general.--The term "tax return preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title. For purposes of the preceding sentence, the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund.

(B) Exceptions.--A person shall not be a "tax return preparer" merely because such person--

(i) furnishes typing, reproducing, or other mechanical assistance,

(ii) prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii) prepares as a fiduciary a return or claim for refund for any person, or

(iv) prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

(37) Individual retirement plan.--The term "individual retirement plan" means--

(A) an individual retirement account described in section 408(a), and

(B) an individual retirement annuity described in section 408(b).

(38) Joint return.--The term "joint return" means a single return made jointly under section 6013 by a husband and wife.

(39) Persons residing outside United States.--If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to--

(A) jurisdiction of courts, or

(B) enforcement of summons.

(40) Indian tribal government.--

(A) In general.--The term "Indian tribal government" means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions.

(B) Special rule for Alaska Natives.--No determination under subparagraph (A) with respect to Alaska Natives shall grant or defer any status or powers other than those enumerated in section 7871. Nothing in the Indian Tribal Governmental Tax Status Act of 1982, or in the amendments made thereby, shall validate or invalidate any claim by Alaska Natives of sovereign authority over lands or people.

(41) TIN.--The term "TIN" means the identifying number assigned to a person under section 6109.

(42) Substituted basis property.--The term "substituted basis property" means property which is--

(A) transferred basis property, or

(B) exchanged basis property.

(43) Transferred basis property.--The term "transferred basis property" means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to the basis in the hands of the donor, grantor, or other transferor.

(44) Exchanged basis property.--The term "exchanged basis property" means property having a basis determined under any provision of subtitle A (or under any corresponding provision of prior income tax law) providing that the basis shall be determined in whole or in part by reference to other property held at any time by the person for whom the basis is to be determined.

(45) Nonrecognition transaction.--The term "nonrecognition transaction" means any disposition of property in a transaction in which gain or loss is not recognized in whole or in part for purposes of subtitle A.

(46) Determination of whether there is a collective bargaining agreement.--In determining whether there is a collective bargaining agreement between employee representatives and 1 or more employers, the term "employee representatives" shall not include any organization more than one-half of the members of which are employees who are owners, officers, or executives of the employer. An agreement shall not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and 1 or more employers.

[(47) Repealed. Pub.L. 111-312, Title III, § 301(a), Dec. 17, 2010, 124 Stat. 3300]

(48) Off-highway vehicles.--

(A) Off-highway transportation vehicles.--

(i) In general.--A vehicle shall not be treated as a highway vehicle if such vehicle is specially designed for the primary function of transporting a particular type of load other than over the public highway and because of this special design such vehicle's capability to transport a load over the public highway is substantially limited or impaired.

(ii) Determination of vehicle's design.--For purposes of clause (i), a vehicle's design is determined solely on the basis of its physical characteristics.

(iii) Determination of substantial limitation or impairment.--For purposes of clause (i), in determining whether substantial limitation or impairment exists, account may be taken of factors such as the size of the vehicle, whether such vehicle is subject to the licensing, safety, and other requirements applicable to highway vehicles, and whether such vehicle can transport a load at a sustained speed of at least 25 miles per hour. It is immaterial that a vehicle can transport a greater load off the public highway than such vehicle is permitted to transport over the public highway.

(B) Nontransportation trailers and semitrailers.--A trailer or semitrailer shall not be treated as a highway vehicle if it is specially designed to function only as an enclosed stationary shelter for the carrying on of an off-highway function at an off-highway site.

(49) Qualified blood collector organization.--The term "qualified blood collector organization" means an organization which is--

(A) described in section 501(c)(3) and exempt from tax under section 501(a),

(B) primarily engaged in the activity of the collection of human blood,

(C) registered with the Secretary for purposes of excise tax exemptions, and

(D) registered by the Food and Drug Administration to collect blood.

(50) Termination of United States citizenship.--

(A) In general.--An individual shall not cease to be treated as a United States citizen before the date on which the individual's citizenship is treated as relinquished under section 877A(g)(4).

(B) Dual citizens.--Under regulations prescribed by the Secretary, subparagraph (A) shall not apply to an individual who became at birth a citizen of the United States and a citizen of another country.

(b) Definition of resident alien and nonresident alien.--

(1) In general.--For purposes of this title (other than subtitle B)--

(A) Resident alien.--An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

(i) Lawfully admitted for permanent residence.--Such individual is a lawful permanent resident of the United States at any time during such calendar year.

(ii) Substantial presence test.--Such individual meets the substantial presence test of paragraph (3).

(iii) First year election.--Such individual makes the election provided in paragraph (4).

(B) Nonresident alien.--An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).

(2) Special rules for first and last year of residency.--

(A) First year of residency.--

(i) In general.--If an alien individual is a resident of the United States under paragraph (1)(A) with respect to any calendar year, but was not a resident of the United States at any time during the preceding calendar year, such alien individual shall be treated as a resident of the United States only for the portion of such calendar year which begins on the residency starting date.

(ii) Residency starting date for individuals lawfully admitted for permanent residence.--In the case of an individual who is a lawfully permanent resident of the United States at any time during the calendar year, but does not meet the substantial presence test of paragraph (3), the residency starting date shall be the first day in such calendar year on which he was present in the United States while a lawful permanent resident of the United States.

(iii) Residency starting date for individuals meeting substantial presence test.--In the case of an individual who meets the substantial presence test of paragraph (3) with respect to any calendar year, the residency starting date shall be the first day during such calendar year on which the individual is present in the United States.

(iv) Residency starting date for individuals making first year election.--In the case of an individual who makes the election provided by paragraph (4) with respect to any calendar year, the residency starting date shall be the 1st day during such calendar year on which the individual is treated as a resident of the United States under that paragraph.

(B) Last year of residency.--An alien individual shall not be treated as a resident of the United States during a portion of any calendar year if--

(i) such portion is after the last day in such calendar year on which the individual was present in the United States (or, in the case of an individual described in paragraph (1)(A)(i), the last day on which he was so described),

(ii) during such portion the individual has a closer connection to a foreign country than to the United States, and

(iii) the individual is not a resident of the United States at any time during the next calendar year.

(C) Certain nominal presence disregarded.--

(i) In general.--For purposes of subparagraphs (A)(iii) and (B), an individual shall not be treated as present in the United States during any period for which the individual establishes that he has a closer connection to a foreign country than to the United States.

(ii) Not more than 10 days disregarded.--Clause (i) shall not apply to more than 10 days on which the individual is present in the United States.

(3) Substantial presence test.--

(A) In general.--Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the "current year") if--

(i) such individual was present in the United States on at least 31 days during the calendar year, and

(ii) the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days:

In the case of days in:	**The applicable multiplier is:**
Current year	1
1st preceding year	⅓

2nd preceding year..... 1/6

(B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign country is established.--An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if--

(i) such individual is present in the United States on fewer than 183 days during the current year, and

(ii) it is established that for the current year such individual has a tax home (as defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.

(C) Subparagraph (B) not to apply in certain cases.--Subparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year--

(i) such individual had an application for adjustment of status pending, or

(ii) such individual took other steps to apply for status as a lawful permanent resident of the United States.

(D) Exception for exempt individuals or for certain medical conditions.--An individual shall not be treated as being present in the United States on any day if--

(i) such individual is an exempt individual for such day, or

(ii) such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

(4) First-year election.--

(A) An alien individual shall be deemed to meet the requirements of this subparagraph if such individual--

(i) is not a resident of the United States under clause (i) or (ii) of paragraph (1)(A) with respect to a calendar year (hereinafter referred to as the "election year"),

(ii) was not a resident of the United States under paragraph (1)(A) with respect to the calendar year immediately preceding the election year,

(iii) is a resident of the United States under clause (ii) of paragraph (1)(A) with respect to the calendar year immediately following the election year, and

(iv) is both--

(I) present in the United States for a period of at least 31 consecutive days in the election year, and

(II) present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the "testing period") for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).

(B) An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.

(C) An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of subparagraph (A).

(D) The rules of subparagraph (D)(i) of paragraph (3) shall apply for purposes of determining an individual's presence in the United States under this paragraph.

(E) An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.

(F) An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

(5) Exempt individual defined.--For purposes of this subsection--

(A) In general.--An individual is an exempt individual for any day if, for such day, such individual is--

(i) a foreign government-related individual,

(ii) a teacher or trainee,

(iii) a student, or

(iv) a professional athlete who is temporarily in the United States to compete in a sports event--

(I) which is organized for the primary purpose of benefiting an organization which is described in section 501(c)(3) and exempt from tax under section 501(a),

(II) all of the net proceeds of which are contributed to such organization, and,

(III) which utilizes volunteers for substantially all of the work performed in carrying out such event.

(B) Foreign government-related individual.--The term "foreign government-related individual" means any individual temporarily present in the United States by reason of--

(i) diplomatic status, or a visa which the Secretary (after consultation with the Secretary of State) determines represents full-time diplomatic or consular status for purposes of this subsection,

(ii) being a full-time employee of an international organization, or

(iii) being a member of the immediate family of an individual described in clause (i) or (ii).

(C) Teacher or trainee.--The term "teacher or trainee" means any individual--

(i) who is temporarily present in the United States under subparagraph (J) or (Q) of section 101(15) of the Immigration and Nationality Act (other than as a student), and

(ii) who substantially complies with the requirements for being so present.

(D) Student.--The term "student" means any individual--

(i) who is temporarily present in the United States--

(I) under subparagraph (F) or (M) of section 101(15) of the Immigration and Nationality Act, or

(II) as a student under subparagraph (J) or (Q) of such section 101(15), and

(ii) who substantially complies with the requirements for being so present.

(E) Special rules for teachers, trainees, and students.--

(i) Limitation on teachers and trainees.--An individual shall not be treated as an exempt individual by reason of clause (ii) of subparagraph (A) for the current year if, for any 2 calendar years during the preceding 6 calendar years, such person was an exempt person under clause (ii) or (iii) of subparagraph (A). In the case of an individual all of whose compensation is described in section 872(b)(3), the preceding sentence shall be applied by substituting "4 calendar years" for "2 calendar years".

(ii) Limitation on students.--For any calendar year after the 5th calendar year for which an individual was an exempt individual under clause (ii) or (iii) of subparagraph (A), such individual shall not be treated as an exempt individual by reason of clause (iii) of subparagraph (A), unless such individual establishes to the satisfaction of the Secretary that such individual does not intend to permanently reside in the United States and that such individual meets the requirements of subparagraph (D)(ii).

(6) Lawful permanent resident.--For purposes of this subsection, an individual is a lawful permanent resident of the United States at any time if--

(A) such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, and

(B) such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.

(7) Presence in the United States.--For purposes of this subsection--

(A) In general.--Except as provided in subparagraph (B), (C), or (D), an individual shall be treated as present in the United States on any day if such individual is physically present in the United States at any time during such day.

(B) Commuters from Canada or Mexico.--If an individual regularly commutes to employment (or self-employment) in the United States from a place of residence in Canada or Mexico, such individual shall not be treated as present in the United States on any day during which he so commutes.

(C) Transit between 2 foreign points.--If an individual, who is in transit between 2 points outside the United States, is physically present in the United States for less than 24 hours, such individual shall not be treated as present in the United States on any day during such transit.

(D) Crew members temporarily present.--An individual who is temporarily present in the United States on any day as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States shall not be treated as present in the United States on such day unless such individual otherwise engages in any trade or business in the United States on such day.

(8) Annual statements.--The Secretary may prescribe regulations under which an individual who (but for subparagraph (B) or (D) of paragraph (3)) would meet the substantial presence test of paragraph (3) is required to submit an annual statement setting forth the basis on which such individual claims the benefits of subparagraph (B) or (D) of paragraph (3), as the case may be.

(9) Taxable year.--

(A) In general.--For purposes of this title, an alien individual who has not established a taxable year for any prior period shall be treated as having a taxable year which is the calendar year.

(B) Fiscal year taxpayer.--If--

(i) an individual is treated under paragraph (1) as a resident of the United States for any calendar year, and

(ii) after the application of subparagraph (A), such individual has a taxable year other than a calendar year,

he shall be treated as a resident of the United States with respect to any portion of a taxable year which is within such calendar year.

(10) Coordination with section 877.--If--

(A) an alien individual was treated as a resident of the United States during any period which includes at least 3 consecutive calendar years (hereinafter referred to as the "initial residency period"), and

(B) such individual ceases to be treated as a resident of the United States but subsequently becomes a resident of the United States before the close of the 3rd calendar year beginning after the close of the initial residency period,

such individual shall be taxable for the period after the close of the initial residency period and before the day on which he subsequently became a resident of the United States in the manner provided in section 877(b). The preceding sentence shall apply only if the tax imposed pursuant to section 877(b) exceeds the tax which, without regard to this paragraph, is imposed pursuant to section 871.

(11) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection.

(c) Includes and including.--The terms "includes" and "including" when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(d) Commonwealth of Puerto Rico.--Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this title to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(e) Treatment of certain contracts for providing services, etc.--For purposes of chapter 1--

(1) In general.--A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not--

(A) the service recipient is in physical possession of the property,

(B) the service recipient controls the property,

(C) the service recipient has a significant economic or possessory interest in the property,

(D) the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,

(E) the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and

(F) the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements.--An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (1) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities.--

(A) In general.--Notwithstanding paragraphs (1) and (2), and except as provided in paragraph (4), any contract or arrangement between a service provider and a service recipient--

(i) with respect to--

(I) the operation of a qualified solid waste disposal facility,

(II) the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or

(III) the operation of a water treatment works facility, and

(ii) which purports to be a service contract,

shall be treated as a service contract.

(B) Qualified solid waste disposal facility.--For purposes of subparagraph (A), the term "qualified solid waste disposal facility" means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed at such facility is collected from the general public.

(C) Cogeneration facility.--For purposes of subparagraph (A), the term "cogeneration facility" means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility.--For purposes of subparagraph (A), the term "alternative energy facility" means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility.--For purposes of subparagraph (A), the term "water treatment works facility" means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) Paragraph (3) not to apply in certain cases.--

(A) In general.--Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if--

(i) the service recipient (or a related entity) operates such facility,

(ii) the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii) the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv) the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term "related entity" has the same meaning as when used in section 168(h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract.--For purposes of subparagraph (A), there shall not be taken into account--

(i) any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii) any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events.--

(i) Temporary shut-downs, etc.--For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs.--For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

(5) Exception for certain low-income housing.--This subsection shall not apply to any property described in clause (i), (ii), (iii), or (iv) of section 1250(a)(1)(B) (relating to low-income housing) if--

(A) such property is operated by or for an organization described in paragraph (3) or (4) of section 501(c), and

(B) at least 80 percent of the units in such property are leased to low-income tenants (within the meaning of section 167(k)(3)(B)) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

(6) Regulations.--The Secretary may prescribe such regulations as may be necessary or appropriate to carry out the provisions of this subsection.

(f) Use of related persons or pass-thru entities.--The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with--

(1) the linking of borrowing to investment, or

(2) diminishing risks,

through the use of related persons, pass-thru entities, or other intermediaries.

(g) Clarification of fair market value in the case of nonrecourse indebtedness.--For purposes of subtitle A, in determining the amount of gain or loss (or deemed gain or loss) with respect to any property, the fair market value of such property shall be treated as being not less than the amount of any nonrecourse indebtedness to which such property is subject.

(h) Motor vehicle operating leases.--

(1) In general.--For purposes of this title, in the case of a qualified motor vehicle operating agreement which contains a terminal rental adjustment clause--

(A) such agreement shall be treated as a lease if (but for such terminal rental adjustment clause) such agreement would be treated as a lease under this title, and

(B) the lessee shall not be treated as the owner of the property subject to an agreement during any period such agreement is in effect.

(2) Qualified motor vehicle operating agreement defined.--For purposes of this subsection--

(A) In general.--The term "qualified motor vehicle operating agreement" means any agreement with respect to a motor vehicle (including a trailer) which meets the requirements of subparagraphs (B), (C), and (D) of this paragraph.

(B) Minimum liability of lessor.--An agreement meets the requirements of this subparagraph if under such agreement the sum of--

(i) the amount the lessor is personally liable to repay, and

(ii) the net fair market value of the lessor's interest in any property pledged as security for property subject to the agreement,

equals or exceeds all amounts borrowed to finance the acquisition of property subject to the agreement. There shall not be taken into account under clause (ii) any property pledged which is property subject to the agreement or property directly or indirectly financed by indebtedness secured by property subject to the agreement.

(C) Certification by lessee; notice of tax ownership.--An agreement meets the requirements of this subparagraph if such agreement contains a separate written statement separately signed by the lessee--

(i) under which the lessee certifies, under penalty of perjury, that it intends that more than 50 percent of the use of the property subject to such agreement is to be in a trade or business of the lessee, and

(ii) which clearly and legibly states that the lessee has been advised that it will not be treated as the owner of the property subject to the agreement for Federal income tax purposes.

(D) Lessor must have no knowledge that certification is false.--An agreement meets the requirements of this subparagraph if the lessor does not know that the certification described in subparagraph (C)(i) is false.

(3) Terminal rental adjustment clause defined.--

(A) In general.--For purposes of this subsection, the term "terminal rental adjustment clause" means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.

(B) Special rule for lessee dealers.--The term "terminal rental adjustment clause" also includes a provision of an agreement which requires a lessee who is a dealer in motor vehicles to purchase the motor vehicle for a predetermined price and then resell such vehicle where such provision achieves substantially the same results as a provision described in subparagraph (A).

(i) Taxable mortgage pools.--

(1) Treated as separate corporations.--A taxable mortgage pool shall be treated as a separate corporation which may not be treated as an includible corporation with any other corporation for purposes of section 1501.

(2) Taxable mortgage pool defined.--For purposes of this title--

(A) In general.--Except as otherwise provided in this paragraph, a taxable mortgage pool is any entity (other than a REMIC) if--

(i) substantially all of the assets of such entity consists of debt obligations (or interests therein) and more than 50 percent of such debt obligations (or interests) consists of real estate mortgages (or interests therein),

(ii) such entity is the obligor under debt obligations with 2 or more maturities, and

(iii) under the terms of the debt obligations referred to in clause (ii) (or underlying arrangement), payments on such debt obligations bear a relationship to payments on the debt obligations (or interests) referred to in clause (i).

(B) Portion of entities treated as pools.--Any portion of an entity which meets the definition of subparagraph (A) shall be treated as a taxable mortgage pool.

(C) Exception for domestic building and loan.--Nothing in this subsection shall be construed to treat any domestic building and loan association (or portion thereof) as a taxable mortgage pool.

(D) Treatment of certain equity interests.--To the extent provided in regulations, equity interest of varying classes which correspond to maturity classes of debt shall be treated as debt for purposes of this subsection.

(3) Treatment of certain REIT's.--If--

(A) a real estate investment trust is a taxable mortgage pool, or

(B) a qualified REIT subsidiary (as defined in section 856(i)(2)) of a real estate investment trust is a taxable mortgage pool,

under regulations prescribed by the Secretary, adjustments similar to the adjustments provided in section 860E(d) shall apply to the shareholders of such real estate investment trust.

(j) Tax treatment of Federal Thrift Savings Fund.--

(1) In general.--For purposes of this title--

(A) the Thrift Savings Fund shall be treated as a trust described in section 401(a) which is exempt from taxation under section 501(a);

(B) any contribution to, or distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from such a trust; and

(C) subject to section 401(k)(4)(B) and any dollar limitation on the application of section 402(e)(3), contributions to the Thrift Savings Fund shall not be treated as distributed or made available to an employee or Member nor as a contribution made to the Fund by an employee or Member merely because the employee or Member has, under the provisions of subchapter III of chapter 84 of title 5, United States Code, and section 8351 of such title 5, an election whether the contribution will be made to the Thrift Savings Fund or received by the employee or Member in cash.

(2) Nondiscrimination requirements.--Notwithstanding any other provision of law, the Thrift Savings Fund is not subject to the nondiscrimination requirements applicable to arrangements described in section 401(k) or to matching contributions (as described in section 401(m)), so long as it meets the requirements of this section.

(3) Coordination with Social Security Act.--Paragraph (1) shall not be construed to provide that any amount of the employee's or Member's basic pay which is contributed to the Thrift Savings Fund shall not be included in the term "wages" for the purposes of section 209 of the Social Security Act or section 3121(a) of this title.

(4) Definitions.--For purposes of this subsection, the terms "Member", "employee", and "Thrift Savings Fund" shall have the same respective meanings as when used in subchapter III of chapter 84 of title 5, United States Code.

(5) Coordination with other provisions of law.--No provision of law not contained in this title shall apply for purposes of determining the treatment under this title of the Thrift Savings Fund or any contribution to, or distribution from, such Fund.

(k) Treatment of certain amounts paid to charity.--In the case of any payment which, except for section 501(b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170(c)--

(1) such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of a State or political subdivision thereof, and

(2) no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.

For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

(l) Regulations relating to conduit arrangements.--The Secretary may prescribe regulations recharacterizing any multiple-party financing transaction as a transaction directly among any 2 or more of such parties where the Secretary determines that such recharacterization is appropriate to prevent avoidance of any tax imposed by this title.

(m) Designation of contract markets.--Any designation by the Commodity Futures Trading Commission of a contract market which could not have been made under the law in effect on the day before the date of the enactment of the Commodity Futures Modernization Act of 2000 shall apply for purposes of this title except to the extent provided in regulations prescribed by the Secretary.

(n) Convention or association of churches.--For purposes of this title, any organization which is otherwise a convention or association of churches shall not fail to so qualify merely because the membership of such organization includes individuals as well as churches or because individuals have voting rights in such organization.

(o) Clarification of economic substance doctrine.--

(1) Application of doctrine.--In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if--

(A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and

(B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

(2) Special rule where taxpayer relies on profit potential.--

(A) In general.--The potential for profit of a transaction shall be taken into account in determining whether the requirements of subparagraphs (A) and (B) of paragraph (1) are met with respect to the transaction only if the present value of the reasonably expected pre-tax profit from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected.

(B) Treatment of fees and foreign taxes.--Fees and other transaction expenses shall be taken into account as expenses in determining pre-tax profit under subparagraph (A). The Secretary shall issue regulations requiring foreign taxes to be treated as expenses in determining pre-tax profit in appropriate cases.

(3) State and local tax benefits.--For purposes of paragraph (1), any State or local income tax effect which is related to a Federal income tax effect shall be treated in the same manner as a Federal income tax effect.

(4) Financial accounting benefits.--For purposes of paragraph (1)(B), achieving a financial accounting benefit shall not be taken into account as a purpose for entering into a transaction if the origin of such financial accounting benefit is a reduction of Federal income tax.

(5) Definitions and special rules.--For purposes of this subsection--

(A) Economic substance doctrine.--The term "economic substance doctrine" means the common law doctrine under which tax benefits under subtitle A with respect to a transaction are not allowable if the transaction does not have economic substance or lacks a business purpose.

(B) Exception for personal transactions of individuals.--In the case of an individual, paragraph (1) shall apply only to transactions entered into in connection with a trade or business or an activity engaged in for the production of income.

(C) Determination of application of doctrine not affected.--The determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted.

(D) Transaction.--The term "transaction" includes a series of transactions.

(p) Cross references.--

(1) Other definitions.--

For other definitions, see the following sections of title 1 of the United States Code:

(1) Singular as including plural, section 1.

(2) Plural as including singular, section 1.

(3) Masculine as including feminine, section 1.

(4) Officer, section 1.

(5) Oath as including affirmation, section 1.

(6) County as including parish, section 2.

(7) Vessel as including all means of water transportation, section 3.

(8) Vehicle as including all means of land transportation, section 4.

(9) Company or association as including successors and assigns, section 5.

(2) Effect of cross references.--

For effect of cross references in this title, see section 7806(a).

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 911; Pub.L. 86-70, § 22(g), (h), June 25, 1959, 73 Stat. 146; Pub.L. 86-624, § 18(i), (j), July 12, 1960, 74 Stat. 416; Pub.L. 86-778, Title I, § 103(t), Sept. 13, 1960, 74 Stat. 941; Pub.L. 87-834, §§ 6(c), 7(h), Oct. 16, 1962, 76 Stat. 982, 988; Pub.L. 87-870, § 5(a), Oct. 23, 1962, 76 Stat. 1161; Pub.L. 88-272, Title II, §§ 204(a)(3), 234(b)(3), Feb. 26, 1964, 78 Stat. 36, 114; Pub.L. 89-368, Title I, § 102(b)(5), Mar. 15, 1966, 80 Stat. 64; Pub.L. 89-809, Title I, § 103(l)(1), Nov. 13, 1966, 80 Stat. 1554; Pub.L. 90-364, Title I, § 103(e)(6), June 28, 1968, 82 Stat. 264; Pub.L. 91-172, Title IV, § 432(c), (d), Title IX, § 960(j), Dec. 30, 1969, 83 Stat. 622, 623, 735; Pub.L. 92-606, § 1(f)(4), Oct. 31, 1972, 86 Stat. 1497; Pub.L. 93-406, Title III, § 3043, Sept. 2, 1974, 88 Stat. 1003; Pub.L. 94-455, Title XII, § 1203(a), Title XIX, § 1906(a)(57), (b)(13)(A), (c)(3), Oct. 4, 1976, 90 Stat. 1688, 1832, 1834, 1835; Pub.L. 95-600, Title I, § 157(k)(2), Title VII, § 701(cc)(2), Nov. 6, 1978, 92 Stat. 2809, 2923; Pub.L. 97-34, Title VII, § 725(c)(4), Aug. 13, 1981, 95 Stat. 346; Pub.L. 97-248, Title II, § 201(d)(10), formerly § 201(c)(10), Title III, §§ 307(a)(17), 308(a), 336(a), Sept. 3, 1982, 96 Stat. 421, 590, 591, 628, renumbered § 201(d)(10) and amended Pub.L. 97-448, Title III, § 306(a)(1)(A)(i), (b)(3), Jan. 12, 1983, 96 Stat. 2400, 2406; Pub.L. 97-449, § 5(e), Jan. 12, 1983, 96 Stat. 2442; Pub.L. 97-473, Title II, § 203, Jan. 14, 1983, 96 Stat. 2611; Pub.L. 98-67, Title I, §§ 102(a), 104(d)(1), Aug. 5, 1983, 97 Stat. 369, 379; Pub.L. 98-216, § 3(c)(2), Feb. 14, 1984, 98 Stat. 6; Pub.L. 98-369, Div. A, Title I, §§ 31(e), 43(a)(1), 53(c), 75(c), 138(a), Title IV, §§ 412(b)(11), 422(d)(3), 474(r)(29)(K), 491(d)(53), Title V, § 526(c)(1), July 18, 1984, 98 Stat. 518, 558, 567, 595, 672, 792, 798, 845, 852, 874; Pub.L. 98-443, § 9(q), Oct. 4, 1984, 98 Stat. 1708; Pub.L. 99-514, Title II, § 201(c), (d)(14), Title VI, §§ 671(b)(3), 673, Title XI, §§ 1137, 1147(a), 1166(a), Title XVIII, §§ 1802(a)(9)(C), 1810(l)(1) to (5)(A), 1842(d), 1899A(63), (64), Oct. 22, 1986, 100 Stat. 2138, 2142, 2317, 2319, 2486, 2493, 2511, 2790, 2830, 2853, 2962; Pub.L. 100-202, § 101(m) [Title VI, § 624(a)], Dec. 22, 1987, 101 Stat. 1329-429; Pub.L. 100-647, § 1(c), Title I, §§ 1001(d)(2)(D), 1002(a)(2), 1006(t)(12), (25)(A), 1011A(m)(1), 1011B(e), 1018(g)(3), Nov. 10, 1988, 102 Stat. 3342, 3351, 3422, 3426, 3483, 3489, 3583; Pub.L. 101-194, Title VI, § 602, Nov. 30, 1989, 103 Stat. 1762; Pub.L. 101-508, Title XI, §§ 11704(a)(34), 11812(b)(13), Nov. 5, 1990, 104 Stat. 1388-519, 1388-536; Pub.L. 102-90, Title III, § 314(e), Aug. 14, 1991, 105 Stat. 470; Pub.L. 102-318, Title V, § 521(b)(43), July 3, 1992, 106 Stat. 313; Pub.L. 103-66, Title XIII, § 13238, Aug. 10, 1993, 107 Stat. 508; Pub.L. 103-296, Title III, § 320(a)(3), Aug. 15, 1994, 108 Stat. 1535; Pub.L. 104-88, Title III, §

304(e), Dec. 29, 1995, 109 Stat. 944; Pub.L. 104-188, Title I, §§ 1402(b)(3), 1621(b)(8), (9), 1907(a)(1), (2), Aug. 20, 1996, 110 Stat. 1790, 1867, 1916; Pub.L. 105-34, Title XI, §§ 1151(a), 1174(b), Title XVI, § 1601(i)(3)(A), Aug. 5, 1997, 111 Stat. 986, 989, 1093; Pub.L. 106-554, § 1(a)(7) [Title IV, § 401(i)], Dec. 21, 2000, 114 Stat. 2763, 2763A-650; Pub.L. 107-16, Title V, § 542(e)(3), June 7, 2001, 115 Stat. 85; Pub.L. 108-311, Title II, § 207(24), Oct. 4, 2004, 118 Stat. 1178; Pub.L. 108-357, Title VIII, §§ 804(b), 835(b)(10), (11), 852(a), Oct. 22, 2004, 118 Stat. 1570, 1594, 1609; Pub.L. 109-135, Title IV, § 403(v)(2), Dec. 21, 2005, 119 Stat. 2628; Pub.L. 109-280, Title XII, §§ 1207(f), 1222, Aug. 17, 2006, 120 Stat. 1071, 1089; Pub.L. 110-28, Title VIII, § 8246(a)(1), May 25, 2007, 121 Stat. 200; Pub.L. 110-245, Title III, § 301(c)(1), (2)(B), (C), June 17, 2008, 122 Stat. 1646; Pub.L. 111-152, Title I, § 1409(a), Mar. 30, 2010, 124 Stat. 1067; Pub.L. 111-312, Title III, § 301(a), Dec. 17, 2010, 124 Stat. 3300; Pub.L. 113-295, Div. A, Title II, § 221(a)(119), Dec. 19, 2014, 128 Stat. 4055; Pub.L. 115-97, Title I, §§ 11051(b)(4), 13304(a)(2)(F), Dec. 22, 2017, 131 Stat. 2090, 2125; Pub.L. 115-141, Div. U, Title IV, § 401(a)(331), (332), (b)(54), (55), Mar. 23, 2018, 132 Stat. 1200, 1205.)

26 U.S.C.A. § 7701, 26 USCA § 7701
Current through PL 117-55.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title IX. Taxation (Ch. 58-65c)
Chapter 63. Taxation of Corporations (Refs & Annos)

M.G.L.A. 63 § 26

§ 26. Examination of records

Currentness

The books, papers and accounts of every insurance company and of its agents shall be opened at all times to inspection and examination by the commissioner and the commissioner of insurance, or their duly authorized representatives, for the purpose of verifying the accuracy of the returns made under section twelve of chapter sixty-two C.

Credits
Amended by St.1946, c. 387, § 3; St.1953, c. 654, § 54; St.1976, c. 415, § 26.

M.G.L.A. 63 § 26, MA ST 63 § 26
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

M.G.L.A. 110A § 201

§ 201. Registration Requirement

Effective: June 28, 2002
Currentness

(a) It is unlawful for any person to transact business in this commonwealth as a broker-dealer or agent unless he is registered under this chapter.

(b) It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when he is not associated with a particular broker-dealer registered under this chapter or a particular issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the secretary.

(c) It is unlawful for any person to transact business in this commonwealth as an investment adviser or as an investment adviser representative unless he is so registered under this chapter.

(d) It is unlawful for:

(i) any investment adviser required to be registered to employ an investment adviser representative unless the investment adviser representative is registered under this chapter, but the registration of an investment adviser representative shall not be effective during any period when he is not employed by an investment adviser registered under this chapter; or

(ii) any investment adviser representative, as defined in Rule 203A-3(a) under the Investment Adviser Act of 1940, with a place of business, as defined in Rule 203A-3(b) under the Investment Adviser Act of 1940, in the commonwealth, who is employed by a federal covered adviser to conduct business in the commonwealth, unless registered under this chapter.

When an investment adviser representative begins or terminates employment with an investment adviser, the investment adviser in the case of clause (i) of subsection (d), or the investment adviser representative in the case of clause (ii) of said subsection (d), shall promptly notify the secretary.

(e) Every annual registration under this section shall expire on December 31.

(f) It is unlawful for any federal covered adviser to conduct advisory business in the commonwealth unless the adviser complies with the provisions of paragraph (b) of section 202.

Credits

Added by St.1972, c. 694, § 1. Amended by St.1993, c. 492, § 1; St.2002, c. 74, § 2.

M.G.L.A. 110A § 201, MA ST 110A § 201
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 110A. Uniform Securities Act (Refs & Annos)
Part IV. General Provisions (Refs & Annos)

M.G.L.A. 110A § 401

§ 401. Definitions

Effective: June 28, 2002
Currentness

When used in this chapter, unless the context otherwise requires:

(a) "Secretary" means the state secretary or the secretary of the commonwealth.

(b) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" shall not include an individual who represents:

(1) an issuer in:

(A) effecting transactions in a security exempted by clause (1), (2), (3), (10) or (11) of subsection (a) of section 402;

(B) effecting transactions exempted by subsection (b) of said section 402;

(C) effecting transactions in a federal covered security as described in section 18(b)(3) and 18(b)(4)(D) of the Securities Act of 1933;

(D) effecting transactions with existing employees, partners or director of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in the commonwealth; or

(2) a broker-dealer in effecting transactions in the commonwealth limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934.

A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition.

(c) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" shall not include:

(1) an agent;

(2) an issuer;

(3) a bank, savings institution, trust company, or the Central Credit Union Fund, Inc., established by chapter 216 of the acts of 1932; or

(4) a person who has no place of business in the commonwealth if:

(A) he effects transactions in the commonwealth exclusively with or through:

(i) the issuers of the securities involved in the transactions;

(ii) other broker-dealers; or

(iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or

(B) during any period of 12 consecutive months he does not direct more than 15 offers to sell or buy into the commonwealth in any manner to persons other than those specified in clause (A), whether or not the offeror or any of the offerees is then present in the commonwealth.

(d) “Fraud,” “deceit,” and “defraud” are not limited to common-law deceit.

(e) “Guaranteed” means guaranteed as to payment of principal, interest, or dividends.

(f) “Issuer” means any person who issues or proposes to issue any security, except that (1) with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted management, or unit type, the term “issuer” means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and (2) with respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payments out of production under such titles or leases, there is not considered to be any “issuer.”

(g) “Non-issuer” means not directly or indirectly for the benefit of the issuer.

(h) “Person” means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a limited liability company, a limited liability partnership, a government, or a political subdivision of a government.

(i) (1) “Sale” or “sell” includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

(2) “Offer” or “offer to sell” includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(3) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

(4) A purported gift of assessable stock is considered to involve an offer and sale.

(5) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

(6) The terms defined in this subsection do not include (A) any bona fide pledge or loan; (B) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; (C) any act incident to a class vote by stockholders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or (D) any act incident to a reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange are approved, after a hearing upon their fairness at which all persons to whom it is proposed to issue securities in the exchange have the right to appear, by any court, any official or agency of the United States, or any state authority expressly authorized by law to grant such approval.

(j) “Securities Act of 1933”, “Securities Exchange Act of 1934”, “Public Utility Holding Company Act of 1935”, “Investment Advisers Act of 1940” and “Investment Company Act of 1940” mean the federal statutes of those names as amended before or after the effective date of this chapter.

(k) “Security” means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. “Security” does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or some other specified period.

(*l*) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

(m) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" shall not include:

(1) (A) an investment adviser representative;

(B) a bank, savings institution, or trust company;

(C) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession, or who does not exercise investment discretion with respect to the assets of clients or maintain custody of the assets of clients for the purpose of investing such assets, except when the person is acting as a bona fide fiduciary in a capacity, such as an executor, trustee, personal representative, estate or trust agent, guardian, conservator, or person serving in a similar fiduciary capacity; and who does not accept or receive, directly or indirectly, any commission, fee or other remuneration contingent upon the purchase or sale of any specific security by a client of such persons;

(D) a publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;

(E) a person whose only clients in this state are federal covered advisers, other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, employee benefit plans with assets of not less than $5,000,000, governmental agencies or instrumentalities, or other financial institutions or institutional buyers, whether acting for themselves or as trustees with investment control;

(F) a registered broker-dealer or broker-dealer agent;

(G) a person who has no place of business in the commonwealth and who during the preceding 12 month period has had fewer than 6 clients, other than those listed in clause (E), who are residents of the commonwealth; and

(H) other persons not within the intent of this subsection as the secretary may by rule or order designate; or

(2) a federal covered adviser.

(n) "Investment adviser representative" means any partner, officer, director, 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;

(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.

"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 secretary may designate by rule or order.

(*o*) "Federal covered adviser" means a person who is registered with the Securities and Exchange Commission under section 203 of the Investment Advisers Act of 1940. "Federal covered adviser" shall not include any person who is excluded from the definition of "investment adviser" pursuant to clauses (A) to (G), inclusive, of paragraph (1) of subsection (m).

(p) "Federal covered security" means any security that is a covered security under section 18(b) of the Securities Act of 1933 or the regulations promulgated thereunder.

Credits

Added by St.1972, c. 694, § 1. Amended by St.1992, c. 157, § 1; St.1993, c. 492, § 11; St.2002, c. 74, §§ 9 to 14; St.2002, c. 438, § 36.

M.G.L.A. 110A § 401, MA ST 110A § 401
Current through Chapter 81 of the 2021 1st Annual Session.

M.G.L.A. 149 § 148

§ 148. Payment of wages; commissions; exemption by contract; persons deemed employers; provision for cashing check or draft; violation of statute

Effective: April 15, 2009
Currentness

Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week, or in the case of an employee who has worked for a period of less than five days, hereinafter called a casual employee, shall, within seven days after the termination of such period, pay the wages earned by such casual employee during such period, but any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday; and any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with; and the commonwealth, its departments, officers, boards and commissions shall so pay every mechanic, workman and laborer employed by it or them, and every person employed in any other capacity by it or them in any penal or charitable institution, and every county and city shall so pay every employee engaged in its business the wages or salary earned by him, unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner; and every town shall so pay each employee engaged in its business if so required by him; but an employee absent from his regular place of labor at a time fixed for payment shall be paid thereafter on demand; provided, however, that the department of telecommunications and energy, after hearing, may authorize a railroad corporation or a parlor or sleeping car corporation to pay the wages of any of its employees less frequently than weekly, if such employees prefer less frequent payments, and if their interests and the interests of the public will not suffer thereby; and provided, further, that employees engaged in a bona fide executive, administrative or professional capacity as determined by the attorney general and employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a work week of substantially the same number of hours from week to week may be paid bi-weekly or semi-monthly unless such employee elects at his own option to be paid monthly; and provided, further, that employees engaged in agricultural work may be paid their wages monthly; in either case, however, failure by a railroad corporation or a parlor or sleeping car corporation to pay its employees their wages as authorized by the said department, or by an employer of employees engaged in agricultural work to pay monthly the wages of his or her employees, shall be deemed a violation of this section; and provided, further, that an employer may make payment of wages prior to the time that they are required to be paid under the provisions of this section, and such wages together with any wages already earned and due under this section, if any, may be paid weekly, bi-weekly, or semi-monthly to a salaried employee, but in no event shall wages remain unpaid by an employer for more than six days from the termination of the pay period in which such wages were earned by the employee. For the purposes of this section the words salaried employee shall mean any employee whose remuneration is on a weekly, bi-weekly, semi-monthly, monthly or annual basis, even though deductions or

increases may be made in a particular pay period. The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement. An employer, when paying an employee his wage, shall furnish to such employee a suitable pay slip, check stub or envelope showing the name of the employer, the name of the employee, the day, month, year, number of hours worked, and hourly rate, and the amounts of deductions or increases made for the pay period.

Compensation paid to public and non-public school teachers shall be deemed to be fully earned at the end of the school year, and proportionately earned during the school year; provided, however, that payment of such compensation may be deferred to the extent that equal payments may be established for a 12 month period including amounts payable in July and August subsequent to the end of the school year.

Every railroad corporation shall furnish each employee with a statement accompanying each payment of wages listing current accrued total earnings and taxes and shall also furnish said employee with each such payment a listing of his daily wages and the method used to compute such wages.

This section shall apply, so far as apt, to the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee, and commissions so determined and due such employees shall be subject to the provisions of section one hundred and fifty.

This section shall not apply to an employee of a hospital which is supported in part by contributions from the commonwealth or from any city or town, nor to an employee of an incorporated hospital which provides treatment to patients free of charge, or which is conducted as a public charity, unless such employee requests such hospital to pay him weekly. This section shall not apply to an employee of a co-operative association if he is a shareholder therein, unless he requests such association to pay him weekly, nor to casual employees as hereinbefore defined employed by the commonwealth or by any county, city or town.

No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. Every public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees, shall be deemed to be an employer of such employees, and shall be responsible under this section for any failure to perform his official duty relative to the payment of their wages or salaries, unless he is prevented from performing the same through no fault on his part.

Any employer paying wages to an employee by check or draft shall provide for such employee such facilities for the cashing of such check or draft at a bank or elsewhere, without charge by deduction from the face amount thereof or otherwise, as shall be deemed by the attorney general to be reasonable. The state treasurer may in his discretion in writing exempt himself and any other public officer from the provisions of this paragraph.

An employer paying his employees on a weekly basis on July first, nineteen hundred and ninety-two shall, prior to paying said employees on a bi-weekly basis, provide each employee with written notice of such change at least ninety days in advance of the first such bi-weekly paycheck.

Whoever violates this section shall be punished or shall be subject to a civil citation or order as provided in section 27C.

Credits

Amended by St.1932, c. 101, § 1; St.1935, c. 350; St.1936, c. 160; St.1943, c. 378; St.1943, c. 467; St.1943, c. 563; St.1946, c. 414; St.1951, c. 28; St.1955, c. 506; St.1956, c. 259; St.1960, c. 416; St.1966, c. 319; St.1970, c. 760, § 12; St.1971, c. 387; St.1971, c. 590; St.1977, c. 664; St.1979, c. 633; St.1987, c. 559, § 29; St.1990, c. 162, § 1; St.1991, c. 138, § 331; St.1992, c. 133, §§ 502 to 504; St.1993, c. 110, § 181; St.1996, c. 151, §§ 426, 427; St.1997, c. 164, § 117; St.1998, c. 236, § 10; St.2008, c. 532, eff. April 15, 2009.

M.G.L.A. 149 § 148, MA ST 149 § 148
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted Preempted by Carey v. Gatehouse Media Massachusetts I, Inc., Mass.App.Ct., Feb. 27, 2018

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 148B

§ 148B. Persons performing service not authorized under this chapter deemed employees; exception

Effective: July 19, 2004
Currentness

(a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:--

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

Credits

Added by St.1990, c. 464. Amended by St.1992, c. 286, § 214; St.1993, c. 110, § 165; St.1998, c. 236, § 12; St.2004, c. 193, § 26, eff. July 19, 2004.

M.G.L.A. 149 § 148B, MA ST 149 § 148B
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 151A. Unemployment Insurance (Refs & Annos)

M.G.L.A. 151A § 6

§ 6. Service not included in "employment"

Effective: September 24, 2014
Currentness

The term "employment" shall not include:

(a) service in agricultural labor, except as otherwise provided in subsection (b) of section 4A and section 8C, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to section 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

<[There are no subsections (b) or (c).]>

(d) Service performed by an individual in the employ of his son, daughter or spouse, and service performed by a child under the age of eighteen in the employ of his father or mother;

(e) Service performed in the employ of the United States government or of an instrumentality of the United States which is wholly or partially owned by the United States, or exempt from the tax imposed by section 3301 of the Federal Internal Revenue Code of 1954 [1] or any acts in addition thereto and amendments thereof, by virtue of any provision of law which specifically refers to such section (or the corresponding section of a prior law) in granting such exemption; provided that if this commonwealth should not be certified by the Secretary of Labor under section 3304 of said Internal Revenue Code, as amended, [2] for any year, then the contributions, interest, penalties and fines required of any instrumentalities of the United States government under this chapter with respect to such year shall be deemed to have been erroneously collected within the meaning of section eighteen and said contributions shall be refunded from the clearing account of the unemployment compensation fund and the interest, penalties and fines shall be refunded from the interest, penalty or fine payments in the clearing account of the unemployment compensation fund or from the contingent fund;

(f) Except as otherwise provided in subsection (a) of section four A, service performed in the employ of a state, or political subdivision thereof, or any instrumentality, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more states or political subdivisions; and any service performed in the employ of any instrumentality of one or more states or political subdivision to the extent that the instrumentality is, with respect to such service, immune under the constitution of the United States from the tax imposed by section 3301 of said Internal Revenue Code, [1] or any acts in addition thereto and amendments thereof.

<[There is no subsection (g).]>

(h) Service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is fifty dollars or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For the purpose of this subsection, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if (A) on each of some twenty-four days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or (B) such individual was regularly employed, as determined under clause (A), by such employer in the performance of such service during the preceding calendar quarter;

(i) Service performed by an individual as an employee or employee representative as defined in section one of the Federal Railroad Unemployment Insurance Act; [3] and service with respect to which unemployment benefits are payable under an unemployment compensation system for maritime employees established by an act of Congress;

(j) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the Federal Internal Revenue Code, [4] other than an organization described in section 401(a) of said Code, [5] or exempt from income tax under section 521 of said Code, [6] if the remuneration for such service is less than fifty dollars;

(k) Service performed in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, or by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and such employment will not be covered by any program of unemployment insurance; or service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subsection shall not apply to service performed in a program established for or on behalf of an employer or group of employers.

(*l*) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to law; and service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;

(m) Service performed in the employ of a foreign government, including service as a consular or other officer or employee or a nondiplomatic representative; or, service performed in the employ of an instrumentality wholly owned by a foreign government and exempt under the provisions of chapters 21-25 inclusive of the Federal Internal Revenue Code [7] or any acts in addition thereto and amendments thereof;

(n) Service performed by an individual as an insurance agent or as an insurance solicitor, if all such service is performed for remuneration solely by way of commission and such service is excluded from the term “employment” under the provisions of section 3306 of the Federal Internal Revenue Code [8] or any acts in addition thereto and amendments thereof; provided, that service performed by any agent selling or servicing policies of industrial life insurance, as defined by section one of chapter

one hundred and seventy-five, and employed by any life insurance company authorized to do business in this commonwealth, whether his remuneration for such service is by way of commission or otherwise, shall be deemed employment within the provisions of this chapter;

(*o*) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

(p) Services performed by an individual as a real estate broker or salesman if he is licensed by the state as a real estate broker or salesman, and if he is remunerated solely by way of commission; provided, however, that the term "employment" shall include service performed by a real estate broker or a salesman, if such service is performed for a governmental employer as defined in subsection (i) of section one.

(q) Service performed by an individual as a poll taker or opinion taker, if the rate of such individual's remuneration is determined by a person other than the person supervising him and if said individual is free to accept or decline any given assignment; provided, however, that term "employment" shall include service performed as a poll taker or opinion taker, if such service is performed for a governmental employer as defined in subsection (i) of section one.

(r) Service performed in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(s) Service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(t) Service performed in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work;

(u) Service performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof or an Indian tribe, by an individual receiving such work relief or work training;

(v) Service performed in a custodial or penal institution by an inmate of said custodial or penal institution.

(w) Service performed by a patient in the employ of a hospital, whether public, nonprofit, or proprietary.

(x) service performed by a full-time student, as defined in section 3306(q) of said Internal Revenue Code of 1954,[9] in the employ of an organized camp if such camp: (i) did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year, or (ii), had average gross receipts for any six months in the preceding calendar year which were not more than thirty-three and one-third per cent of its average receipts for the other six

months in the preceding year and if such full-time student performed services in the employ of such camp for less than thirteen calendar weeks in such calendar year.

Credits

Added by St.1941, c. 685, § 1. Amended by St.1947, c. 433; St.1949, c. 639, § 1; St.1951, c. 763, § 3; St.1954, c. 280, § 1; St.1954, c. 431, § 1; St.1961, c. 393, § 1; St.1962, c. 414, §§ 2, 3; St.1964, c. 358; St.1964, c. 454; St.1966, c. 560, § 1; St.1968, c. 239; St.1971, c. 940, §§ 5 to 9; St.1973, c. 925, § 56; St.1977, c. 720, §§ 5 to 9; St.1983, c. 451, §§ 1, 2; St.1986, c. 444; St.1993, c. 263, § 6; St.2002, c. 347, §§ 3, 4; St.2014, c. 148, § 6, eff. Sept. 24, 2014.

Footnotes

1 26 U.S.C.A. § 3301.
2 26 U.S.C.A. § 3304.
3 45 U.S.C.A. § 351 et seq.
4 26 U.S.C.A. § 501(a).
5 26 U.S.C.A. § 401(a).
6 26 U.S.C.A. § 521.
7 26 U.S.C.A. §§ 3101 to 3510.
8 26 U.S.C.A. § 3306.
9 26 U.S.C.A. § 3306(q).

M.G.L.A. 151A § 6, MA ST 151A § 6
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

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Part I. Administration of the Government (Ch. 1-182)
Title XXII. Corporations (Ch. 155-182)
Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 4

§ 4. Examination of companies

Effective: March 19, 2015
Currentness

(1) Before granting licenses or certificates of authority to a company to issue policies of insurance or annuity or pure endowment contracts, the commissioner shall be satisfied, by such examination as the commissioner may make and such evidence as the commissioner may require, that such company is otherwise duly qualified under the law of the commonwealth to transact business therein; provided, however, that before granting such a certificate of authority to a domestic company, the commissioner shall require the filing with the division of insurance of an affidavit signed by the officers of the company stating the amount of expenses incurred in the organization thereof and stating that the company has no outstanding liabilities except said organization expenses and except, in the case of a stock company or a mutual company with a guaranty capital, its liabilities to stockholders for the amount paid in for shares of stock. The commissioner may make an examination and investigation concerning the truth of the matters contained in such affidavit as the commissioner deems necessary. Such affidavit shall be kept in the office of the commissioner and shall be open to public inspection. The commissioner shall require every domestic company to keep its books, records, accounts and vouchers in such manner that the commissioner or any authorized representatives may readily verify its annual statements and ascertain whether the company has complied with the law.

(2) At least once in every five years, and whenever the commissioner determines it to be prudent, the commissioner shall personally, or by any deputy or examiner, visit each domestic company and any foreign company applying for admission or already admitted to do business in the commonwealth, and thoroughly inspect and examine its affairs and ascertain its financial condition, its ability to fulfill its obligations, whether it has complied with the law and any other facts relating to its business methods and management, and the equity of its dealings with its policyholders. The commissioner shall also make such examination upon the request of five or more stockholders, creditors, policyholders or persons pecuniarily interested therein who shall make an affidavit of their belief, with specifications of the reasons therefore, that such company is in an unsound condition. The commissioner, or any deputy or examiner may also, whenever the commissioner determines it to be prudent, visit any other entity subject to the commissioner's jurisdiction, including but is not limited to, joint underwriting associations, residual market mechanisms and insurers issuing insurance through special insurance brokers pursuant to section one hundred and sixty-eight.

(3) In scheduling and determining the nature, scope and frequency of the examinations, the commissioner shall consider such matters as the results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, reports of independent certified public accountants and other criteria as set forth in the examiners' handbook adopted by the National Association of Insurance Commissioners and in effect when the commissioner exercises discretion under this section. The commissioner may also consider other matters reasonably related to solvency or market conduct. In conducting the examination, the examiner shall observe guidelines and procedures set forth in the examiners' handbook adopted by the National Association of Insurance Commissioners. The commissioner may also employ such other guidelines or procedures as the commissioner may deem appropriate.

(4) The charge for each such examination shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven, and shall be paid by each company within thirty days after notice from the commissioner of such charge. Such charge shall include an amount equal to the cost of fringe benefits as established by the commissioner of administration pursuant to section six B of chapter twenty-nine. If in the course of an examination of a domestic company or foreign company which maintains a branch office outside the commonwealth, it becomes necessary or expedient for the commissioner or any deputies or examiners to travel outside the commonwealth, such company shall pay the proper expenses of the commissioner, or any deputies or examiners incurred by reason thereof. Whenever the commissioner deems it advisable the commissioner shall cause a complete audit of the books of the company to be made by a disinterested expert accountant, and such company shall pay the proper expenses of such audit. When making an examination under this section, the commissioner may retain attorneys, appraisers independent actuaries, independent certified public accountants and other professionals and specialists as examiners, the proper cost of which shall be borne by the company which is the subject of the examination.

(5) In lieu of an examination under this section of any foreign or alien insurer licensed in the commonwealth, the commissioner may accept an examination report on the company as prepared by the insurance department for the company's state of domicile or port-of-entry state until January first, nineteen hundred and ninety-four. Thereafter, such reports may only be accepted if: (a) the insurance department was at the time of the examination accredited under the National Association of Insurance Commissioners' Financial Regulation Standards and Accreditation Program; or (b) the examination is performed under the supervision of an accredited insurance department or with the participation of one or more examiners who are employed by such an accredited insurance department and who, after a review of the examination work papers and report, state under oath that the examination was performed in a manner consistent with the standards and procedures required by their accredited insurance department.

(6) If it shall appear upon examination that any company has entered into an agreement with a corporation, domestic or foreign, or other organization whereby such corporation has undertaken, except by reinsurance, to be responsible for the whole or any part of the expenses, liabilities or other obligations appertaining to the transaction of business by such company for the consideration that such company shall become liable to such corporation or organization for a part of said company's income, assets or profits, the commissioner may examine or cause to be examined such corporation or organization, and may thoroughly investigate its affairs to ascertain its financial condition, its ability to fulfill its obligation to the company, and any other facts relating to its business methods and management, and shall set forth any findings, so far as they affect the financial condition of the company, in a report which shall be a public record.

(7) Nothing contained in this section shall be construed to limit the commissioner's authority to terminate or suspend any examination in order to pursue other legal or regulatory action pursuant to this chapter, chapters one hundred and seventy-five J, one hundred and seventy-six D and one hundred and seventy-six *I*, and any other applicable sections of the General Laws. Findings of fact and conclusions made pursuant to any examination shall be prima facie evidence in any legal or regulatory action.

(8) Nothing contained in this section shall be construed to limit the commissioner's authority to use and if appropriate, to make public any final or preliminary examination report, any examiner or company work papers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his sole discretion, deem appropriate.

(9) Any report of an examination shall be comprised of only facts appearing upon the books, records, or other documents of the company, its agents or other persons examined, or as ascertained from the testimony of its officers, agents or other persons examined concerning its affairs, and such conclusions and recommendations as the examiners find reasonably warranted from

the facts. The assets and liabilities of the company shall be allowed and computed, in any report of an examination under this section, in accordance with sections nine to twelve, inclusive, and may be set forth in such report in accordance with the items specified in the forms of annual statements prescribed by section twenty-five, as the commissioner may deem appropriate.

(10) No later than sixty days following completion of the examination, the examiner in charge shall file with the commissioner a verified written report of examination under oath. Upon receipt of the verified report, the commissioner shall transmit the report to the company examined, together with a notice which shall afford the company examined a reasonable opportunity of not more than thirty days to make a written submission or rebuttal with respect to any matters contained in the examination report. Within thirty days of the end of the period allowed for the receipt of written submissions or rebuttals, the commissioner shall consider and review the reports together with any written submissions or rebuttals and any relevant portions of the examiner's work papers and enter an order:

(a) adopting the examination report as filed with modifications or corrections, and if the examination report reveals that the company is operating in violation of any law, regulation or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure such violation; or

(b) rejecting the examination report with directions to examiners to reopen the examination for the purposes of obtaining additional data, documentation or information, and refiling pursuant to the provisions above; or

(c) calling for an investigatory hearing with no less than twenty days notice to the company for purposes of obtaining additional documentation, data, information and testimony.

(11) An order entered pursuant to this section shall be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, relevant examiner work papers and any written submissions or rebuttals. An order shall be considered a final agency decision and may be appealed pursuant to chapter thirty A and shall be served upon the company by certified mail, together with a copy of the adopted examination report. Within thirty days of the issuance of the adopted report, the company shall file affidavits executed by each of its directors stating under oath that they have received a copy of the adopted report and related orders. Any hearing conducted under this section by the commissioner or designee shall be conducted as a nonadversarial confidential investigatory proceeding as necessary for the resolution of the inconsistencies, discrepancies or disputed issues apparent upon the face of the filed examination report or raised by or as a result of the commissioner's review of relevant work papers or by the written submission or rebuttal of the company. Within twenty days of the conclusion of any such hearing, the commissioner shall enter an order pursuant to this section. The hearing shall be conducted in accordance with rules and regulations promulgated by the commissioner.

(12) Notwithstanding any other provision of the General Laws, including clause Twenty-sixth of section 7 of chapter 4 and chapter 66, documents, materials or other information, including but not limited to, all working papers and copies thereof created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made pursuant to this section or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall be confidential by law and privileged, shall not be a public record under said clause Twenty-sixth, shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner may use the documents, materials or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties.

(a) Documents, materials or other information, including but not limited to, all working papers and copies thereof in the possession or control of the National Association of Insurance Commissioners and its affiliates and subsidiaries shall be confidential by law and privileged, shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action if they are:

(i) created, produced, obtained by or disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries in the course of the National Association of Insurance Commissioners and its affiliates and subsidiaries assisting an examination made pursuant to this subsection or assisting the commissioner in the analysis of the financial condition or market conduct of a company; or

(ii) disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries pursuant to this subsection by any member of the National Association of Insurance Commissioners.

(b) Neither the commissioner nor any person who received the documents, material or other information while acting under the authority of the commissioner, including the National Association of Insurance Commissioners and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials or information subject to this section.

(c) In order to assist in the performance of the commissioner's duties, the commissioner:

(i) may share documents, materials or other information, including the confidential and privileged documents, materials or information subject to this subsection with other state, federal and international regulatory agencies, the National Association of Insurance Commissioners and its affiliates and subsidiaries and state, federal and international law enforcement authorities provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication or other information;

(ii) may receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries and regulatory and law enforcement officials of other foreign or domestic jurisdictions and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

(iii) may enter into agreements governing sharing and use of information consistent with this subsection.

(d) No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this subsection or as a result of sharing as authorized in this subsection.

(e) A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under this subsection shall be available and enforced in any proceeding in and in any court of the commonwealth.

(13) If it shall appear to the commissioner, from charges filed with the division setting forth the facts under oath, that unwarranted and misleading statements, estimates and promises have been made, and excessive compensation allowed for, promoting the sale in the commonwealth of stock for establishing a new company, domestic or foreign, the commissioner shall investigate said charges, or may act on the commissioner's own initiative in making such investigations, and shall make a record in the division of any findings in relation thereto.

(14) The commissioner may investigate, in such manner and to such extent as the commissioner may deem expedient, a complaint of a policyholder in respect to a claim under a policy of insurance or annuity or pure endowment contract.

(15) The commissioner or any person authorized by the commissioner to make examinations or investigations provided for by this section shall have access to all the assets of the company, corporation or other organization for the purpose of verification and to all the books and papers relating to its business and to the books and papers of its representatives. The commissioner or any person authorized by the commissioner may summon and examine under oath any person who, the commission or the examiner reasonably believes, has knowledge of the affairs, transactions or circumstances being examined or investigated; and the refusal, without justifiable cause, of any person, including any company, its officers, directors, employees or agents to submit to examination or to comply with any reasonable written request of the commissioner or any representative shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the company to engage in an insurance or other business subject to the commissioner's jurisdiction, and shall be subject to a fine of not more than one thousand dollars or to imprisonment for not more than one year. Any such proceedings for suspension, revocation or refusal of any license or authority shall be conducted pursuant to the provisions of section five.

(16) No examiner may be appointed by the commissioner if such examiner, either directly or indirectly, has a conflict of interest, or is affiliated with the management of, or owns a pecuniary interest in any company subject to examination under this section. This section shall not be construed to automatically preclude an examiner from being: a policyholder or claimant under an insurance policy; a grantor of a mortgage or similar instrument on the examiner's residence to a regulated entity if done under customary terms and in the ordinary course of business; an investment owner in shares of regulated diversified investment companies; or a settlor or beneficiary of a blind trust into which any otherwise impermissible holdings have been placed. Notwithstanding the requirements of this section, the commissioner may retain qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even if said persons may from time to time be similarly employed or retained by a company subject to examination under this section.

(17) No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives or any examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this section. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative or examiner pursuant to an examination made under this section, if such act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive. This section shall not abrogate or modify a common law or statutory privilege or immunity heretofore enjoyed by such person identified. Such person shall be entitled to an award of attorney's fees and costs if such person is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this section if the party bringing the action was not justified in doing so. For purposes of this section a proceeding is justified if it had a reasonable basis in law or fact at the time it was initiated.

Credits

Amended by St.1938, c. 357, § 1; St.1939, c. 472, § 4; St.1941, c. 324; St.1983, c. 233, § 71; St.1986, c. 614; St.1993, c. 226, § 1; St.2014, c. 409, § 5, eff. Mar. 19, 2015.

M.G.L.A. 175 § 4, MA ST 175 § 4
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

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Part I. Administration of the Government (Ch. 1-182)
Title XXII. Corporations (Ch. 155-182)
Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 36A

§ 36A. Agents and agency employees; retirement or insurance benefits

Currentness

Any domestic life company or any domestic company transacting business solely under subdivisions (a) and (d) of clause sixth of section forty-seven may establish a plan for retirement or insurance benefits, or both, for agents, or any class or classes thereof as the company may determine, having a written contract with such company or with any agent thereof under which he solicits exclusively applications for policies of life or endowment insurance or annuity or pure endowment contracts or accident and health insurance issued by such company, and for the agency employees of any agent having such a contract; provided, that qualification requirements for such plans and the determination of the amounts of such retirement benefits shall be based exclusively upon the solicitation and sale of life or endowment insurance or annuity or pure endowment contracts or accident and health insurance for such company and shall not in any manner directly or indirectly be based upon the solicitation or sale of any other kind of insurance by said agent. Any such plan may provide for contributions by such agents and agency employees. The word "agent" as used in this section shall, in case any such contract is held by a partnership or corporation, include any member of such partnership or any officer of such corporation. Such retirement or insurance benefits may be provided for in a group annuity contract, a group life, or a general or blanket accident and health policy, or in a single group policy, issued by such company, if authorized to issue any such policy or contract, or by any other company so authorized, or in any other manner that the directors of such company may prescribe. If any such benefits are provided otherwise than by any such group policy, the company may in connection therewith establish special funds for the purpose of financing the payment of such benefits. The provisions of the last sentence of the third paragraph of section thirty-six shall apply to any person covered by or insured under any such group policy or contract issued by a domestic mutual life company. The provisions of section one hundred and thirty-two C shall apply to any retirement benefits granted under the authority of this section or section thirty-six. Section one hundred and thirty-five shall apply to any insurance benefits so granted.

Credits

Added by St.1948, c. 496. Amended by St.1959, c. 261; St.1969, c. 311, § 2.

M.G.L.A. 175 § 36A, MA ST 175 § 36A
Current through Chapter 81 of the 2021 1st Annual Session.

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Title XXII. Corporations (Ch. 155-182)
Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 113I

§ 113*I*. Freedom of contract between insurers and agents or brokers; manner of issuing policies

Currentness

Nothing in this chapter shall be construed to abridge or restrict the freedom of contract between insurers and agents or brokers nor to require an insurer to issue policies in any way other than through its ordinary and usual method of marketing except that insurers shall, pursuant to the plan approved under section one hundred and thirteen H, be required to recognize and to permit immediate certification of insurance by and to pay a fair and reasonable commission to any licensed broker or agent designated as the producers of record by applicants for insurance or renewal thereof. Nothing in this chapter shall be construed to restrict the application of section one hundred and sixty-three.

Credits
Added by St.1954, c. 274. Amended by St.1973, c. 551, § 6.

M.G.L.A. 175 § 113I, MA ST 175 § 113I
Current through Chapter 81 of the 2021 1st Annual Session.

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M.G.L.A. 175 § 162

§ 162. Agent, broker and adjuster defined; on-premises and off-premise solicitation of negotiation of policy of insurance

Effective: March 16, 2005
Currentness

Solicitation or negotiation of policies of insurance that takes place off the premises of an insurance broker, agent or company shall be by a duly licensed broker or agent. Solicitation or negotiation of policies of insurance performed on the premises of an insurance broker, agent or company, may be done by an employee insofar as such solicitation or negotiation is under the immediate direction and general supervision of a duly licensed broker or agent. All binders of insurance and insurance policies shall be signed by a licensed individual or by such person acting under a power of attorney; provided, however, that the provisions of this paragraph shall apply only to the solicitation or negotiation of property or casualty policies of insurance.

Whoever, for compensation, not being an attorney at law acting in the usual course of his profession, directly or indirectly solicits from an insured or the representative of the insured, or performs services pursuant to an agreement, engagement or undertaking to represent the insured in connection with the assessment of damages, negotiation, settlement, appraisal or reference of a loss under a fire insurance policy, homeowners insurance policy, commercial multi-peril insurance policy, business interruption insurance policy, fidelity bond or crime insurance policy, inland or ocean marine insurance policy, or other property damage insurance coverage of any sort, shall be a public insurance adjuster.

Credits
Amended by St.1941, c. 286; St.1982, c. 576; St.2002, c. 106, §§ 3, 3A; St.2002, c. 314, § 2; St.2004, c. 431, § 15, eff. Mar. 16, 2005.

M.G.L.A. 175 § 162, MA ST 175 § 162
Current through Chapter 81 of the 2021 1st Annual Session.

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Part I. Administration of the Government (Ch. 1-182)
Title XXII. Corporations (Ch. 155-182)
Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 162I

§ 162*I*. License required to sell, solicit or negotiate insurance

Effective: January 1, 2003
Currentness

A person shall not sell, solicit or negotiate insurance in the commonwealth for any class or classes of insurance unless the person is licensed for that line of authority in accordance with sections 162H to 162X, inclusive.

Credits
Added by St.2002, c. 106, § 5.

M.G.L.A. 175 § 162I, MA ST 175 § 162I
Current through Chapter 81 of the 2021 1st Annual Session.

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Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 162K

§ 162K. Insurance producer license; written examination

Effective: January 1, 2003
Currentness

(a) A resident individual applying for an insurance producer license shall pass a written examination unless exempt pursuant to section 162*O*. The examination shall test the knowledge of the individual concerning the lines of authority for which application is made, the duties and responsibilities of an insurance producer and the insurance laws and regulations of the commonwealth. Examinations required by this section shall be developed and conducted under rules and regulations prescribed by the commissioner.

(b) The commissioner may make arrangements, including contracting with an outside testing service, for administering examinations and collecting the nonrefundable fee determined or approved by the commissioner.

(c) Each individual applying for an examination shall remit a nonrefundable fee as prescribed by the commissioner.

(d) An individual who fails to appear for the examination as scheduled or fails to pass the examination, shall reapply for an examination and remit all required fees and forms before being rescheduled for another examination.

Credits
Added by St.2002, c. 106, § 5.

M.G.L.A. 175 § 162K, MA ST 175 § 162K
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXII. Corporations (Ch. 155-182)
Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 162S

§ 162S. Insurance producers acting as agents of insurers; appointment procedures

Effective: January 1, 2003
Currentness

(a) An insurance producer shall not act as an agent of an insurer unless the insurance producer becomes an appointed agent of that insurer. An insurance producer who is not acting as an agent of an insurer is not required to become appointed.

(b) To appoint a producer as its agent, the appointing insurer shall file, in a format approved by the commissioner, a notice of appointment within 15 days from the date the agency contract is executed or the first insurance application is submitted. An insurer may also elect to appoint a producer to all or some insurers within the insurer's holding company system or group by the filing of a single appointment request.

(c) Upon receipt of the notice of appointment, the commissioner shall verify within a reasonable time not to exceed 30 days that the insurance producer is eligible for appointment. If the insurance producer is determined to be ineligible for appointment, the commissioner shall notify the insurer within 5 days of its determination.

(d) An insurer shall pay an appointment fee, in the amount prescribed by section 14, for each insurance producer appointed by the insurer.

(e) An insurer shall remit, in a manner prescribed by the commissioner, a renewal appointment fee in the amount prescribed by section 14.

Credits
Added by St.2002, c. 106, § 5.

M.G.L.A. 175 § 162S, MA ST 175 § 162S
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXII. Corporations (Ch. 155-182)
Chapter 175. Insurance (Refs & Annos)

M.G.L.A. 175 § 162T

§ 162T. Insurer's termination of appointment, contract, etc. with producer; procedures

Effective: January 1, 2003
Currentness

(a) An insurer or authorized representative of the insurer that terminates the appointment, employment, contract or other insurance business relationship with a producer shall notify the commissioner within 30 days following the effective date of the termination, using a format prescribed by the commissioner, if the reason for termination is one of the reasons set forth in section 162R or the insurer has knowledge the producer was found by a court, government body, or self-regulatory organization authorized by law to have engaged in any of the activities in section 162R. Upon the written request of the commissioner, the insurer shall provide additional information, documents, records or other data pertaining to the termination or activity of the producer.

(b) An insurer or authorized representative of the insurer that terminates the appointment, employment or contract with a producer for any reason not set forth in section 162R shall notify the commissioner within 30 days following the effective date of the termination, using a format prescribed by the commissioner. Upon written request of the commissioner, the insurer shall provide additional information, documents, records or other data pertaining to the termination.

(c) The insurer or the authorized representative of the insurer shall promptly notify the commissioner in a format acceptable to the commissioner if, upon further review or investigation, the insurer discovers additional information that would have been reportable to the commissioner in accordance with subsection (a) had the insurer then known of its existence.

(d)(1) Within 15 days after making the notification required by subsections (a), (b) and (c), the insurer shall mail a copy of the notification to the producer at his last known address. If the producer is terminated for cause for any of the reasons listed in section 162R, the insurer shall provide a copy of the notification to the producer at his last known address by certified mail, return receipt requested, postage prepaid or by overnight delivery using a nationally recognized carrier.

(2) Within 30 days after the producer has received the original or additional notification, the producer may file written comments concerning the substance of the notification with the commissioner. The producer shall, by the same means, simultaneously send a copy of the comments to the reporting insurer, and the comments shall become a part of the commissioner's file and accompany every copy of a report distributed or disclosed for any reason about the producer as permitted under subsection (f).

(e)(1) In the absence of actual malice, an insurer, the authorized representative of the insurer, a producer, the commissioner, or an organization of which the commissioner is a member and which compiles information and makes it available to other insurance commissioners or regulatory or law enforcement agencies, shall not be subject to civil liability, and a civil cause of action of any nature shall not arise against these entities or their respective agents or employees, as a result of any statement or information required by or provided under this section; or any information relating to any statement that may be requested in writing by the

commissioner, from an insurer or producer; or a statement by a terminating insurer or producer to an insurer or producer limited solely and exclusively to whether a termination for cause under subsection (a) was reported to the commissioner, provided that the propriety of any termination for cause under subsection (a) is certified in writing by an officer or authorized representative of the insurer or producer terminating the relationship.

(2) In any action brought against a person that may have immunity under paragraph (1) for making any statement required by this section or providing any information relating to any statement that may be requested by the commissioner, the party bringing the action shall plead specifically in any allegation that paragraph (1) does not apply because the person making the statement or providing the information did so with actual malice.

(3) Paragraph (1) or (2) shall not abrogate or modify any existing statutory or common law privileges or immunities.

(f)(1) Any documents, materials or other information in the control or possession of the division of insurance that is furnished by an insurer, producer or an employee or agent thereof acting on behalf of the insurer or producer, or obtained by the commissioner in an investigation under this section shall be confidential by law and privileged, shall not be subject to the public records law, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the commissioner may use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's duties.

(2) Neither the commissioner nor any person who received documents, materials or other information while acting under the authority of the commissioner shall be permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to paragraph (1).

(3) In order to assist in the performance of the commissioner's duties under sections 162H to 162X, inclusive, the commissioner:--

(i) may share documents, materials or other information, including the confidential and privileged documents, materials or information subject to paragraph (1), with other state, federal and international regulatory agencies, with the NAIC, its affiliates or subsidiaries, and with state, federal and international law enforcement authorities, if the recipient agrees to maintain the confidentiality and privileged status of the document, material or other information;

(ii) may receive documents, materials or information, including otherwise confidential and privileged documents, materials or information, from the NAIC, its affiliates or subsidiaries and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

(iii) may enter into agreements governing sharing and use of information consistent with this paragraph.

(4) No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in paragraph (3).

(5) Nothing in sections 162H to 162X, inclusive, shall prohibit the commissioner from releasing final, adjudicated actions including for cause terminations that are open to public inspection, under clause Twenty-sixth of section 7 of chapter 4 and section 10 of chapter 66, to a database or other clearinghouse service maintained by the NAIC, its affiliates or subsidiaries of the NAIC.

(g) An insurer, the authorized representative of the insurer, or producer that fails to report as required under this section or that is found to have reported with actual malice by a court of competent jurisdiction may, after notice and hearing, have its license or certificate of authority suspended or revoked and may be fined in accordance with chapter 176D.

(h) Nothing in this section shall modify the provisions of section 163.

Credits
Added by St.2002, c. 106, § 5.

M.G.L.A. 175 § 162T, MA ST 175 § 162T
Current through Chapter 81 of the 2021 1st Annual Session.

End of Document

Massachusetts General Laws Annotated
Massachusetts Rules of Appellate Procedure (Refs & Annos)

Massachusetts Rules of Appellate Procedure (Mass.R.A.P.), Rule 17

Rule 17. Brief of an Amicus Curiae

Currentness

(a) General. A brief of an amicus curiae may be filed only (1) by leave of the appellate court or a single justice granted on motion or (2) when solicited by the appellate court, except that leave shall not be required when the brief is presented by the Commonwealth or its officer or agency. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable.

(b) Timing. In all cases, an amicus curiae shall file its brief no later than 21 days before the date of oral argument for that case unless the appellate court or a single justice for cause shown shall grant leave for later filing. Any party may request leave from the appellate court or a single justice to file a response to a brief filed by an amicus curiae.

(c) Cover, Length, and Content. An amicus brief must comply with Rule 20. In addition to the requirements of Rule 20, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal or neither. An amicus brief need not comply with all the requirements of Rule 16, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Supreme Judicial Court Rule 1:21;

(2) a table of contents with page references, in accord with Rule 16(a)(3);

(3) a table of authorities, in accord with Rule 16(a)(4);

(4) a concise statement of the identity of the amicus curiae and its interest in the case;

(5) unless the brief is presented by the Commonwealth or its officer or agency, a declaration that indicates whether

(A) a party or a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) a person or entity--other than the amicus curiae, its members, or its counsel--contributed money that was intended to fund preparing or submitting the brief and, if so, identifying each such person or entity; and

(D) the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal, and, if so, identifying the proceeding or transaction, its relevance to the present appeal, and the parties involved;

(6) a summary of argument, in accord with Rule 16(a)(8), if the argument is more than 20 pages in length or more than 4,500 words if produced in a proportionally spaced font;

(7) an argument, which need not include a statement of the applicable standard of review;

(8) a signature block, in accord with Rule 16(a)(12);

(9) a certificate stating that the brief complies with the requirements of this rule and Rule 20 and specifying how compliance with the length limit of Rule 20(a)(3)(E) was ascertained, by stating either (A) the name, size, and number of characters per inch of the monospaced font used and the number of non-excluded pages, or (B) the name and size of the proportionally spaced font used, the number of non-excluded words, and the name and version of the word-processing program used; and

(10) a certificate of service, in accord with Rule 13(e).

A brief not complying with these rules (including a brief that does not contain a certification) may be struck from the files by the appellate court or a single justice.

(d) Filing. The same number of copies of the brief of an amicus curiae shall be filed with the clerk and served on each party as required by Rule 19(d).

(e) Oral argument. A motion of an amicus curiae to participate in the oral argument will be granted only for good cause.

Credits
Amended October 30, 1997, effective January 1, 1998; October 31, 2018, effective March 1, 2019.

Rules App. Proc., Rule 17, MA ST RAP Rule 17
Current with amendments received through November 1, 2021.

End of Document

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter C. Employment Taxes and Collection of Income Tax at Source
Part 31. Employment Taxes and Collection of Income Tax at Source (Refs & Annos)
Subpart B. Federal Insurance Contributions Act (Chapter 21, Internal Revenue Code of 1954)
General Provisions

26 C.F.R. § 31.3121(d)–1, Treas. Reg. § 31.3121(d)–1

§ 31.3121(d)–1 Who are employees.

Currentness

(a) In general. (1) Whether an individual is an employee with respect to services performed after 1954 is determined in accordance with section 3121(d) and (o) and section 3506. This section of the regulations applies with respect only to services performed after 1954. Whether an individual is an employee with respect to services performed after 1936 and before 1940 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether an individual is an employee with respect to services performed after 1939 and before 1951 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether an individual is an employee with respect to services performed after 1950 and before 1955 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) Section 3121(d) contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee for purposes of the regulations in this subpart whether or not he is an employee under any of the other tests.

(3) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(4) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.

(5) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3121(b)–3).

(b) Corporate officers. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled

to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) Special classes of employees. (1) In addition to individuals who are employees under paragraph (b) or (c) of this section, other individuals are employees if they perform services for remuneration under certain prescribed circumstances in the following occupational groups:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for his principal;

(ii) As a full-time life insurance salesman;

(iii) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(iv) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) In order for an individual to be an employee under this paragraph, the individual must perform services in an occupation falling within one of the enumerated groups. If the individual does not perform services in one of the designated

occupational groups, he is not an employee under this paragraph. An individual who is not an employee under this paragraph may nevertheless be an employee under paragraph (b) or (c) of this section. The language used to designate the respective occupational groups relates to fields of endeavor in which particular designations are not necessarily in universal use with respect to the same service. The designations are addressed to the actual services without regard to any technical or colloquial labels which may be attached to such services. Thus, a determination whether services fall within one of the designated occupational groups depends upon the facts of the particular situation.

(3) The factual situations set forth below are illustrative of some of the individuals falling within each of the above enumerated occupational groups. The illustrative factual situations are as follows:

(i) Agent-driver or commission-driver. This occupational group includes agent-drivers or commission-drivers who are engaged in distributing meat or meat products, vegetables or vegetable products, fruit or fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for their principals. An agent-driver or commission-driver includes an individual who operates his own truck or the truck of the person for whom he performs services, serves customers designated by such person as well as those solicited on his own, and whose compensation is a commission on his sales or the difference between the price he charges his customers and the price he pays to such person for the product or service.

(ii) Full-time life insurance salesman. An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

(iii) Home workers. This occupational group includes a worker who performs services off the premises of the person for whom the services are performed, according to specifications furnished by such person, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him. For provisions relating to the determination of wages in the case of a home worker to whom this subdivision is applicable, see § 31.3121(a)(10)–1.

(iv) Traveling or city salesman. (a) This occupational group includes a city or traveling salesman who is engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person or persons) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. An agent-driver or commission-driver is not within this occupational group. City or traveling salesmen who sell to retailers or to the others specified, operate off the premises of their principals, and are generally compensated on a commission basis, are within this occupational group. Such salesmen are generally not controlled as to the details of their services or the means by which they cover their territories, but in the ordinary case they are expected to call on regular customers with a fair degree of regularity.

(b) In order for a city or traveling salesman to be included within this occupational group, his entire or principal business activity must be devoted to the solicitation of orders for one principal. Thus, the multiple-line salesman generally is not within this occupational group. However, if the salesman solicits orders primarily for one principal, he

is not excluded from this occupational group solely because of side-line sales activities on behalf of one or more other persons. In such a case, the salesman is within this occupational group only with respect to the services performed for the person for whom he primarily solicits orders and not with respect to the services performed for such other persons. The following examples illustrate the application of the foregoing provisions:

Example 1. Salesman A's principal business activity is the solicitation of orders from retail pharmacies on behalf of the X Wholesale Drug Company. A also occasionally solicits orders for drugs on behalf of the Y and Z Companies. A is within this occupational group with respect to his services for the X Company but not with respect to his services for either the Y Company or the Z Company.

Example 2. Salesman B's principal business activity is the solicitation of orders from retail hardware stores on behalf of the R Tool Company and the S Cooking Utensil Company. B regularly solicits orders on behalf of both companies. B is not within this occupational group with respect to the services performed for either the R Company or the S Company.

Example 3. Salesman C's principal business activity is the house-to-house solicitation of orders on behalf of the T Brush Company. C occasionally solicits such orders from retail stores and restaurants. C is not within this occupational group.

(4)(i) The fact that an individual falls within one of the enumerated occupational groups, however, does not make such individual an employee under this paragraph unless (a) the contract of service contemplates that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by such individual, (b) such individual has no substantial investment in the facilities used in connection with the performance of such services (other than in facilities for transportation) and (c) such services are part of a continuing relationship with the person for whom the services are performed and are not in the nature of a single transaction.

(ii) The term “contract of service”, as used in this paragraph, means an arrangement, formal or informal, under which the particular services are performed. The requirement that the contract of service shall contemplate that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by the individual means that it is not contemplated that any material part of the services to which the contract relates in such occupation will be delegated to any other person by the individual who undertakes under the contract to perform such services.

(iii) The facilities to which reference is made in this paragraph include equipment and premises available for the work or enterprise as distinguished from education, training, and experience, but do not include such tools, instruments, equipment, or clothing, as are commonly or frequently provided by employees. An investment in an automobile by an individual which is used primarily for his own transportation in connection with the performance of services for another person has no significance under this paragraph, since such investment is comparable to outlays for transportation by an individual performing similar services who does not own an automobile. Moreover, the investment in facilities for the transportation of the goods or commodities to which the services relate is to be excluded in determining the investment in a particular case. If an individual has a substantial investment in facilities of the requisite character, he is not an employee within the meaning of this paragraph, since a substantial investment of the requisite character standing alone is sufficient to exclude the individual from the employee concept under this paragraph.

(iv) If the services are not performed as part of a continuing relationship with the person for whom the services are performed, but are in the nature of a single transaction, the individual performing such services is not an employee of such person within the meaning of this paragraph. The fact that the services are not performed on consecutive workdays does not indicate that the services are not performed as part of a continuing relationship.

Credits

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964; T.D. 7691, 45 FR 24129, April 9, 1980]

Historical Treasury Decisions: T.D. 6190, July 13, 1956.

SOURCE: T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960; T.D. 9860, 84 FR 24379, May 28, 2019; T.D. 9861, 84 FR 31719, July 3, 2019; T.D. 9904, 85 FR 45518, July 29, 2020; T.D. 9920, 85 FR 61815, Oct. 1, 2020; T.D. 9924, 85 FR 63026, Oct. 6, 2020; T.D. 9953, 86 FR 50642, Sept. 10, 2021, unless otherwise noted.

AUTHORITY: 26 U.S.C. 7805.; Section 31.3111–6T also issued under sec. 7001 and sec. 7003 of the Families First Coronavirus Response Act of 2020 and sec. 2301 of the Coronavirus Aid, Relief, and Economic Security Act of 2020.; Sections 31.3121(a)–1, 31.3121(a)–3, 31.3231(e)–1, 31.3231(e)–3, 31.3306(b)–1, 31.3306(b)–2, 31.3401(a)–1, and 31.3401(a)–4 also issued under 26 U.S.C. 62.; Section 31.3121(b)(7)–2 also issued under 26 U.S.C. 3121(b)(7)(F).; Section 31.3121(b)(19)–1 also issued under 26 U.S.C. 7701(b)(11).; Section 31.3131–1T also issued under 26 U.S.C. 3131(g).; Section 31.3132–1T also issued under 26 U.S.C. 3132(g).; Section 31.3134–1T also issued under 26 U.S.C. 3134(m)(3).; Section 31.3221–5T also issued under sec. 7001 and sec. 7003 of the Families First Coronavirus Response Act of 2020 and sec. 2301 of the Coronavirus Aid, Relief, and Economic Security Act of 2020.; Section 31.3306(c)(18)–1 also issued under 26 U.S.C. 7701(b)(11).; Section 31.3401(a)(6)–1 also issued under 26 U.S.C. 1441(c)(4) and 26 U.S.C. 3401(a)(6).; Section 31.3402 also issued under 26 U.S.C. 3402(i) and (m).; Section 31.3402(f)(1)–1 also issued under 26 U.S.C. 3402(m).; Section 31.3402(f)(5)–1 also issued under 26 U.S.C. 3402 (i) and (m).; Section 31.3402(n)–1 also issued under 26 U.S.C. 6001, 6011 and 6364.; Section 31.3402(r)–1 also issued under 26 U.S.C. 3402(p) and (r).; Section 31.3405(a)–1 also issued under 26 U.S.C. 3405(a)(4).; Sections 31.3406(a)–1 through 31.3406(i)–1 also issued under 26 U.S.C.3406(i).; Section 31.3406(j)–1 also issued under 26 U.S.C. 3406(i).; Section 31.3511–1 is also issued under 26 U.S.C. 3511(h).; Section 31.6011(a)–3A is also issued under the authority of 26 U.S.C. 6011.; Section 31.6011(a)–4 also issued under 26 U.S.C. 6011.; Section 31.6051–1 also issued under 26 U.S.C. 6051.; Section 31.6051–2 also issued under 26 U.S.C. 6051.; Section 31.6051–3 also issued under 26 U.S.C. 6051.; Sections 31.6053–3 (b)(5), (h) and (j)(9) and 31.6053–4 are also issued under sec. 1072 of Pub. L. 98–369, 98 Stat. 1052; and 26 U.S.C. 6001.; Sections 31.6053–3T and 31.6053–4T are also issued under sec. 1072 of Pub. L. 98–369, 98 Stat. 1052; and 26 U.S.C. 6001.; Section 31.6060–1 also issued under 26 U.S.C. 6060(a).; Section 31.6071(a)–1 also issued under 26 U.S.C.6071.; Section 31.6071(a)–1A is also issued under the authority of 26 U.S.C. 6071.; Section 31.6081–1 also issued under 26 U.S.C. 6081.; Section 31.6109–2 also issued under 26 U.S.C. 6109(a).; Section 31.6205–2 is also issued under 26 U.S.C. 6205(a)(1).; Section 31.6302–1 also issued under 26 U.S.C. 6302(a) and (h).; Section 31.6302–2, 31.6302–3, and 31.6302–4 also issued under 26 U.S.C. 6302(a) and (h).; Section 31.6302(c)–2A also issued under 26 U.S.C. 6157(d) and 6302(a) and (h).; Section 31.6302(c)–3 also issued under 26 U.S.C. 6302(a) and (h).; Section 31.6695–1 also issued under 26 U.S.C. 6695(b).

Current through November 12, 2021, 86 FR 62891

End of Document

Code of Massachusetts Regulations
Title 211: Division of Insurance
Chapter 96.00: Consumer Protection and Suitability in Annuity Transactions (Refs & Annos)

211 CMR 96.05

96.05: Duties of Insurance Producers and Insurers

Currentness

(1) In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products, his or her financial situation and needs and his or her suitability information.

(2) The Producer shall have informed the consumer of various features of the annuity, including but not limited to the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, insurance and investment components and market risk, and has a reasonable basis to believe that;

(a) The consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit;

(b) The particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, are suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer based on his or her suitability information; and

(c) In the case of an exchange or replacement of an annuity, the exchange or replacement is suitable including taking into consideration whether:

1. The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

2. The consumer would benefit from product enhancements and improvements; and

3. The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding 36 months.

(3) Prior to the execution of a purchase, exchange or replacement of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producers is involved, shall make reasonable efforts to confirm the consumers suitability information.

(4) Except as permitted under 211 CMR 96.05(5) an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is based on the consumer's suitability information.

(5)(a) Except as provided under 211 CMR 96.05(5)(b), neither an insurance producer, nor an insurer where no producer is involved, shall have any obligation to a consumer under 211 CMR 96.05(1) or (4) related to any recommendation if a consumer:

1. Refuses to provide relevant information requested by the insurance producer or insurer;

2. Decides to enter into an insurance transaction that is not based on a recommendation of the insurance producer or insurer; or

3. Fails to provide complete or accurate information.

(b) An insurer's issuance of an annuity subject to 211 CMR 96.05(5)(a) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.

(6)(a) An insurer shall establish a supervision system that is designed to achieve compliance with 211 CMR 96.00 including, but not limited to, the following:

1. The insurer shall maintain procedures to inform its insurance producers of the requirements of 211 CMR 96.00 and shall incorporate the requirements of 211 CMR 96.00 into relevant insurance producer training manuals;

2. The insurer shall establish standards for insurance producer product training and shall maintain procedures to require its insurance producers to comply with the requirements of 211 CMR 96.06;

3. The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its insurance producers;

4. The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity. The review procedures shall be designed to ensure that the recommendation is suitable. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such review procedures may be designed to require additional review only of those transactions identified for additional review;

5. The insurer shall maintain procedures to detect unsuitable recommendations. In addition to investigating consumer complaints, these may include, but are not limited to, confirmation of consumer suitability information, systematic

customer surveys, interviews, confirmation letters and programs of internal monitoring. Insurers may comply with this requirement by applying sampling procedures, or by confirming suitability information after issuance or delivery of the annuity;

6. The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.

(b)1. Insurers may contract for compliance with 211 CMR 96.05(6)(a). An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to 211 CMR 96.07 regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with 211 CMR 96.05(6)(b)(2).

2. An insurer's supervision system under 211 CMR 96.05(6)(a) shall include supervision of contractual performance. This includes, but is not limited to, the following:

a. Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and

b. Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the function is properly performed.

3. An insurer is not required to include in its system of supervision an insurance producer's recommendations to consumers of products other than the annuities offered by the insurer.

(7) An insurance producer or, where no insurance producer is involved, the responsible insurer representative, shall at the time of sale:

(a) Make a record of any recommendation subject to 211 CMR 96.05(1);

(b) Obtain a customer signed statement documenting a customer's refusal to provide suitability information, if any; and

(c) Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the insurance producer's or insurer's recommendation.

(8) An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

(a) Truthfully responding to an insurer's request for confirmation of suitability information;

(b) Filing a complaint; or

(c) Cooperating with the investigation of a complaint.

(9)(a) Sales made in compliance with FINRA requirements pertaining to suitability and supervision of annuity transactions shall satisfy the requirements of 211 CMR 96.00. 211 CMR 96.05(9) applies to FINRA broker-dealer sales of variable annuities and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales. However, nothing in 211 CMR 96.05(9) shall limit the commissioner's ability to investigate and enforce the provisions of 211 CMR 96.00.

(b) For 211 CMR 96.05(9)(a) to apply, an insurer shall:

1. monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and

2. Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

The Massachusetts Administrative Code titles are current through Register No. 1453, dated October 1, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 211, § 96.05, 211 MA ADC 96.05

End of Document

Code of Massachusetts Regulations
Title 211: Division of Insurance
Chapter 96.00: Consumer Protection and Suitability in Annuity Transactions (Refs & Annos)

211 CMR 96.06

96.06: Insurance Producer Training

Currentness

(1) An insurance producer shall not solicit the sale of an annuity product unless the insurance producer has adequate knowledge of the product to recommend the annuity and the insurance producer is in compliance with the insurer's standards for product training. An insurance producer may rely on insurer-provided product-specific training standards and materials to comply with 211 CMR 96.06.

(2)(a) An insurance producer who engages in the sale of annuity products shall complete a one-time training course for four CE credits, approved by the Division of Insurance and provided by the Division of Insurance-approved education provider.

(b) Insurance producers who hold a life insurance line of authority on July 1, 2016 and who desire to sell annuities shall complete the requirements of 211 CMR 96.06(2) on or before December 31, 2016. Individuals who obtain a life insurance line of authority on or after July 1, 2016 may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.

(3) The minimum length of the training required under 211 CMR 96.06(2) shall be sufficient to qualify for at least four CE credits, but may be longer.

(4) The training required under 211 CMR 96.06 shall include information on the following topics:

(a) The types of annuities and various classifications of annuities;

(b) Identification of the parties to an annuity;

(c) How fixed, variable and indexed annuity contract provisions affect consumers;

(d) The application of income taxation of qualified and non-qualified annuities;

(e) The primary uses of annuities; and

(f) Appropriate sales practices, replacement and disclosure requirements.

(5) Training courses intended to comply with 211 CMR 96.06 shall cover all topics listed in 211 CMR 96.06(4) and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's products. Additional topics may be offered in conjunction with and in additional to the required topics.

(6) A provider of an annuity training course intended to comply with 211 CMR 96.06 shall register as a CE provider in this Commonwealth and comply with the rules and guidelines applicable to insurance producer continuing education courses as set forth in M.G.L. c. 175, §177E, and 211 CMR 50.00: *Continuing Education for Insurance Producers.*

(7) The satisfaction of training requirements of another State that are substantially similar to the provisions of 211 CMR 96.06 shall be deemed to satisfy the training requirements of 211 CMR 96.06.

(8) An insurer shall verify that an insurance producer has completed the annuity training course required under 211 CMR 96.06 before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under 211 CMR 96.06(8) by obtaining certificates of completion of the training course or CE transcripts from the insurance Producer.

The Massachusetts Administrative Code titles are current through Register No. 1453, dated October 1, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 211, § 96.06, 211 MA ADC 96.06

End of Document

Code of Massachusetts Regulations
Title 211: Division of Insurance
Chapter 31.00: Life Insurance Solicitation (Refs & Annos)

211 CMR 31.07

31.07: General Rules

Currentness

(1) Each insurer shall maintain at its home office or principal office, a complete file containing one copy of each form authorized by the insurer for use pursuant to 211 CMR 31.00. Such file shall contain one copy of each authorized form for a period of three years following the date of its last authorized use unless otherwise provided by 211 CMR 31.00.

(2) An insurance producer shall inform the prospective purchaser, prior to commencing a life insurance sales presentation, that he is acting as an insurance producer and inform the prospective purchaser of the full name of the insurance company which he is representing to the buyer. In sales situations in which an insurance producer is not involved, the insurer shall identify its full name.

(3) Terms such as financial planner, investment advisor, financial consultant, or financial counseling shall not be used in such a way as to imply that the insurance producer is primarily engaged in an advisory business in which compensation is unrelated to sales unless such is actually the case. This provision is not intended to preclude persons who hold some form of formal recognized financial planning or consultant designation from using this designation even when they are only selling insurance. This provision also is not intended to preclude persons who are members of a recognized trade or professional association having such terms as part of its name from citing membership, providing that a person citing membership, if authorized only to sell insurance products, shall disclose that fact. This provision does not permit persons to charge an additional fee for services that are customarily associated with the solicitation, negotiation or servicing of policies.

(4) Any reference to nonguaranteed elements must include a statement that the item is not guaranteed and is based on the company's current scale of nonguaranteed elements. If a nonguaranteed element would be reduced by the existence of a policy loan, a statement to that effect shall be included in any reference to nonguaranteed elements. A presentation or depiction of a policy issued after the effective date of 211 CMR 28.00 that includes nonguaranteed elements over a period of years shall be governed by 211 CMR 28.00.

(5) For the purposes of 211 CMR 31.00, the company must show the maximum annual premium if it reserves the right to change the premium.

Mass. Regs. Code tit. 211, § 31.07, 211 MA ADC 31.07

Code of Massachusetts Regulations
Title 254: Board of Registration of Real Estate Brokers and Salesmen
Chapter 3.00: Professional Standards of Practice (Refs & Annos)

254 CMR 3.00

3.00: Professional Standards of Practice

Currentness

Violation of any of the provisions of 254 CMR 3.00 may result in the suspension, revocation or discipline of a license.

(1) Address Reporting. Each broker and salesperson shall provide to the Board written notice of their current business and residential address at all times.

(2) Broker Employee. A broker who is employed by or affiliated with another broker shall not employ or have affiliated with him/her any salespersons within the business entity.

(3) Business Name. Any broker operating under a business or trade name (doing business as) shall provide the Board with written notice of such name.

(4) Display of License. Each broker and salesperson shall display a copy of their license in a conspicuous location that is readily observable to the general public.

(5) Single License Requirement. No broker shall also be licensed as a salesperson nor shall any salesperson be licensed as a broker.

(6) Salespersons Cannot Be Self-Employed. A licensed salesperson must be engaged by a licensed broker and a licensed salesperson shall not conduct his own real estate business.

(7) Notification to Board of Affiliation. Brokers shall furnish the Board with the names, addresses and license numbers of all brokers and salespeople engaged by them at the commencement of such association or affiliation and shall further notify the Board of the termination of such relationship at the time such relationship is terminated.

(8) Sharing of Fees. No fee, commission or other valuable consideration shall be paid to or shared by an owner's managing agent or its employees as the result of the sale of real estate for the owner unless such agent and its employees are licensed brokers or salespersons, except as provided in M.G.L. c. 112, § 87QQ.

(9) Advertising. A broker shall not advertise in any way that is false or misleading.

(a) Broker Identification. No broker may advertise real property to purchase, sell, rent, mortgage or exchange through classified advertisement or otherwise unless he/she affirmatively discloses that he/she is a real estate broker. No broker shall insert advertisements in any advertising publication or other means where only a post office box number, telephone, facsimile, electronic mail number or street address appears. All advertisements shall include the name of the real estate broker.

(b) Salespersons Prohibited From Advertising. Salespeople are prohibited from advertising the purchase, sale, rental or exchange of any real property under their own name.

(c) Discriminatory Advertising Prohibited. No broker shall advertise to purchase, sell, rent, mortgage or exchange any real property in any manner that indicates directly or indirectly unlawful discrimination against any individual or group.

(10) Client Funds.

(a) Escrow Accounts. Unless otherwise agreed to in writing by the parties in transactions involving the sale, purchase, renting or exchange of real property, all money of whatever kind and nature paid over to a real estate broker to be held during the pendency of a transaction shall be immediately deposited in a bank escrow account and such broker shall be responsible for such money until the transaction is either consummated or terminated, at which time a proper account and distribution of such money shall be made. An escrow account is an account where the broker deposits and maintains the money of other parties in a real estate transaction and such broker has no claim to such money. An escrow account may be interest or non-interest bearing but where it is interest bearing the broker must make a proper account of such interest at either the consummation or termination of the transaction.

(b) Record Keeping. Every broker shall keep a record of funds deposited in his/her escrow accounts, which records shall clearly indicate the date and from whom the broker received the money, date deposited along with the source of the money and check number, date of withdrawal with the name of the person receiving such withdrawal, and other pertinent information concerning the transaction and shall clearly show for whose account the money is deposited and to whom the money belongs. Every broker shall also keep a copy of each check deposited into and withdrawn from the escrow account for a period of three years from the date of issuance. All such funds and records shall be subject to inspection by the Board or its agents.

(c) Salespersons Prohibited from Holding Funds. A real estate salesperson or broker engaged by another broker shall immediately turn over all deposit money or other money received to such employing broker. No salesperson shall at any time hold client funds.

(11) Conflicts of Interests. A broker or salesperson must act honestly and ethically and in the best interests of their client at all times.

(a) A broker or salesperson shall not buy, sell, rent, mortgage, or acquire any interest in, or represent a client in the buying, selling, renting or exchange of real property in which the broker or salesperson or his/her kin has a personal financial interest unless the broker or salesperson shall fully disclose in writing to all parties to the transaction the nature of his/her interest and unless the parties shall provide the broker or salesperson with written acknowledgment of such disclosure.

(b) A broker shall not take an option, either directly or indirectly, upon real property for the lease or sale of which the broker has been approached by the owner to act as a broker without first disclosing that such broker is now a prospective purchaser or lessor and no longer acting as a broker for the owner.

(c) A broker or salesperson shall not accept a "net" listing from an owner or landlord for the sale or rental of real property in which the commission is unspecified.

(d) Conveying Offers. All offers submitted to brokers or salespeople to purchase or rent real property that they have a right to sell or rent shall be conveyed forthwith to the owner of such real property.

(12) Attorney Services. No broker or salesperson shall advise against the use of an attorney in any real property transaction.

(13) Relationships with Real Estate Brokers and Salespeople.

(a) Agency Disclosure for Real Estate Agents Representing the Seller or Buyer. A real estate broker or salesperson shall provide to a prospective purchaser or seller of real estate a notice developed and approved by the board which clearly discloses the relationship of the broker or salesperson with the prospective purchaser or seller of the real estate. The notice, developed by the Board, shall be provided to a prospective purchaser or seller at the time of the first personal meeting between the prospective purchaser or seller and the broker or salesperson for the purpose of discussing a specific property.

1. A broker or salesperson shall request a prospective purchaser or seller to sign and date such notice, provide the original to the prospective purchaser or seller and maintain a copy with their records for a period of three years from the date on the notice. The broker or salesperson must also sign the notice, indicate their license status as either a broker or salesperson, provide their license number and date such notice.

2. If a prospective purchaser or seller declines to sign the notice the broker or sales-person shall make a notation indicating the date the notice was given to the prospective purchaser or seller and that the prospective purchaser or seller declined to sign it. The broker shall maintain such notice for a period of three years from the date on the notice.

3. Nothing herein shall require written notice to each prospective purchaser or seller who comes to an open house showing of real property provided, however, the broker or salesperson, by sign, poster, distributed listing literature or property description form conspicuously discloses any pre-existing agency relationship. Where the listing literature or property description form is distributed at an open house the written disclosure of the agency relationship therein shall be more conspicuous than any other written material.

4. All such records and notices are subject to inspection by the Board or its agents.

(b) Consensual Dual Agency Disclosure. 254 CMR 3.00(13)(b) applies to real estate brokers or salespeople engaged in the purchase or sale of land with a building intended for use as a one to four unit residential dwelling or the purchase or sale of land on which a building is intended to be constructed for use as a one or two unit residential dwelling. A real estate broker or salesperson may act as an agent for both a seller and prospective purchaser of real estate provided that the

broker or salesperson obtains informed written consent from both the seller and the prospective purchaser. The real estate broker or salesperson shall provide a written consent form which shall clearly state that the broker or salesperson will be representing both the seller and prospective purchaser in the purchase and sale of real property. The consent form must also state that a dual agent assists the seller and buyer in a transaction but shall be neutral with regard to any conflicting interest of the seller and buyer. Consequently, the consent form must state that a dual agent will not have the ability to satisfy fully the duties of loyalty, full disclosure, reasonable care and obedience to lawful instructions, but shall still owe the duty of confidentiality of material information and the duty to account for funds. The consent form must provide that material information received from either client that is confidential may not be disclosed by a dual agent, except: (1) if disclosure is expressly authorized; (2) if such disclosure is required by law; (3) if such disclosure is intended to prevent illegal conduct; or (4) if such disclosure is necessary to prosecute a claim against a person represented or to defend a claim against the broker or salesperson. Lastly, the consent form must state that the duty of confidentiality shall continue after termination of the brokerage relationship.

1. A broker or salesperson shall obtain the signature of the seller or prospective purchaser on one or more of such consent forms, provide the original forms to the seller and prospective purchase and maintain a copy with their records for a period of three years from the date on the form. The broker or salesperson must also sign the consent form, indicate their license status as either a broker or salesperson, provide their license number and date such form. Nothing herein shall require the seller and prospective purchaser to sign the same consent form.

2. There shall be a conclusive presumption that the seller or prospective purchaser has consented to dual agency if they have signed a form that contains the description in 254 CMR 3.00(13)(b), indicating consent to that relationship. Consent may be given by a seller in a written agreement to list their property for sale with a real estate agent; by a prospective purchaser in a buyer representation agreement; or in another document signed either before or after a potential transaction between a seller and prospective purchaser has been identified. When consent to dual agency has been given by a seller or prospective purchaser in advance of the identification of a potential transaction, written notice of dual agency must also be given by the broker or salesperson to the seller and prospective purchaser after a transaction has been identified stating that the broker is a dual agent with regard to the transaction. Written notice of dual agency shall satisfy 254 CM 3.00(13)(b) and such written notice shall be given prior to the seller and prospective purchaser entering into a written agreement for the purchase or sale of residential property.

3. Nothing herein shall require written notice to each prospective purchaser or seller who comes to an open house showing of real property provided, however, the broker or salesperson, by sign, poster, distributed listing literature or property description form conspicuously discloses any pre-existing agency relationship. Where the listing literature or property description form is distributed at an open house the written disclosure of the agency relationship therein shall be more conspicuous than any other written material.

4. All such records and notices are subject to inspection by the Board or its agents.

(c) Designated Agency Disclosure. 254 CMR 3.00(13)(c) applies to real estate brokers or salespeople engaged in the purchase or sale of land with a building intended for use as a one to four unit residential dwelling or the purchase or sale of land on which a building is intended to be constructed for use as a one or two unit residential dwelling. A real estate broker or salesperson may appoint one or more affiliated brokers or salespersons to represent the seller, provided the seller gives written consent after being advised that (a) the designated seller's agent will represent the seller and will owe the seller the duties of loyalty, full disclosure, confidentiality, to account for funds, reasonable care and obedience to lawful instruction; (b) all other licensees affiliated with the appointing broker will not represent the seller nor will they have the other duties specified herein to that seller, and may potentially represent the purchaser; and (c) if designated agents affiliated with the

same broker represent the seller and purchaser in a transaction, the appointing broker shall be a dual agent and neutral as to any conflicting interests of the seller and purchaser, but will continue to owe the seller and purchaser the duties of confidentiality of material information and to account for funds. Conversely, a real estate broker or salesperson may appoint one or more affiliated brokers or salespersons to act as a designated agent on behalf of a prospective purchaser, provided the purchaser gives written consent after being advised that; (a) the designated buyer's agent will represent the purchaser and will owe the purchaser the duties of loyalty, full disclosure, confidentiality, to account for funds, reasonable care and obedience to lawful instruction; (b) all other licensees affiliated with the appointing broker will not represent the purchaser nor will they have the other duties specified herein to that purchaser, and potentially may represent the seller; and (c) if designated agents affiliated with the same broker represent the seller and purchaser in a transaction, the appointing broker shall be a dual agent and neutral as to any conflicting interests of the seller and purchaser, but will continue to owe the seller and purchaser the duties of confidentiality of material information and to account for funds.

There shall be a conclusive presumption that a seller or purchaser has consented to a designated agency relationship, if they have signed a consent form that substantially contains the description of designated agency set forth in 254 CMR 3.00(13)(c). If the designated seller's agent and designated buyer's agent in a transaction are affiliated with the same broker and the seller and purchaser each have consented to designated agency, a separate consent to dual agency of the appointing broker shall not be required. Consent to designated agency may be given by a seller in a listing agreement; by a purchaser in a buyer representation agreement or by either the seller or purchaser in a consent form that substantially contains the description of designated agency set forth in 254 CMR 3.00(13)(c). The form may be signed either before a potential transaction between a seller and purchaser is identified or when it is identified but, in any event, no later than prior to the execution of a written agreement for the purchase or sale of residential property. If consent to designated agency has been given by the seller or purchaser in advance of the identification of a potential transaction, the broker or salesperson shall also provide written notice to the seller and prospective purchaser of designated agency. Such written notice shall be given prior to the seller or purchaser entering into a written agreement for the purchase or sale of a residential property. Such written notice for designated agency shall satisfy 254 CMR 3.00(13)(c).

1. The designated real estate broker or salesperson exclusively represents the seller or purchaser and is responsible for the performance of any duties owed to the seller or purchaser. The designated broker or salesperson may not share known or acquired information with any other real estate agent or person that would harm the seller's or purchaser's interest in the real estate transaction, except for known material defects in real property. The designated broker or salesperson shall have an affirmative obligation to disclose known material defects in real property.

2. Appointment by a broker or salesperson of another affiliated broker or salesperson to represent a seller or purchaser shall not limit the liability or responsibility of the appointing broker or salesperson for any breach of duty by the designated broker or salesperson. The appointment of the broker or salesperson to represent the seller or purchaser shall extend only to those brokers or salespersons so appointed by the appointing broker or salesperson and consented to by the seller or purchaser.

3. An appointing broker or salesperson who designates another affiliated broker or salesperson to represent the seller and an affiliated broker or salesperson to represent the purchaser shall be presumed to be a dual agent, provided that the seller and purchaser consent to such designation on a form developed by the Board. The designated broker or salesperson must comply with the requirements set forth in 254 CMR 3.00(13)(a)1. through 4. provided, however, that notice must be provided when such designation is established or at the execution of an agreement to advertise for sale the real property of the seller and when an offer to purchase is submitted by the purchaser, whichever is sooner.

(d) Sub-agency Representation. No broker or salesperson shall enter into an agreement with any other broker or salesperson to represent a seller or purchaser as a secondary or sub-agent without informing such seller or purchaser in writing that the secondary or sub-agent's actions may subject the seller or purchaser to vicarious liability. The broker or salesperson shall provide written notice containing the information of potential vicarious liability and obtain the seller's or purchasers consent on such notice to secondary or sub-agency. The written notice must state that the broker may cooperate with another broker who is then a sub-agent of the seller or buyer. The written notice must further state that vicarious liability is the potential for a seller or buyer to be held liable for a misrepresentation or an act or commission of the sub-agent and that the seller or buyer authorizes the broker or salesperson to offer sub-agency in signing the notice. The broker or salesperson shall provide such notice at the execution of an agreement to sell the real property of the seller or when the agent and purchaser agree that the agent will represent such purchaser. 254 CMR 3.00(13)(d) applies to real estate brokers or salespeople engaged in the purchase or sale of land with a building intended for use as a one to four unit residential dwelling or to the purchase or sale of land on which a building is intended to be constructed for use as a one or two unit residential dwelling.

(e) Non-agent Facilitator. Nothing herein shall prohibit a broker or salesperson from working with a seller or purchaser in such capacity where the broker or salesperson does not represent them as a sole, designated or dual agent provided written notice of such representation is provided. The notice must state that no agency relationship exists between the facilitator and the seller or purchaser. The notice must be provided at the first personal meeting to discuss a specific property. A facilitator has a duty to present all real property honestly and accurately, disclosing known material defects and accounting for funds. The facilitator does not have a duty of confidentiality with regard to any information received from the seller or purchaser. A facilitator may also be called a transaction broker or salesperson and a facilitator relationship may be changed to an agency relationship provided for in this regulation with the written agreement of the person so represented.

(14) Additional Grounds For Discipline. No real estate broker or salesperson shall violate, or attempt to violate, directly or indirectly, or assist or abet the violation of, or conspire to violate any provision of the relevant licensing law, the regulations herein or order of the Board.

(a) no broker or salesperson shall practice while his/her ability to do so is impaired by drugs, alcohol or other reason.

(b) no broker or salesperson shall practice while his/her license is expired, revoked suspended or otherwise not valid.

(c) no broker or salesperson shall discriminate in the provision of services on the basis of age, marital status, gender, sexual preference, race, religion, socioeconomic status or disability.

(d) no broker or salesperson shall attempt to procure a license by false pretenses or in any way aid another in obtaining a license by false pretenses.

(e) a broker or salesperson shall only assume those duties and responsibilities for which he/she has adequate preparation and for which competency has been acquired and maintained.

(f) a broker or salesperson shall comply with all the laws of the Commonwealth, the United States and those of any other state in which he/she is licensed.

(g) a broker or salesperson shall report to the Board within 30 days his or her conviction of any crime including any misdemeanor or felony under the law of the Commonwealth, the United States or laws of another jurisdiction which if committed in Massachusetts would constitute a crime under Massachusetts law.

(h) a real estate broker and salesperson who fraudulently certifies to the Board completion of the educational curriculum described in 254 CMR 5.03 may, following a hearing, which hearing may be waived by such broker or salesperson, be subject to the suspension of their license until such time that the Board is satisfied that the educational curriculum has been completed.

(i) a broker or salesperson upon notice of suspension or revocation of his license shall deliver his/her license to the offices of the Board within seven days of the receipt of such notice.

The Massachusetts Administrative Code titles are current through Register No. 1453, dated October 1, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 254, § 3.00, 254 MA ADC 3.00

End of Document

Code of Massachusetts Regulations
Title 950: Office of the Secretary of the Commonwealth
Chapter 12.200: Registration of Broker-Dealer, Agents, Investment Adviser, Investment Adviser Representatives and Notice Filing Procedures for Federal Covered Advisers (Refs & Annos)

950 CMR 12.201

12.201: Broker-dealer/Agent Registration Requirements

Currentness

(1) Registration Expiration Date. Every registration of a broker-dealer, agent, investment adviser, investment adviser representative, or issuer-agent expires on the last day of the calendar year, unless renewed or terminated at an earlier date.

(2) Prohibition Against Dual Registration. No person may be registered concurrently as an agent of more than one broker-dealer or issuer. The Director may waive this requirement if he or she determines that it would not interfere with effective supervision of the agent by the broker- dealer or issuer and it is in the public interest.

(3) Boston Stock Exchange. (Reserved)

(4) Automatic Registration as Agent for Executive Officers, Directors or Partners. Each executive officer, director, partner, or a person occupying a similar status performing similar functions is presumed to be acting as an agent and thus registered automatically, pursuant to M.G.L. c. 110A, § 202(a), when the broker-dealer is registered. If any such person does not desire automatic registration because he or she does not meet the definition of an agent, he or she must file with the Division an affidavit stating that he performs no activity for the broker-dealer that would require him or her to register as an agent.

(5) Scope of Activity Permitted by Registration. A broker-dealer's registration permits only such activity in types of business indicated on the Form BD, unless such activity constitutes 1% or less of the broker-dealer's revenue from its securities business. An agent's registration permits only activity that is conducted within the scope of the agency relationship, and activity for which the appropriate examination has been passed. Any activity that occurs outside of that permitted by the registration, shall be considered in violation of M.G.L. c. 110A, § 201(a), unless the person is separately registered or appropriately exempt to conduct such activity.

Credits
History: 1412 Mass. Reg. 61, amended eff. Mar. 6, 2020.

The Massachusetts Administrative Code titles are current through Register No. 1453, dated October 1, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 950, § 12.201, 950 MA ADC 12.201

End of Document

FINRA Manual, 1011., Financial Industry Regulatory Authority, Definitions

FINRA Manual
FINRA Rule 1011

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Unless otherwise provided, terms used in the Rule 1000 Series shall have the meaning as defined in Rule 0160.

(a) "Applicant" The term "Applicant" means a person that applies for membership in FINRA under Rule 1013 or a member that files an application for approval of a change in ownership, control, or business operations under Rule 1017.

(b) "Associated Person" The term "Associated Person" means: (1) a natural person registered under FINRA rules; or (2) a sole proprietor, or any partner, officer, director, branch manager of the Applicant, or any person occupying a similar status or performing similar functions; (3) any company, government or political subdivision or agency or instrumentality of a government controlled by or controlling the Applicant; (4) any employee of the Applicant, except any person whose functions are solely clerical or ministerial; (5) any person directly or indirectly controlling the Applicant whether or not such person is registered or exempt from registration under the FINRA By-Laws or FINRA rules; (6) any person engaged in investment banking or securities business controlled directly or indirectly by the Applicant whether such person is registered or exempt from registration under the FINRA By-Laws or FINRA rules; or (7) any person who will be or is anticipated to be a person described in (1) through (6) above.

(c) "Covered Pending Arbitration Claim" The term "Covered Pending Arbitration Claim" means:

(1) For purposes of a business expansion as described in IM-1011-2 and Rule 1017(a)(6)(B):

(A) An investment-related, consumer initiated claim filed against the Associated Person in any arbitration forum that is unresolved; and whose claim amount (individually or, if there is more than one claim, in the aggregate) exceeds the hiring member's excess net capital.

(2) For purposes of an event described in Rule 1017(a)(6)(A):

(A) An investment-related, consumer initiated claim filed against the transferring member or its Associated Persons in any arbitration forum that is unresolved; and whose claim amount (individually or, if there is more than one claim, in the aggregate) exceeds the transferring member's excess net capital.

For purposes of this definition, the claim amount includes claimed compensatory loss amounts only, not requests for pain and suffering, punitive damages or attorney's fees, and shall be the maximum amount for which the Associated Person or transferring member, as applicable, is potentially liable regardless of whether the claim was brought against additional persons or the Associated Person reasonably expects to be indemnified, share liability or otherwise lawfully avoid being held responsible for all or part of such maximum amount.

(d) "Department" The term "Department" means the Department of Member Regulation of FINRA.

(e) "Director" The term "Director" means a member of the FINRA Regulation Board.

(f) "district" The term "district" means a district established by the FINRA Regulation Board.

(g) "district office" The term "district office" means an office of FINRA located in a district.

(h) "final criminal matter" The term "final criminal matter" means a criminal matter that resulted in a conviction of, or plea of guilty or nolo contendere ("no contest") by, a person that is disclosed, or is or was required to be disclosed, on the applicable Uniform Registration Forms.

(i) "FINRA Board" The term "FINRA Board" means the Board of Governors of FINRA.

(j) "FINRA Regulation Board" The term "FINRA Regulation Board" means the Board of Directors of FINRA Regulation.

(k) "Governor" The term "Governor" means a member of the FINRA Board.

(l) "Interested FINRA Staff" The term "Interested FINRA Staff" means an employee who directly participates in a decision under Rule 1014 or 1017, an employee who directly supervises an employee with respect to such decision, an employee who conducted an investigation or examination of a member that files an application under Rule 1017, the District Director for the relevant district, and the head of the Department.

(m) "material change in business operations" The term "material change in business operations" includes, but is not limited to:

(1) removing or modifying a membership agreement restriction;

(2) market making, underwriting, or acting as a dealer for the first time; and

(3) adding business activities that require a higher minimum net capital under SEA Rule 15c3-1;

(n) "principal place of business" The term "principal place of business" means the executive office from which the sole proprietor or the officers, partners, or managers of the Applicant direct, control, and coordinate the activities of the Applicant, unless the Department determines that the principal place of business is where: (1) the largest number of Associated Persons of the Applicant are located; or (2) the books and records necessary to provide information and data to operate the business and comply with applicable rules are located.

(o) "sales practice event" The term "sales practice event" means any customer complaint, arbitration, or civil litigation that has been reported to the Central Registration Depository, currently is required to be reported to the Central Registration Depository, or otherwise has been reported to FINRA.

(p) "specified risk event" The term "specified risk event" means any one of the following events that are disclosed, or are or were required to be disclosed, on an applicable Uniform Registration Form:

(1) a final investment-related, consumer-initiated customer arbitration award or civil judgment against the person for a dollar amount at or above $15,000 in which the person was a named party;

(2) a final investment-related, consumer-initiated customer arbitration settlement or civil litigation settlement for a dollar amount at or above $15,000 in which the person was a named party;

(3) a final investment-related civil action where: (A) the total monetary sanctions (including civil and administrative penalties or fines, disgorgement, monetary penalties other than fines, or restitution) were ordered for a dollar amount at or above $15,000; or (B) the sanction against the person was a bar, expulsion, revocation, or suspension; and

(4) a final regulatory action where (A) the total monetary sanctions (including civil and administrative penalties or fines, disgorgement, monetary penalties other than fines, or restitution) were ordered for a

dollar amount at or above $15,000; or (B) the sanction against the person was a bar (permanently or temporarily), expulsion, rescission, revocation, or suspension.

(q) "Subcommittee" The term "Subcommittee" means a subcommittee of the National Adjudicatory Council that is constituted pursuant to Rule 1015 to conduct a review of a Department decision issued under the Rule 1000 Series.

(r) "Uniform Registration Forms" The term "Uniform Registration Forms" means the Uniform Application for Broker-Dealer Registration (Form BD), the Uniform Application for Securities Industry Registration or Transfer (Form U4), the Uniform Termination Notice for Securities Industry Registration (Form U5) and the Uniform Disciplinary Action Reporting Form (Form U6), as such may be amended or any successor(s) thereto.

[Adopted by SR-NASD-82-24 eff. July 20, 1984; amended by SR-NASD-91-45 eff. Feb. 1, 1992; amended by SR-NASD-94-14 eff. July 20, 1994.Amended by SR-NASD-97-28 eff. Aug. 7, 1997; amended by SR-NASD-97-81 eff. Jan. 16, 1998.Amended by SR-NASD-99-67 eff. Nov. 15, 2000; amended by SR-NASD-2003-07 eff. March 24, 2004; amended by SR-NASD-2007-015 eff. May 7, 2007; amended by SR-FINRA-2008-008 eff. June 26, 2008; amended by SR-FINRA-2019-009 eff. May 8, 2019; amended by SR-FINRA-2019-030 eff. Sept. 14, 2020; amended by SR-FINRA-2020-011 eff. Sept. 1, 2021; amended by SR-FINRA-2021-011 eff. Sept. 1, 2021.]

Selected Notices: 04-10, 07-20, 20-15, 21-09.

FINRA Manual, 1210., Financial Industry Regulatory Authority, Registration Requirements

FINRA Manual
FINRA Rule 1210

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Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative or principal in each category of registration appropriate to his or her functions and responsibilities as specified in Rule 1220, unless exempt from registration pursuant to Rule 1230. Such person shall not be qualified to function in any registered capacity other than that for which the person is registered, unless otherwise stated in the rules.

• • • Supplementary Material:

.01 Minimum Number of Registered Principals. Each member, except a member with only one associated person, shall have at least two officers or partners who are registered as General Securities Principals pursuant to Rule 1220(a)(2), provided that a member that is limited in the scope of its activities may instead have two officers or partners who are registered in a principal category under Rule 1220(a) that corresponds to the scope of the member's activities. The requirement that a member have a minimum of two principals shall apply to persons seeking admission as members and existing members.

Pursuant to the Rule 9600 Series, FINRA may waive the requirement that a member have a minimum of two principals in situations that indicate conclusively that only one person associated with an applicant for membership or existing member should be required to register as a principal.

In addition to the requirement that a member have a minimum of two principals, an applicant for membership or existing member shall have at least one person: (1) registered as a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal, as applicable, pursuant to Rule 1220(a)(4)(A); (2) designated as a Principal Financial Officer pursuant to Rule 1220(a)(4)(B); and (3) designated as a Principal Operations Officer pursuant to Rule 1220(a)(4)(B). An applicant for membership or existing member, if the nature of its business so requires, shall also have at least one person registered as: (1) an Investment Banking Principal pursuant to Rule 1220(a)(5); (2) a Research Principal pursuant to Rule 1220(a)(6); (3) a Securities Trader Principal pursuant to Rule 1220(a)(7); and (4) a Registered Options Principal pursuant to Rule 1220(a)(8).

.02 Permissive Registrations. A member may make application for or maintain the registration as a representative or principal, pursuant to Rule 1220, of any associated person of the member and any individual engaged in the investment banking or securities business of a foreign securities affiliate or subsidiary of the member. Individuals maintaining such permissive registrations shall be considered registered persons and subject to all FINRA rules, to the extent relevant to their activities.

Consistent with the requirements of Rule 3110, members shall have adequate supervisory systems and procedures reasonably designed to ensure that individuals with permissive registrations do not act outside the scope of their assigned functions. With respect to an individual who solely maintains a permissive registration(s), the individual's direct supervisor shall not be required to be a registered person. However, for purposes of compliance with Rule 3110(a)(5), a member shall assign a registered supervisor who shall be responsible for periodically contacting such individual's direct supervisor to verify that the individual is not acting outside the scope of his or her assigned functions. If such individual is permissively registered as a representative, the registered supervisor shall be registered as a representative or principal. If the individual is permissively registered as a principal, the registered supervisor shall be registered as a principal. Moreover, the registered

supervisor of an individual who solely maintains a permissive registration(s) shall not be required to be registered in the same representative or principal registration category as the permissively-registered individual.

.03 Qualification Examinations and Waivers of Examinations. Before the registration of a person as a representative can become effective under Rule 1210, such person shall pass the Securities Industry Essentials ("SIE") and an appropriate representative qualification examination as specified in Rule 1220(b). Before the registration of a person as a principal can become effective under Rule 1210, such person shall pass an appropriate principal qualification examination as specified in Rule 1220(a).

If the job functions of a registered representative, other than an individual registered as an Order Processing Assistant Representative or a Foreign Associate, change so as to require the person to register in another representative category, the person shall not be required to pass the SIE. Rather, the registered person would need to pass only an appropriate representative qualification examination as specified in Rule 1220(b). All associated persons shall be eligible to take the SIE. In addition, individuals who are not associated persons shall be eligible to take the SIE. However, passing the SIE alone shall not qualify an individual for registration with FINRA. To be eligible for registration with FINRA, an individual shall pass an applicable representative or principal qualification examination as specified in Rule 1220 and satisfy all other applicable prerequisite registration requirements.

Pursuant to the Rule 9600 Series, FINRA may, in exceptional cases and where good cause is shown, waive the applicable qualification examination(s) and accept other standards as evidence of an applicant's qualifications for registration. Age or disability will not individually of themselves constitute sufficient grounds to waive a qualification examination. Experience in fields ancillary to the investment banking or securities business may constitute sufficient grounds to waive a qualification examination. FINRA shall only consider waiver requests submitted by a member for individuals associated with the member who are seeking registration in a representative or principal registration category. Moreover, FINRA shall consider waivers of the SIE alone or the SIE and the applicable representative and principal examination(s) for such individuals. FINRA shall not consider a waiver of the SIE for individuals who are not associated persons or for associated persons who are not registering as representatives or principals.

.04 Requirements for Registered Persons Functioning as Principals for a Limited Period. Subject to the requirements of Rule 1220.03, a member may designate any person currently registered, or who becomes registered, with the member as a representative to function as a principal for a period of 120 calendar days prior to passing an appropriate principal qualification examination as specified under Rule 1220(a), provided that such person has at least 18 months of experience functioning as a registered representative within the five-year period immediately preceding the designation and has fulfilled all applicable prerequisite registration, fee and examination requirements prior to designation as a principal. However, in no event may such person function as a principal beyond the initial 120 calendar day period without having successfully passed an appropriate principal qualification examination as specified under Rule 1220(a). The requirements above apply to designations to any principal category, including those categories that are not subject to a prerequisite representative registration requirement. Further, a person registered as an Order Processing Assistant Representative or a Foreign Associate shall not be eligible to be designated as a principal under Supplementary Material .04 of this Rule.

Subject to the requirements of Rule 1220.03, a member may designate any person currently registered, or who becomes registered, with the member as a principal to function in another principal category for a period of 120 calendar days prior to passing an appropriate qualification examination as specified under Rule 1220. However, in no event may such person function in such other principal category beyond the initial 120 calendar day period without having successfully passed an appropriate qualification examination as specified under Rule 1220.

.05 Rules of Conduct for Taking Examinations and Confidentiality of Examinations. Associated persons taking the SIE shall be subject to the SIE Rules of Conduct. Associated persons taking any representative or principal examination shall be subject to the Rules of Conduct for representative and principal examinations. A violation of the SIE Rules of Conduct or the Rules of Conduct for representative and principal examinations by an associated person shall be deemed to be a violation of Rule 2010. If FINRA determines that an associated

person has violated the SIE Rules of Conduct or the Rules of Conduct for representative and principal examinations, the associated person may forfeit the results of the examination and may be subject to disciplinary action by FINRA.

Individuals taking the SIE who are not associated persons shall agree to be subject to the SIE Rules of Conduct. If FINRA determines that such individuals cheated on the SIE or that they misrepresented their qualifications to the public subsequent to passing the SIE, they may forfeit the results of the examination and may be prohibited from retaking the SIE.

FINRA considers all of its qualification examinations content to be highly confidential. The removal of examination content from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such qualification examination or any other use that would compromise the effectiveness of the examinations and the use in any manner and at any time of the questions or answers to the examinations shall be prohibited and shall be deemed to be a violation of Rule 2010. An applicant cannot receive assistance while taking the examination and shall certify that no assistance was given to or received by him or her during the examination.

.06 Waiting Periods for Retaking a Failed Examination. Any person who fails to pass a qualification examination prescribed by FINRA shall be permitted to take that examination again after a period of 30 calendar days has elapsed from the date of such person's last attempt to pass that examination, except that any person who fails to pass an examination three or more times in succession within a two-year period shall be prohibited from again taking that examination until a period of 180 calendar days has elapsed from the date of such person's last attempt to pass that examination.

The waiting periods for retaking a failed examination shall apply to the SIE and the representative and principal examinations specified under Rule 1220. Individuals taking the SIE who are not associated persons shall agree to be subject to the same waiting periods for retaking the SIE.

.07 All Registered Persons Must Satisfy the Regulatory Element of Continuing Education. All registered persons, including those individuals who solely maintain permissive registrations pursuant to Rule 1210.02, shall satisfy the Regulatory Element of continuing education as specified in Rule 1240(a).

If a person registered with a member has a continuing education deficiency with respect to that registration as provided under Rule 1240(a), such person shall not be permitted to be registered in another registration category under Rule 1220 with that member or to be registered in any registration category under Rule 1220 with another member, until the person has satisfied the deficiency.

.08 Lapse of Registration and Expiration of SIE. Any person who was last registered as a representative two or more years immediately preceding the date of receipt by FINRA of a new application for registration as a representative shall be required to pass a representative qualification examination appropriate to his or her category of registration as specified in Rule 1220(b). Any person who last passed the SIE or who was last registered as a representative, whichever occurred last, four or more years immediately preceding the date of receipt by FINRA of a new application for registration as a representative shall be required to pass the SIE in addition to a representative qualification examination appropriate to his or her category of registration as specified in Rule 1220(b).

Any person who was last registered as a principal two or more years immediately preceding the date of receipt by FINRA of a new application for registration as a principal shall be required to pass a principal qualification examination appropriate to his or her category of registration as specified in Rule 1220(a).

Any person whose registration has been revoked pursuant to Rule 8310 shall be required to pass a principal or representative qualification examination appropriate to his or her category of registration as specified in Rule 1220(a) or Rule 1220(b), respectively, to be eligible for registration with FINRA.

For purposes of Supplementary Material .08 of this Rule, an application shall not be considered to have been received by FINRA if that application does not result in a registration.

.09 Waiver of Examinations for Individuals Working for a Financial Services Industry Affiliate of a Member. Upon request by a member, FINRA shall waive the applicable qualification examination(s) for an individual designated with FINRA as working for a financial services industry affiliate of a member if the following conditions are met:

(a) Prior to the individual's initial designation, the individual was registered as a representative or principal with FINRA for a total of five years within the most recent 10-year period, including for the most recent year with the member that initially designated the individual;

(b) The waiver request is made within seven years of the individual's initial designation;

(c) The initial designation and any subsequent designation(s) were made concurrently with the filing of the individual's related Form U5;

(d) The individual continuously worked for the financial services industry affiliate(s) of a member since the individual's last Form U5 filing;

(e) The individual has complied with the Regulatory Element of continuing education as specified in Rule 1240(a); and

(f) The individual does not have any pending or adverse regulatory matters, or terminations, that are reportable on the Form U4, and has not otherwise been subject to a statutory disqualification as defined in Section 3(a)(39) of the Exchange Act while the individual was designated as eligible for a waiver.

As used in Supplementary Material .09 of this Rule, a "financial services industry affiliate of a member" is a legal entity that controls, is controlled by or is under common control with a member and is regulated by the SEC, CFTC, state securities authorities, federal or state banking authorities, state insurance authorities, or substantially equivalent foreign regulatory authorities.

.10 Status of Persons Serving in the Armed Forces of the United States. The following provisions address the status of current and former registered persons serving in active duty in the Armed Forces of the United States:

(a) Inactive Status of Currently Registered Persons

A registered person of a member who volunteers for or is called into active duty in the Armed Forces of the United States shall be placed, after proper notification to FINRA, on inactive status and need not be re-registered by such member upon his or her return to active employment with the member. Such person shall remain eligible to receive transaction-related compensation, including continuing commissions. The employing member also may allow such person to enter into an arrangement with another registered person of the member to take over and service the person's accounts and to share transaction-related compensation based upon the business generated by such accounts. However, because such persons are inactive, they may not perform any of the functions and responsibilities performed by a registered person.

A registered person who is placed on inactive status pursuant to this paragraph (a) shall not be included within the definition of "Personnel" for purposes of the dues or assessments as provided in *Article VI* of the FINRA By-Laws. In addition, a registered person who is placed on inactive status pursuant to this paragraph (a) shall not be required to complete either the Regulatory Element or Firm Element set forth in Rule 1240 during the pendency of such inactive status.

The relief provided in this paragraph (a) shall be available to a registered person who is placed on inactive status pursuant to this paragraph (a) during the period that such person remains registered with the member with which he or she was registered at the beginning of active duty in the Armed Forces of the United States, regardless of whether the person returns to active employment with another member upon completion of his or her active duty in the Armed Forces of the United States.

The relief described in this paragraph (a) shall be provided only to a person registered with a member and only while the person remains on active military duty. Further, the member with which such person is registered shall

promptly notify FINRA in such manner as FINRA may specify of such person's return to active employment with the member.

(b) Inactive Status of Sole Proprietorships

A member that is a sole proprietor who temporarily closes his or her business by reason of volunteering for or being called into active duty in the Armed Forces of the United States, shall be placed, after proper notification to FINRA, on inactive status while the member remains on active military duty.

A sole proprietor member placed on inactive status as set forth in this paragraph (b) shall not be required to pay dues or assessments during the pendency of such inactive status and shall not be required to pay an admission fee upon return to active participation in the investment banking or securities business.

The relief described in this paragraph (b) shall be provided only to a sole proprietor member and only while the person remains on active military duty. Further, the sole proprietor shall promptly notify FINRA in such manner as FINRA may specify of his or her return to active participation in the investment banking or securities business.

(c) Status of Formerly Registered Persons

If a person who was formerly registered with a member volunteers for or is called into active duty in the Armed Forces of the United States at any time within two years after the date the person ceased to be registered with a member, FINRA shall defer the lapse of registration requirements set forth in Rule 1210.08 (i.e., toll the two-year expiration period for representative and principal qualification examinations) and the lapse of the SIE (i.e., toll the four-year expiration period for the SIE). FINRA shall defer the lapse of registration requirements and the SIE commencing on the date the person begins actively serving in the Armed Forces of the United States, provided that FINRA is properly notified of the person's period of active military service within 90 days following his or her completion of active service or upon his or her re-registration with a member, whichever occurs first. The deferral will terminate 90 days following the person's completion of active service in the Armed Forces of the United States. Accordingly, if such person does not re-register with a member within 90 days following his or her completion of active service in the Armed Forces of the United States, the amount of time in which the person must become re-registered with a member without being subject to a representative or principal qualification examination or the SIE shall consist of the standard two-year period for representative and principal qualification examinations or the standard four-year period for the SIE, whichever is applicable, as provided in Rule 1210.08 reduced by the period of time between the person's termination of registration and beginning of active service in the Armed Forces of the United States.

If a person placed on inactive status while serving in the Armed Forces of the United States ceases to be registered with a member, FINRA shall defer the lapse of registration requirements set forth in Rule 1210.08 (i.e., toll the two-year expiration period for representative and principal qualification examinations) and the lapse of the SIE (i.e., toll the four-year expiration period for the SIE) during the pendency of his or her active service in the Armed Forces of the United States. FINRA shall defer the lapse of registration requirements based on existing information in the CRD system, provided that FINRA is properly notified of the person's period of active military service within two years following his or her completion of active service or upon his or her re-registration with a member, whichever occurs first. The deferral shall terminate 90 days following the person's completion of active service in the Armed Forces of the United States. Accordingly, if such person does not re-register with a member within 90 days following his or her completion of active service in the Armed Forces of the United States, the amount of time in which the person must become re-registered with a member without being subject to a representative or principal qualification examination or the SIE shall consist of the standard two-year period for representative and principal qualification examinations or the standard four-year period for the SIE, whichever is applicable, as provided in Rule 1210.08.

.11 Impermissible Registrations. Members shall not register or maintain the registration of any person unless consistent with the requirements of Rule 1210.

[Adopted by SR-FINRA-2017-007 eff. Oct. 1, 2018.]

Selected Notice: 17-30.

FINRA Manual, 1220., Financial Industry Regulatory Authority, Registration Categories

FINRA Manual
FINRA Rule 1220

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(a) Definition of Principal and Principal Registration Categories

(1) Definition of Principal A "principal" is any person associated with a member, including, but not limited to, sole proprietor, officer, partner, manager of office of supervisory jurisdiction, director or other person occupying a similar status or performing similar functions, who is actively engaged in the management of the member's investment banking or securities business, such as supervision, solicitation, conduct of business in securities or the training of persons associated with a member for any of these functions. Such persons shall include, among other persons, a member's chief executive officer and chief financial officer (or equivalent officers).

A "principal" also includes any other person associated with a member who is performing functions or carrying out responsibilities that are required to be performed or carried out by a principal under the FINRA rules.

The term "actively engaged in the management of the member's investment banking or securities business" includes the management of, and the implementation of corporate policies related to, such business. The term also includes managerial decision-making authority with respect to the member's investment banking or securities business and management-level responsibilities for supervising any aspect of such business, such as serving as a voting member of the member's executive, management or operations committees.

(2) General Securities Principal

(A) Requirement Each principal as defined in paragraph (a)(1) of this Rule shall be required to register with FINRA as a General Securities Principal, subject to the following exceptions:

(i) if a principal's activities include the functions of a Compliance Officer, a Financial and Operations Principal (or an Introducing Broker-Dealer Financial and Operations Principal, as applicable), a Principal Financial Officer, a Principal Operations Officer, an Investment Banking Principal, a Research Principal, a Securities Trader Principal or a Registered Options Principal as specified in paragraphs (a)(3) through (a)(8) of this Rule, then such person shall appropriately register in one or more of those categories;

(ii) if a principal's activities are limited solely to the functions of a Government Securities Principal, an Investment Company and Variable Contracts Products Principal, a Direct Participation Programs Principal or a Private Securities Offerings Principal as specified in paragraphs (a)(9), (a)(11), (a)(12) or (a)(13) of this Rule, then such person may appropriately register in one or more of those categories in lieu of registering as a General Securities Principal;

(iii) if a principal's activities are limited solely to the functions of a General Securities Sales Supervisor as specified in paragraph (a)(10) of this Rule, then such person may appropriately register in that category in lieu of registering as a General Securities Principal, provided, however, that if such person is engaged in options sales activities, such person shall be required to register

with FINRA as a Registered Options Principal as specified in paragraph (a)(8) of this Rule or as a General Securities Sales Supervisor as specified in paragraph (a)(10) of this Rule; and

(iv) if a principal's activities are limited solely to the functions of a Supervisory Analyst as specified in paragraph (a)(14) of this Rule, then such person may appropriately register in that category in lieu of registering as a General Securities Principal, provided, however, that if such person is responsible for approving the content of a member's research report on equity securities, such person shall be required to register with FINRA as a Research Principal as specified in paragraph (a)(6) of this Rule or as a Supervisory Analyst as specified in paragraph (a)(14) of this Rule.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Corporate Securities Representative and a General Securities Principal on October 1, 2018 and each person who was registered with FINRA as a Corporate Securities Representative and a General Securities Principal within two years prior to October 1, 2018 shall be qualified to register as a General Securities Principal without passing any additional qualification examinations, provided that his or her supervisory responsibilities in the investment banking or securities business of a member are limited to corporate securities activities of the member.

All other individuals registering as General Securities Principals after October 1, 2018 shall, prior to or concurrent with such registration, become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative and either (i) pass the General Securities Principal qualification examination or (ii) register as a General Securities Sales Supervisor and pass the General Securities Principal Sales Supervisor Module qualification examination.

(3) Compliance Officer

(A) Requirement Subject to the exception in paragraph (a)(3)(C) of this Rule, each person designated as a Chief Compliance Officer on Schedule A of Form BD as specified in Rule 3130(a) shall be required to register with FINRA as a Compliance Officer.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a General Securities Representative and a General Securities Principal on October 1, 2018 and each person who was registered with FINRA as a General Securities Representative and a General Securities Principal within two years prior to October 1, 2018 shall be qualified to register as a Compliance Officer without passing any additional qualification examinations. In addition, subject to the lapse of registration provisions in Rule 1210.08, each person registered as a Compliance Official in the CRD system on October 1, 2018 and each person who was registered as a Compliance Official in the CRD system within two years prior to October 1, 2018 shall be qualified to register as a Compliance Officer without passing any additional qualification examinations.

All other individuals registering as Compliance Officers after October 1, 2018, shall, prior to or concurrent with such registration: (i) become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative and pass the General Securities Principal qualification examination; or (ii) pass the Compliance Official qualification examination.

(C) Exception An individual designated as a Chief Compliance Officer on Schedule A of Form BD of a member that is engaged in limited investment banking or securities business may be registered in a principal category under Rule 1220(a) that corresponds to the limited scope of the member's business.

(4) Financial and Operations Principal and Introducing Broker-Dealer Financial and Operations Principal

(A) Requirement Each member that is operating pursuant to the provisions of SEA Rules 15c3-1(a)(1)(ii), (a)(2)(i) or (a)(8), shall designate a Financial and Operations Principal. Each member subject to the requirements of SEA Rule 15c3-1, other than a member operating pursuant to SEA Rules 15c3-1(a)

(1)(ii), (a)(2)(i) or (a)(8), shall designate either a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal.

A Financial and Operations Principal and an Introducing Broker-Dealer Financial and Operations Principal shall be responsible for performing the following duties:

(i) final approval and responsibility for the accuracy of financial reports submitted to any duly established securities industry regulatory body;

(ii) final preparation of such reports;

(iii) supervision of individuals who assist in the preparation of such reports;

(iv) supervision of and responsibility for individuals who are involved in the actual maintenance of the member's books and records from which such reports are derived;

(v) supervision and performance of the member's responsibilities under all financial responsibility rules promulgated pursuant to the provisions of the Exchange Act;

(vi) overall supervision of and responsibility for the individuals who are involved in the administration and maintenance of the member's back office operations; and

(vii) any other matter involving the financial and operational management of the member.

The requirements of paragraph(a)(4)(A) of this Rule shall not apply to a member that is exempt from the requirement to designate a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal.

(B) Designation of Principal Financial Officer and Principal Operations Officer Each member shall designate a:

(i) Principal Financial Officer with primary responsibility for financial filings and those books and records related to such filings; and

(ii) Principal Operations Officer with primary responsibility for the day-to-day operations of the member's business, including overseeing the receipt and delivery of securities and funds, safeguarding customer and member assets, calculation and collection of margin from customers and processing dividend receivables and payables and reorganization redemptions and those books and records related to such activities.

Each member that self-clears, or that clears for other members, shall be required to designate separate persons to function as Principal Financial Officer and Principal Operations Officer. Such persons may also carry out the other responsibilities of a Financial and Operations Principal and an Introducing Broker-Dealer Financial and Operations Principal as specified in paragraph (a)(4)(A) of this Rule. If such member is limited in size and resources, it may, pursuant to the Rule 9600 Series, request a waiver of the requirement to designate separate persons to function as Principal Financial Officer and Principal Operations Officer.

Each member that is an introducing member may designate the same person to function as Financial and Operations Principal (or Introducing Broker-Dealer Financial and Operations Principal), Principal Financial Officer and Principal Operations Officer.

Each person designated as a Principal Financial Officer or Principal Operations Officer, other than a person associated with a member that is exempt from the requirement to designate a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal, shall be

required to register as a Financial and Operations Principal or an Introducing Broker-Dealer Financial and Operations Principal pursuant to paragraph (a)(4)(A) of this Rule.

(C) Qualifications Each person seeking to register as a Financial and Operations Principal shall, prior to or concurrent with such registration, pass the Financial and Operations Principal qualification examination. Each person seeking to register as an Introducing Broker-Dealer Financial and Operations Principal shall, prior to or concurrent with such registration, pass the Financial and Operations Principal qualification examination or the Introducing Broker-Dealer Financial and Operations Principal qualification examination.

(5) Investment Banking Principal

(A) Requirement Each principal as defined in paragraph (a)(1) of this Rule who is responsible for supervising the investment banking activities specified in paragraph (b)(5) of this Rule shall be required to register with FINRA as an Investment Banking Principal.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as an Investment Banking Representative and a General Securities Principal on October 1, 2018 and each person who was registered with FINRA as an Investment Banking Representative and a General Securities Principal within two years prior to October 1, 2018 shall be qualified to register as an Investment Banking Principal without passing any additional qualification examinations.

All other individuals registering as Investment Banking Principals after October 1, 2018 shall, prior to or concurrent with such registration, become registered pursuant to paragraph (b)(5) of this Rule as an Investment Banking Representative and pass the General Securities Principal qualification examination.

(6) Research Principal

(A) Requirement Each principal as defined in paragraph (a)(1) of this Rule who is responsible for approving the content of a member's research reports on equity securities, or who, with respect to equity research, is responsible for supervising the overall conduct of a Research Analyst registered pursuant to paragraph (b)(6) of this Rule or a Supervisory Analyst registered pursuant to paragraph (a)(14) of this Rule shall be required to register with FINRA as a Research Principal, subject to the following exceptions:

(i) if a principal's activities are limited solely to approving the content of a member's research reports on equity securities, then such person may register as a Supervisory Analyst pursuant to paragraph (a)(14) of this Rule in lieu of registering as a Research Principal;

(ii) if a principal's activities are limited solely to reviewing a member's research reports on equity securities only for compliance with the disclosure provisions of Rule 2241, then such person may register as a General Securities Principal pursuant to paragraph (a)(2) of this Rule in lieu of registering as a Research Principal; and

(iii) if a principal's activities are limited solely to approving the content of a member's research reports on debt securities or the content of third-party research reports, then such person may register as a General Securities Principal pursuant to paragraph (a)(2) of this Rule or as a Supervisory Analyst pursuant to paragraph (a)(14) of this Rule in lieu of registering as a Research Principal.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Research Principal on October 1, 2018 and each person who was

registered with FINRA as a Research Principal within two years prior to October 1, 2018 shall be qualified to register as a Research Principal without passing any additional qualification examinations.

All other individuals registering as Research Principals after October 1, 2018 shall, prior to or concurrent with such registration: (i) become registered pursuant to paragraph (b)(6) of this Rule as a Research Analyst and pass the General Securities Principal qualification examination; or (ii) become registered pursuant to paragraph (a)(14) of this Rule as a Supervisory Analyst and pass the General Securities Principal qualification examination.

(7) Securities Trader Principal

(A) Requirement Each principal as defined in paragraph (a)(1) of this Rule who is responsible for supervising the securities trading activities specified in paragraph (b)(4) of this Rule shall be required to register with FINRA as a Securities Trader Principal.

(B) Qualifications Each person seeking to register as a Securities Trader Principal shall, prior to or concurrent with such registration, become registered pursuant to paragraph (b)(4) of this Rule as a Securities Trader and pass the General Securities Principal qualification examination.

(8) Registered Options Principal

(A) Requirement Each member that is engaged in transactions in options with the public shall have at least one Registered Options Principal.

In addition, each principal as defined in paragraph (a)(1) of this Rule who is responsible for supervising a member's options sales practices with the public, including a person designated pursuant to Rule 3110(a)(2), shall be required to register with FINRA as a Registered Options Principal, subject to the following exception. If a principal's options activities are limited solely to those activities that may be supervised by a General Securities Sales Supervisor as specified in Rule 2360, then such person may register as a General Securities Sales Supervisor pursuant to paragraph (a)(10) of this Rule in lieu of registering as a Registered Options Principal.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Registered Options Principal on October 1, 2018 and each person who was registered with FINRA as a Registered Options Principal within two years prior to October 1, 2018 shall be qualified to register as a Registered Options Principal without passing any additional qualification examinations.

All other individuals registering as Registered Options Principals after October 1, 2018 shall, prior to or concurrent with such registration, become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative and pass the Registered Options Principal qualification examination.

(9) Government Securities Principal

(A) Requirement Each principal as defined in paragraph (a)(1) of this Rule shall be required to register with FINRA as a Government Securities Principal if his or her activities include:

(i) the management or supervision of the member's government securities business, including:

a. underwriting, trading or sales of government securities;

b. financial advisory or consultant services for issuers in connection with the issuance of government securities;

c. research or investment advice, other than general economic information or advice, with respect to government securities in connection with the activities described in subparagraphs a. and b. above;

d. activities other than those specifically described above that involve communication, directly or indirectly, with public investors in government securities in connection with the activities described in subparagraphs a. and b. above; or

(ii) the supervision of:

a. the processing and clearance activities with respect to government securities; or

b. the maintenance of records involving any of the activities described in paragraph (a)(9)(A)(i) of this Rule.

If a principal's functions include the activities specified in paragraph (a)(9)(A) of this Rule, then such person may register as a General Securities Principal pursuant to paragraph (a)(2) of this Rule in lieu of registering as a Government Securities Principal.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Government Securities Principal on October 1, 2018 and each person who was registered with FINRA as a Government Securities Principal within two years prior to October 1, 2018 shall be qualified to register as a Government Securities Principal without passing any additional qualification examinations.

All other individuals registering as Government Securities Principals after October 1, 2018 shall, prior to or concurrent with such registration, become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative.

(10) General Securities Sales Supervisor

(A) Principals Engaged in Limited Activities Each principal as defined in paragraph (a)(1) of this Rule may register with FINRA as a General Securities Sales Supervisor if his or her supervisory responsibilities in the investment banking or securities business of a member are limited to the securities sales activities of the member, including the approval of customer accounts, training of sales and sales supervisory personnel and the maintenance of records of original entry or ledger accounts of the member required to be maintained in branch offices by Exchange Act record-keeping rules.

A person registered solely as a General Securities Sales Supervisor shall not be qualified to perform any of the following activities:

(i) supervision of the origination and structuring of underwritings;

(ii) supervision of market making commitments;

(iii) supervision of the custody of broker-dealer or customer funds or securities for purposes of SEA Rule 15c3-3; or

(iv) supervision of overall compliance with financial responsibility rules for broker-dealers promulgated pursuant to the provisions of the Exchange Act.

(B) Qualifications Each person seeking to register as a General Securities Sales Supervisor shall, prior to or concurrent with such registration become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative and pass the General Securities Sales Supervisor qualification examinations

(11) Investment Company and Variable Contracts Products Principal

(A) Principals Engaged in Limited Activities Each principal as defined in paragraph (a)(1) of this Rule may register with FINRA as an Investment Company and Variable Contracts Products Principal

if his or her activities in the investment banking or securities business of a member are limited to the activities specified in paragraph (b)(7) of this Rule.

(B) Qualifications Each person seeking to register as an Investment Company and Variable Contracts Products Principal shall, prior to or concurrent with such registration: (i) become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative and pass the Investment Company and Variable Contracts Products Principal qualification examination; or (ii) become registered pursuant to paragraph (b)(7) of this Rule as an Investment Company and Variable Contracts Products Representative and pass the Investment Company and Variable Contracts Products Principal qualification examination.

(12) Direct Participation Programs Principal

(A) Principals Engaged in Limited Activities Each principal as defined in paragraph (a)(1) of this Rule may register with FINRA as a Direct Participation Program Principal if his or her activities in the investment banking or securities business of a member are limited to the activities specified in paragraph (b)(8) of this Rule.

(B) Qualifications Each person seeking to register as a Direct Participation Program Principal shall, prior to or concurrent with such registration: (i) become registered pursuant to paragraph (b)(2) of this Rule as a General Securities Representative and pass the Direct Participation Program Principal qualification examination; or (ii) become registered pursuant to paragraph (b)(8) of this Rule as a Direct Participation Programs Representative and pass the Direct Participation Program Principal qualification examination.

(13) Private Securities Offerings Principal

(A) Principals Engaged in Limited Activities Each principal as defined in paragraph (a)(1) of this Rule may register with FINRA as a Private Securities Offerings Principal if his or her activities in the investment banking or securities business of a member are limited to the activities specified in paragraph (b)(9) of this Rule.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Private Securities Offerings Representative and a General Securities Principal on October 1, 2018 and each person who was registered with FINRA as a Private Securities Offerings Representative and a General Securities Principal within two years prior to October 1, 2018 shall be qualified to register as a Private Securities Offerings Principal without passing any additional qualification examinations.

All other individuals registering as Private Securities Offerings Principals after October 1, 2018 shall, prior to or concurrent with such registration, become registered pursuant to paragraph (b)(9) of this Rule as a Private Securities Offerings Representative and pass the General Securities Principal qualification examination.

(14) Supervisory Analyst

(A) Principals Engaged in Limited Activities Each principal as defined in paragraph (a)(1) of this Rule may register with FINRA as a Supervisory Analyst if his or her activities are limited to approving the following: (i) the content of a member's research reports on equity securities; (ii) the content of a member's research reports on debt securities; (iii) the content of third-party research reports; (iv) retail communications as described in Rule 2241(a)(11)(A); or (v) other research communications that do not meet the definition of "research report" under Rule 2241, provided that the Supervisory Analyst has technical expertise in the particular product area.

The activities of a Supervisory Analyst engaged in equity research shall be supervised by a Research Principal registered pursuant to paragraph (a)(6) of this Rule.

(B) Qualifications Each person seeking to register as a Supervisory Analyst shall, prior to or concurrent with such registration pass the Supervisory Analyst qualification examination.

Upon written request pursuant to the Rule 9600 Series, FINRA shall grant a waiver from the securities analysis portion (Part II) of the Supervisory Analyst qualification examination upon verification that the applicant has passed Level I of the Chartered Financial Analyst ("CFA") Examination.

(b) Definition of Representative and Representative Registration Categories

(1) Definition of Representative A "representative" is any person associated with a member, including assistant officers other than principals, who is engaged in the member's investment banking or securities business, such as supervision, solicitation, conduct of business in securities or the training of persons associated with a member for any of these functions.

(2) General Securities Representative

(A) Requirement Each representative as defined in paragraph (b)(1) of this Rule shall be required to register with FINRA as a General Securities Representative, subject to the following exceptions:

(i) if a representative's activities include the functions of an Operations Professional, a Securities Trader, an Investment Banking Representative or a Research Analyst as specified in paragraphs (b)(3) through (b)(6) of this Rule, then such person shall appropriately register in one or more of those categories; and

(ii) if a representative's activities are limited solely to the functions of an Investment Company and Variable Contracts Products Representative, a Direct Participation Programs Representative or a Private Securities Offerings Representative as specified in paragraphs (b)(7) through (b)(9) of this Rule, then such person may appropriately register in one or more of those categories in lieu of registering as a General Securities Representative.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a General Securities Representative on October 1, 2018 and each person who was registered with FINRA as a General Securities Representative within two years prior to October 1, 2018 shall be qualified to register as a General Securities Representative without passing any additional qualification examinations.

All other individuals registering as General Securities Representatives after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the General Securities Representative qualification examination.

(3) Operations Professional

(A) Requirement

(i) Covered Persons Each of the following persons shall be required to register with FINRA as an Operations Professional:

a. senior management with direct responsibility over the covered functions specified in paragraph (b)(3)(A)(ii) of this Rule;

b. any person designated by senior management specified in paragraph (b)(3)(A)(i)a. of this Rule as a supervisor, manager or other person responsible for approving or authorizing work, including work of other persons, in direct furtherance of each of the covered functions specified in paragraph (b)(3)(A)(ii) of this Rule, as applicable, provided that there is sufficient designation of such persons by senior management to address each of the applicable covered functions; and

c. persons with the authority or discretion materially to commit a member's capital in direct furtherance of the covered functions specified in paragraph (b)(3)(A)(ii) of this Rule or to commit

a member to any material contract or agreement (written or oral) in direct furtherance of the covered functions specified in paragraph (b)(3)(A)(ii) of this Rule.

(ii) Covered Functions For purposes of paragraph (b)(3) of this Rule, the following are the covered functions:

a. client on-boarding (customer account data and document maintenance);

b. collection, maintenance, re-investment (*i.e.*, sweeps) and disbursement of funds;

c. receipt and delivery of securities and funds, account transfers;

d. bank, custody, depository and firm account management and reconciliation;

e. settlement, fail control, buy ins, segregation, possession and control;

f. trade confirmation and account statements;

g. margin;

h. stock loan or securities lending;

i. prime brokerage (services to other broker-dealers and financial institutions);

j. approval of pricing models used for valuations;

k. financial control, including general ledger and treasury;

l. contributing to the process of preparing and filing financial regulatory reports;

m. defining and approving business requirements for sales and trading systems and any other systems related to the covered functions, and validation that these systems meet such business requirements;

n. defining and approving business security requirements and policies for information technology, including, but not limited to, systems and data, in connection with the covered functions;

o. defining and approving information entitlement policies in connection with the covered functions; and

p. posting entries to a member's books and records in connection with the covered functions to ensure integrity and compliance with the federal securities laws and regulations and FINRA rules.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as an Investment Company Products and Variable Contracts Representative, a General Securities Representative, a United Kingdom Securities Representative, a Canada Securities Representative, an Operations Professional, a Registered Options Principal, a General Securities Sales Supervisor, a Supervisory Analyst, a General Securities Principal, an Investment Company Products and Variable Products Principal, a Financial and Operations Principal, an Introducing Broker-Dealer Financial and Operations Principal, a Municipal Fund Securities Limited Principal or a Municipal Securities Principal on October 1, 2018 and each person who was registered with FINRA in such registration categories within two years prior to October 1, 2018 shall be qualified to register as an Operations Professional without passing any additional qualification examinations.

Each person who registers with FINRA as an Investment Company Products and Variable Contracts Representative, a General Securities Representative, a Registered Options Principal, a General Securities Sales Supervisor, a Supervisory Analyst, a General Securities Principal, an Investment Company Products and Variable Products Principal, a Financial and Operations Principal, an Introducing Broker-Dealer Financial and Operations Principal, a Municipal Fund Securities Limited Principal or a Municipal Securities Principal after October 1, 2018 shall also be qualified to register as an Operations Professional without passing any additional qualification examinations.

All other individuals registering as Operations Professionals after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Operations Professional qualification examination.

FINRA may accept as an alternative to the qualification examination requirement in paragraph (b)(3)(B) of this Rule any domestic or foreign qualification if it determines that acceptance of such alternative qualification is consistent with the purposes of paragraph (b)(3) of this Rule, the protection of investors, and the public interest.

A person registering as an Operations Professional shall be allowed a period of 120 days beginning on the date such person requests Operations Professional registration to pass any applicable qualification examination, during which time such person may function as an Operations Professional.

(4) Securities Trader

(A) Requirement Each representative as defined in paragraph (b)(1) of this Rule shall be required to register with FINRA as a Securities Trader if, with respect to transactions in equity, preferred or convertible debt securities effected otherwise than on a securities exchange, such person is engaged in proprietary trading, the execution of transactions on an agency basis, or the direct supervision of such activities, other than any person associated with a member whose trading activities are conducted principally on behalf of an investment company that is registered with the SEC pursuant to the Investment Company Act and that controls, is controlled by or is under common control, with the member.

In addition, each person associated with a member who is: (i) primarily responsible for the design, development or significant modification of an algorithmic trading strategy relating to equity, preferred or convertible debt securities; or (ii) responsible for the day-to-day supervision or direction of such activities shall be required to register with FINRA as a Securities Trader.

For purposes of paragraph (b)(4) of this Rule, an "algorithmic trading strategy" is an automated system that generates or routes orders (or order-related messages) but shall not include an automated system that solely routes orders received in their entirety to a market center.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Securities Trader on October 1, 2018 and each person who was registered with FINRA as a Securities Trader within two years prior to October 1, 2018 shall be qualified to register as a Securities Trader without passing any additional qualification examinations.

All other individuals registering as Securities Traders after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Securities Trader qualification examination.

(5) Investment Banking Representative

(A) Requirement Each representative as defined in paragraph (b)(1) of this Rule shall be required to register with FINRA as an Investment Banking Representative if his or her activities in the investment banking or securities business of a member involve:

(i) advising on or facilitating debt or equity securities offerings through a private placement or a public offering, including but not limited to origination, underwriting, marketing, structuring,

syndication, and pricing of such securities and managing the allocation and stabilization activities of such offerings, or

(ii) advising on or facilitating mergers and acquisitions, tender offers, financial restructurings, asset sales, divestitures or other corporate reorganizations or business combination transactions, including but not limited to rendering a fairness, solvency or similar opinion.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as an Investment Banking Representative on October 1, 2018 and each person who was registered with FINRA as an Investment Banking Representative within two years prior to October 1, 2018 shall be qualified to register as an Investment Banking Representative without passing any additional qualification examinations.

All other individuals registering as Investment Banking Representatives after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Investment Banking Representative qualification examination.

(C) Exceptions

(i) Associated Persons Participating in New Employee Training Program

An associated person who participates in a new employee training program conducted by a member shall not be required to register as an Investment Banking Representative for a period of up to six months from the time the associated person first engages within the program in activities described in paragraph (b)(5) of this Rule, but in no event more than two years after commencing participation in the training program. This exception is conditioned upon the member maintaining records that:

a. evidence the existence and details of the training program, including but not limited to its scope, length, eligible participants and administrator; and

b. identify those participants whose activities otherwise would require registration as an Investment Banking Representative and the date on which each participant commenced such activities.

(ii) Associated Persons Engaged in Limited Activities

An associated person shall not be required to register as an Investment Banking Representative if his or her activities in the investment banking or securities business of a member are limited solely to:

a. advising on or facilitating the placement of direct participation program securities as defined in paragraph (b)(8)(A) of this Rule;

b. effecting private securities offerings as specified in paragraph (b)(9) of this Rule; or c. retail or institutional sales and trading activities.

c. retail or institutional sales and trading activities.

(6) Research Analyst

(A) Requirement Each person associated with a member who is to function as a research analyst shall be required to register with FINRA as a Research Analyst.

For purposes of paragraph (b)(6) of this Rule, "research analyst" shall mean an associated person whose primary job function is to provide investment research and who is primarily responsible for the preparation of the substance of an equity research report or whose name appears on an equity research report, and "research report" shall have the same meaning as in Rule 2241.

The requirements of paragraph (b)(6) of this Rule shall not apply to an associated person who:

(i) is an employee of a non-member foreign affiliate of a member ("foreign research analyst");

(ii) resides outside the United States; and

(iii) contributes, partially or entirely, to the preparation of globally branded or foreign affiliate research reports but does not contribute to the preparation of a member's research, including a mixed-team report, that is not globally branded.

Provided that the following conditions are satisfied:

a. a member that publishes or otherwise distributes globally branded research reports partially or entirely prepared by a foreign research analyst must subject such research to pre-use review and approval by a Research Principal registered pursuant to paragraph (a)(6) of this Rule or a Supervisory Analyst registered pursuant to paragraph (a)(14) of this Rule. In addition, the member must ensure that such research reports comply with Rule 2241, as applicable;

b. in publishing or otherwise distributing globally branded research reports partially or entirely prepared by a foreign research analyst, a member must prominently disclose:

1. each affiliate contributing to the research report;

2. the names of the foreign research analysts employed by each contributing affiliate;

3. that such research analysts are not registered as Research Analysts with FINRA; and

4. that such research analysts may not be associated persons of the member and therefore may not be subject to Rule 2241 restrictions on communications with a subject company, public appearances and trading securities held by a research analyst account;

c. the disclosures required by paragraph (b)(6)(A)(iii)b. of this Rule shall be presented on the front page of the research report or the front page shall refer to the page on which the disclosures can be found. In electronic research reports, a member may hyperlink to the disclosures. References and disclosures shall be clear, comprehensive and prominent;

d. members shall establish and maintain records that identify those individuals who have availed themselves of this exemption, the basis for such exemption, and evidence of compliance with the conditions of the exemption. Failure to establish and maintain such records shall create an inference of a violation of paragraph (b)(6) of this Rule. Members shall also establish and maintain records that evidence compliance with the applicable content, disclosure and supervision provisions of Rule 2241. Members shall maintain these records in accordance with the supervisory requirements of Rule 3110, and in addition to such requirement, the failure to establish and maintain such records shall create an inference of a violation of the applicable content, disclosure and supervision provisions of Rule 2241;

e. nothing in paragraph (b)(6) of this Rule shall affect the obligation of any person or broker-dealer, including a foreign broker-dealer, to comply with the applicable provisions of the federal securities laws, rules and regulations and any self-regulatory organization rules;

f. the fact that a foreign research analyst avails himself or herself of the exemption in paragraph (b)(6) of this Rule shall not be probative of whether that individual is an associated person of the member for other purposes, including whether the foreign research analyst is subject to the Rule 2241 restrictions on communications with a subject company, public appearances and trading securities held by a research analyst account;

g. a member that distributes non-member foreign affiliate research reports that are clearly and prominently labeled as such must comply with the third-party research report requirements in Rule 2241; and

h. for purposes of the exemption in paragraph (b)(6) of this Rule, the terms "affiliate," "globally branded research report" and "mixed-team research report" shall have the following meanings:

1. "affiliate" shall mean a person that directly or indirectly controls, is controlled by, or is under common control with, a member;

2. "globally branded research report" refers to the use of a single marketing identity that encompasses the member and one or more of its affiliates; and

3. "mixed-team research report" refers to any member research report that is not globally branded and includes a contribution by a research analyst who is not an associated person of the member.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Research Analyst on October 1, 2018 and each person who was registered with FINRA as a Research Analyst within two years prior to October 1, 2018 shall be qualified to register as a Research Analyst without passing any additional qualification examinations.

All other individuals registering as Research Analysts after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Research Analyst qualification examinations.

Upon written request pursuant to the Rule 9600 Series, FINRA shall grant a waiver from the analytical portion of the Research Analyst qualification examinations (Series 86) upon verification that the applicant has passed:

(i) Levels I and II of the CFA Examination; or

(ii) if the applicant functions as a research analyst who prepares only technical research reports as defined in paragraph (b)(6) of this Rule, Levels I and II of the Chartered Market Technician ("CMT") Examination; and

(iii) has either functioned as a research analyst continuously since having passed the Level II CFA or CMT Examination or applied for registration as a Research Analyst within two years of having passed the Level II CFA or CMT Examination.

For purposes of paragraph (b)(6) of this Rule, a "technical research report" shall mean a research report, as that term is defined in Rule 2241, that is based solely on stock price movement and trading volume and not on the subject company's financial information, business prospects, contact with subject company's management, or the valuation of a subject company's securities.

An applicant who has been granted an exemption pursuant to paragraph (b)(6)(B) of this Rule still must pass the regulatory portion of the Research Analyst qualification examinations (Series 87) before that applicant can be registered as a Research Analyst.

(7) Investment Company and Variable Contracts Products Representative

(A) Representatives Engaged in Limited Activities Each representative as defined in paragraph (b)(1) of this Rule may register with FINRA as an Investment Company and Variable Contracts Products Representative if his or her activities in the investment banking or securities business of a member are limited to the solicitation, purchase or sale of:

(i) redeemable securities of companies registered pursuant to the Investment Company Act;

(ii) securities of closed-end companies registered pursuant to the Investment Company Act during the period of original distribution only;

(iii) variable contracts and insurance premium funding programs and other contracts issued by an insurance company except contracts that are exempt securities pursuant to Section 3(a)(8) of the Securities Act; or

(iv) municipal fund securities as defined under MSRB Rule D-12.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as an Investment Company and Variable Contracts Products Representative on October 1, 2018 and each person who was registered with FINRA as an Investment Company and Variable Contracts Products Representative within two years prior to October 1, 2018 shall be qualified to register as an Investment Company and Variable Contracts Products Representative without passing any additional qualification examinations.

All other individuals registering as Investment Company and Variable Contracts Products Representatives after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Investment Company and Variable Contracts Products Representative qualification examination.

(8) Direct Participation Programs Representative

(A) Representatives Engaged in Limited Activities Each representative as defined in paragraph (b)(1) of this Rule may register with FINRA as a Direct Participation Programs Representative if his or her activities in the investment banking or securities business of a member are limited to the solicitation, purchase or sale of equity interests in or the debt of direct participation programs as defined in paragraph (b)(8)(A) of this Rule.

"Direct participation programs" shall mean programs that provide for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution including, but not limited to, oil and gas programs, cattle programs, condominium securities, Subchapter S corporate offerings and all other programs of a similar nature, regardless of the industry represented by the program, or any combination thereof. Excluded from this definition are real estate investment trusts, tax qualified pension and profit sharing plans pursuant to Sections 401 and 403(a) of the Internal Revenue Code ("Code") and individual retirement plans under Section 408 of the Code, tax sheltered annuities pursuant to the provisions of Section 403(b) of the Code and any company including separate accounts registered pursuant to the Investment Company Act. Also excluded from this definition is any program that is listed on a national securities exchange or any program for which an application for listing on a national securities exchange has been made.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Direct Participation Programs Representative on October 1, 2018 and each person who was registered with FINRA as a Direct Participation Programs Representative within two years prior to October 1, 2018 shall be qualified to register as a Direct Participation Programs Representative without passing any additional qualification examinations.

All other individuals registering as Direct Participation Programs Representatives after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Direct Participation Programs Representative qualification examination.

(9) Private Securities Offerings Representative

(A) Representatives Engaged in Limited Activities Each representative as defined in paragraph (b)(1) of this Rule may register with FINRA as a Private Securities Offerings Representative if his or her activities in the investment banking or securities business of a member are limited to effecting sales

as part of a primary offering of securities not involving a public offering, pursuant to Sections 3(b), 4(2) or 4(6) of the Securities Act and the Securities Act rules and regulations, provided, however, that such person shall not effect sales of municipal or government securities, or equity interests in or the debt of direct participation programs as defined in paragraph (b)(8)(A) of this Rule.

(B) Qualifications Subject to the lapse of registration provisions in Rule 1210.08, each person registered with FINRA as a Private Securities Offerings Representative on October 1, 2018 and each person who was registered with FINRA as a Private Securities Offerings Representative within two years prior to October 1, 2018 shall be qualified to register as a Private Securities Offerings Representative without passing any additional qualification examinations.

All other individuals registering as Private Securities Offerings Representatives after October 1, 2018 shall, prior to or concurrent with such registration, pass the SIE and the Private Securities Offerings Representative qualification examination. However, FINRA shall, upon such evidence as it determines to be appropriate, deem any person who while employed by a bank, engaged in effecting sales of private securities offerings as described in paragraph (b)(9) of this Rule, during the period from May 12, 1999 to November 12, 1999, as qualified to register as a Private Securities Offerings Representative without the need to pass the SIE and the Private Securities Offerings Representative qualification examination.

• • • Supplementary Material:

.01 Foreign Registrations. Persons who are in good standing as a representative with the Financial Conduct Authority in the United Kingdom or with a Canadian stock exchange or securities regulator shall be exempt from the requirement to pass the SIE.

.02 Additional Qualification Requirements for Persons Engaged in Security Futures Activities. Each person who is registered with FINRA as a General Securities Representative, United Kingdom Securities Representative, Canada Securities Representative, Options Representative, Registered Options Principal or General Securities Sales Supervisor shall be eligible to engage in security futures activities as a representative or principal, as applicable, provided that such individual completes a Firm Element program as set forth in Rule 1240 that addresses security futures products before such person engages in security futures activities.

.03 Members With One Registered Options Principal. A member that has one Registered Options Principal shall promptly notify FINRA in the event such person is terminated, resigns, becomes incapacitated or is otherwise unable to perform the duties of a Registered Options Principal.

Following receipt of such notification, FINRA shall require the member to agree, in writing, to refrain from engaging in any options-related activities that would necessitate the prior or subsequent approval of a Registered Options Principal until such time as a new Registered Options Principal has been qualified.

Members failing to qualify a new Registered Options Principal within two weeks following the loss of their sole Registered Options Principal, or by the earliest available date for administration of the Registered Options Principal examination, whichever is longer, shall be required to cease doing an options business; provided, however, they may effect closing transactions in options to reduce or eliminate existing open options positions in their own account as well as the accounts of their customers.

.04 Scope of General Securities Sales Supervisor Registration Category. The General Securities Sales Supervisor category is an alternate category of registration designed to lessen the qualification burdens on principals of general securities firms who supervise sales. Without this category of limited registration, such principals would be required to separately qualify pursuant to the rules of FINRA, the MSRB, the NYSE and the options exchanges. While persons may continue to separately qualify with all relevant self-regulatory organizations, the General Securities Sales Supervisor examinations permit qualification as a supervisor of sales of all securities through one registration category. Persons registered as General Securities Sales Supervisors

may also qualify in any other category of principal registration. Persons who are already qualified in one or more categories of principal registration may supervise sales activities of all securities by also qualifying as General Securities Sales Supervisors.

Any person required to be registered as a principal who supervises sales activities in corporate, municipal and option securities, investment company products, variable contracts, direct participation program securities as defined in paragraph (b)(8)(A) of this Rule, and security futures (subject to the requirements of Supplementary Material .02 of this Rule) may be registered solely as a General Securities Sales Supervisor. In addition to branch office managers, other persons such as regional and national sales managers may also be registered solely as General Securities Sales Supervisors as long as they supervise only sales activities.

.05 Scope of Operations Professional Requirement. Any person whose activities are limited to performing a function ancillary to a covered function specified in paragraph (b)(3)(A)(ii) of this Rule, or whose function is to serve a role that can be viewed as supportive of or advisory to the performance of a covered function specified in paragraph (b)(3)(A)(ii) of this Rule (e.g., internal audit, legal or compliance personnel who review but do not have primary responsibility for any covered function), or who engages solely in clerical or ministerial activities in a covered function specified in paragraph (b)(3)(A)(ii)of this Rule shall not be required to register as an Operations Professional. For the purpose of paragraph (b)(3)(A)(i)c. of this Rule, the determination as to what constitutes "materially" or "material" is based on a member's pre-established spending guidelines and risk management policies.

An employee of a foreign broker-dealer whose activities, relating to a transaction in foreign securities on behalf of a customer of a member, are limited to facilitating the clearance and settlement of the transaction shall not be required to register as an Operations Professional where:

(a) the member sending the order for a transaction in foreign securities on behalf of the customer to the foreign broker-dealer is not a direct participant of the applicable foreign clearing system; and

(b) in executing such order in the foreign market, the foreign broker-dealer accepts the member's customer's instructions to settle the transaction in foreign securities on a DVP/RVP basis through the foreign clearing system and settle directly with a custodian for the customer.

.06 Eliminated Registration Categories. Subject to the lapse of registration provisions in Rule 1210.08, each person who is registered with FINRA as an Order Processing Assistant Representative, a United Kingdom Securities Representative, a Canada Securities Representative, an Options Representative, a Corporate Securities Representative or a Government Securities Representative on October 1, 2018 and each person who was registered with FINRA in such categories within two years prior to October 1, 2018 shall be eligible to maintain such registrations with FINRA. However, if persons registered in such categories subsequently terminate such registration(s) with FINRA and the registration remains terminated for two or more years, they shall not be eligible to re-register in such categories. In addition, each person who is registered with FINRA as a Foreign Associate on October 1, 2018 shall be eligible to maintain such registration with FINRA. However, if persons registered as Foreign Associates subsequently terminate such registrations with FINRA, they shall not be eligible to re-register as Foreign Associates.

(a) Persons registered as Order Processing Assistant Representatives shall be subject to the following conditions:

(1) Order Processing Assistant Representatives may not solicit transactions or new accounts on behalf of a member, render investment advice, make recommendations to customers regarding the appropriateness of securities transactions, effect transactions in securities markets on behalf of a member or accept customer orders for municipal securities and direct participation program securities as defined in paragraph (b)(8)(A) of this Rule;

(2) members may only compensate Order Processing Assistant Representatives on an hourly wage or salaried basis and may not in any way, directly or indirectly, relate their compensation to the number or size of transactions effected for customers, provided that

Order Processing Assistant Representatives are not prohibited from receiving bonuses or other compensation based on a member's profit sharing plan or similar arrangement;

(3) the activities of Order Processing Assistant Representatives may only be conducted at a business location of a member that is under the direct supervision of an appropriately registered principal of the member; and

(4) an Order Processing Assistant Representative shall not be precluded from registering as a General Securities Representative or in another registration category appropriate to his or her functions; however, upon registration in such other category, such person's registration as an Order Processing Assistant Representative shall be terminated.

(b) Persons registered as Foreign Associates shall be subject to the following conditions:

(1) They shall not be citizens, nationals, or residents of the United States or any of its territories or possessions;

(2) They shall not engage in any securities activities with or for any citizen, national or resident of the United States; and

(3) They shall conduct all of their securities activities in areas outside the jurisdiction of the United States.

[Adopted by SR-FINRA-2011-013 eff. Oct. 17, 2011; amended by SR-FINRA-2011-040 eff. Oct. 17, 2011; amended by SR-FINRA-2011-060 eff. Oct. 17, 2011; amended by SR-FINRA-2017-007 eff. Oct. 1, 2018; amended by SR-2018-031 eff. Oct. 1, 2018.]

Selected Notices: 11-33, 17-30.

FINRA Manual, 1240., Financial Industry Regulatory Authority, Continuing Education Requirements

FINRA Manual
FINRA Rule 1240

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This Rule prescribes requirements regarding the continuing education of specified persons subsequent to their initial registration with FINRA. The requirements shall consist of a Regulatory Element and a Firm Element as set forth below.

(a) Regulatory Element

(1) Requirements All covered persons shall comply with the requirement to complete the Regulatory Element.

Each covered person shall complete the Regulatory Element on the occurrence of their second registration anniversary date and every three years thereafter, or as otherwise prescribed by FINRA. On each occasion, the Regulatory Element must be completed within 120 days after the person's registration anniversary date. A person's initial registration date, also known as the "base date," shall establish the cycle of anniversary dates for purposes of this Rule. The content of the Regulatory Element shall be appropriate to either the registered representative or principal status of persons subject to the Rule. The content of the Regulatory Element for a person designated as eligible for a waiver pursuant to Rule 1210.09 shall be determined based on the person's most recent registration status, and the Regulatory Element shall be completed based on the same cycle had the person remained registered.

(2) Failure to Complete Unless otherwise determined by FINRA, any covered persons who have not completed the Regulatory Element within the prescribed time frames will have their registrations deemed inactive until such time as the requirements of the program have been satisfied. Any person whose registration has been deemed inactive under this Rule shall cease all activities as a registered person and is prohibited from performing any duties and functioning in any capacity requiring registration. Further, such person may not accept or solicit business or receive any compensation for the purchase or sale of securities. However, such person may receive trail or residual commissions resulting from transactions completed before the inactive status, unless the member with which such person is associated has a policy prohibiting such trail or residual commissions. A registration that is inactive for a period of two years will be administratively terminated. A person whose registration is so terminated may reactivate the registration only by reapplying for registration and meeting the qualification requirements of the applicable provisions of Rules 1210 and 1220. FINRA may, upon application and a showing of good cause, allow for additional time for a covered person to satisfy the program requirements. If a person designated as eligible for a waiver pursuant to Rule 1210.09 fails to complete the Regulatory Element within the prescribed time frames, the person shall no longer be eligible for such a waiver.

(3) Disciplinary Actions Unless otherwise determined by FINRA, a covered person, other than a person designated as eligible for a waiver pursuant to Rule 1210.09, will be required to retake the Regulatory Element and satisfy all of its requirements in the event such person:

(A) (A) is subject to any statutory disqualification as defined in Section 3(a)(39) of the Exchange Act;

(B) (B) is subject to suspension or to the imposition of a fine of $5,000 or more for violation of any provision of any securities law or regulation, or any agreement with or rule or standard of conduct of

any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding; or

(C) (C) is ordered as a sanction in a disciplinary action to retake the Regulatory Element by any securities governmental agency or self-regulatory organization.

The retaking of the Regulatory Element shall commence with participation within 120 days of the covered person becoming subject to the statutory disqualification, in the case of (A) above, or the disciplinary action becoming final, in the case of (B) and (C) above. The date of the disciplinary action shall be treated as such person's new base date with FINRA.

(4) Reassociation in a Registered Capacity Any covered person who has terminated association with a member and who has, within two years of the date of termination, become reassociated in a registered capacity with a member shall participate in the Regulatory Element at such intervals that may apply (second anniversary and every three years thereafter) based on the initial registration anniversary date rather than based on the date of reassociation in a registered capacity.

(5) Definition of Covered Person For purposes of this Rule, the term "covered person" means any person, other than a Foreign Associate, registered with FINRA pursuant to Rule 1210, including any person who is permissively registered pursuant to Rule 1210.02, and any person who is designated as eligible for a waiver pursuant to Rule 1210.09.

(6) Delivery of the Regulatory Element The continuing education Regulatory Element program will be administered through Web-based delivery or such other technological manner and format as specified by FINRA.

(7) Regulatory Element Contact Person Each member shall designate and identify to FINRA (by name and e-mail address) an individual or individuals responsible for receiving e-mail notifications provided via the Central Registration Depository regarding when a covered person is approaching the end of his or her Regulatory Element time frame and when a covered person is deemed inactive due to failure to complete the requirements of the Regulatory Element program. Each member shall identify, review, and, if necessary, update the information regarding its Regulatory Element contact person(s) in the manner prescribed by Rule 4517.

(b) Firm Element

(1) Persons Subject to the Firm Element The requirements of this subparagraph shall apply to any person registered with a member who has direct contact with customers in the conduct of the member's securities sales, trading and investment banking activities, any person registered as an operations professional pursuant to Rule 1220(b)(3) or a research analyst pursuant to Rule 1220(b)(6), and to the immediate supervisors of such persons (collectively, "covered registered persons"). "Customer" shall mean any natural person and any organization, other than another broker or dealer, executing securities transactions with or through or receiving investment banking services from a member.

(2) Standards for the Firm Element

(A) Each member must maintain a continuing and current education program for its covered registered persons to enhance their securities knowledge, skill, and professionalism. At a minimum, each member shall at least annually evaluate and prioritize its training needs and develop a written training plan. The plan must take into consideration the member's size, organizational structure, and scope of business activities, as well as regulatory developments and the performance of covered registered persons in the Regulatory Element. If a member's analysis establishes the need for supervisory training for persons with supervisory responsibilities, such training must be included in the member's training plan.

(B) Minimum Standards for Training Programs — Programs used to implement a member's training plan must be appropriate for the business of the member and, at a minimum must cover training in ethics and professional responsibility and the following matters concerning securities products, services, and strategies offered by the member:

(i) General investment features and associated risk factors;

(ii) Suitability and sales practice considerations; and

(iii) Applicable regulatory requirements.

(C) Administration of Continuing Education Program — A member must administer its continuing education programs in accordance with its annual evaluation and written plan and must maintain records documenting the content of the programs and completion of the programs by covered registered persons.

(3) Participation in the Firm Element Covered registered persons included in a member's plan must take all appropriate and reasonable steps to participate in continuing education programs as required by the member.

(4) Specific Training Requirements FINRA may require a member, individually or as part of a larger group, to provide specific training to its covered registered persons in such areas as FINRA deems appropriate. Such a requirement may stipulate the class of covered registered persons for which it is applicable, the time period in which the requirement must be satisfied and, where appropriate, the actual training content.

[Adopted by SR-NASD-94-72 eff. July 1, 1995; amended by SR-NASD-95-22 eff. July 1, 1995.Amended by SR-NASD-98-03 eff. July 1, 1998; amended by SR-NASD-2000-64 eff. March 11, 2001; amended by SR-NASD-2002-154 eff. July 29, 2003; amended by SR-NASD-2003-183 eff. April 16, 2004; amended by SR-NASD-2004-098 eff. April 4, 2005; amended by SR-NASD-2007-034 eff. Dec. 31, 2007; amended by SR-FINRA-2011-013 eff. Oct. 17, 2011; amended by SR-FINRA-2015-004 eff. Feb. 12, 2015; amended by SR-FINRA-2015-015 eff. Oct. 1, 2015; amended by SR-FINRA-2015-050 eff. Dec. 24, 2015; amended by SR-FINRA-2017-007 eff. Oct. 1, 2018.]

Selected Notices: 94-59, 95-13, 95-35, 96-27, 98-23, 01-14, 03-44, 04-22, 05-20, 07-42, 11-33, 15-28, 17-30.

FINRA Manual, 2040., Financial Industry Regulatory Authority, Payments to Unregistered Persons

FINRA Manual
FINRA Rule 2040

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(a) General No member or associated person shall, directly or indirectly, pay any compensation, fees, concessions, discounts, commissions or other allowances to:

(1) any person that is not registered as a broker-dealer under Section 15(a) of the Exchange Act but, by reason of receipt of any such payments and the activities related thereto, is required to be so registered under applicable federal securities laws and SEA rules and regulations; or

(2) any appropriately registered associated person unless such payment complies with all applicable federal securities laws, FINRA rules and SEA rules and regulations.

(b) Retiring Representatives

(1) A member may pay continuing commissions to a retiring registered representative of the member, after he or she ceases to be associated with such member, that are derived from accounts held for continuing customers of the retiring registered representative regardless of whether customer funds or securities are added to the accounts during the period of retirement, provided that:

(A) a bona fide contract between the member and the retiring registered representative providing for the payments was entered into in good faith while the person was a registered representative of the member and such contract, among other things, prohibits the retiring registered representative from soliciting new business, opening new accounts, or servicing the accounts generating the continuing commission payments; and

(B) the arrangement complies with applicable federal securities laws, SEA rules and regulations.

(2) The term “retiring registered representative,” as used in this Rule shall mean an individual who retires from a member (including as a result of a total disability) and leaves the securities industry. In the case of death of the retiring registered representative, the retiring registered representative’s beneficiary designated in the written contract or the retiring registered representative’s estate if no beneficiary is so designated may be the beneficiary of the respective member’s agreement with the deceased representative.

(c) Nonregistered Foreign Finders A member may pay to a nonregistered foreign person (the “finder”) transaction-related compensation based upon the business of customers the finder directs to the member if the following conditions are met:

(1) the member has assured itself that the finder who will receive the compensation is not required to register in the United States as a broker-dealer nor is subject to a disqualification as defined in Article III, Section 4 of FINRA’s By-Laws, and has further assured itself that the compensation arrangement does not violate applicable foreign law;

(2) the finder is a foreign national (not a U.S. citizen) or foreign entity domiciled abroad;

(3) the customers are foreign nationals (not U.S. citizens) or foreign entities domiciled abroad transacting business in either foreign or U.S. securities;

(4) customers receive a descriptive document, similar to that required by Rule 206(4)-3(b) of the Investment Advisers Act, that discloses what compensation is being paid to finders;

(5) customers provide written acknowledgment to the member of the existence of the compensation arrangement and such acknowledgment is retained and made available for inspection by FINRA;

(6) records reflecting payments to finders are maintained on the member's books, and actual agreements between the member and the finder are available for inspection by FINRA; and

(7) the confirmation of each transaction indicates that a referral or finders fee is being paid pursuant to an agreement.

• • • Supplementary Material:

.01 Reasonable Support for Determination of Compliance with Section 15(a) of the Exchange Act. For purposes of Rule 2040, FINRA expects members to determine that their proposed activities would not require the recipient of the payments to register as a broker-dealer and to reasonably support such determination. Members that are uncertain as to whether an unregistered person may be required to be registered under Section 15(a) of the Exchange Act by reason of receiving payments from the member can derive support for their determination by, among other things, (1) reasonably relying on previously published releases, no-action letters or interpretations from the Commission or Commission staff that apply to their facts and circumstances; (2) seeking a no-action letter from the Commission staff; or (3) obtaining a legal opinion from independent, reputable U.S. licensed counsel knowledgeable in the area. The member's determination must be reasonable under the circumstances and should be reviewed periodically if payments to the unregistered person are ongoing in nature. In addition, a member must maintain books and records that reflect the member's determination.

[Adopted by SR-NASD-94-51 eff. Feb 15, 1995 (Paragragh (c)); amended by SR-FINRA-2014-037 eff. Aug. 24, 2015.]

Selected Notice: 15-07.

FINRA Manual, 2210., Financial Industry Regulatory Authority, Communications with the Public

FINRA Manual
FINRA Rule 2210

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(a) Definitions For purposes of this Rule and any interpretation thereof:

(1) "Communications" consist of correspondence, retail communications and institutional communications.

(2) "Correspondence" means any written (including electronic) communication that is distributed or made available to 25 or fewer retail investors within any 30 calendar-day period.

(3) "Institutional communication" means any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member's internal communications.

(4) "Institutional investor" means any:

(A) person described in Rule 4512(c), regardless of whether the person has an account with a member;

(B) governmental entity or subdivision thereof;

(C) employee benefit plan, or multiple employee benefit plans offered to employees of the same employer, that meet the requirements of Section 403(b) or Section 457 of the Internal Revenue Code and in the aggregate have at least 100 participants, but does not include any participant of such plans;

(D) qualified plan, as defined in Section 3(a)(12)(C) of the Exchange Act, or multiple qualified plans offered to employees of the same employer, that in the aggregate have at least 100 participants, but does not include any participant of such plans;

(E) member or registered person of such a member; and

(F) person acting solely on behalf of any such institutional investor.

No member may treat a communication as having been distributed to an institutional investor if the member has reason to believe that the communication or any excerpt thereof will be forwarded or made available to any retail investor.

(5) "Retail communication" means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.

(6) "Retail investor" means any person other than an institutional investor, regardless of whether the person has an account with a member.

(7) "Covered investment fund research report" has the meaning given that term in paragraph (c)(3) of Securities Act Rule 139b.

(b) Approval, Review and Recordkeeping
(1) Retail Communications

(A) An appropriately qualified registered principal of the member must approve each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department ("Department").

(B) The requirements of paragraph (b)(1)(A) may be met by a Supervisory Analyst approved pursuant to Rule 1220(a)(14) with respect to: (i) research reports on debt and equity securities as described in Rules 2241(a)(11) and 2242(a)(3); (ii) retail communications as described in Rules 2241(a)(11)(A) and 2242(a)(3)(A); and (iii) other research communications, provided that the Supervisory Analyst has technical expertise in the particular product area. A Supervisory Analyst may not approve a retail communication that requires a separate registration unless the Supervisory Analyst also has such other registration.

(C) The requirements of paragraph (b)(1)(A) shall not apply with regard to any retail communication if, at the time that a member intends to publish or distribute it:

(i) another member has filed it with the Department and has received a letter from the Department stating that it appears to be consistent with applicable standards; and

(ii) the member using it in reliance upon this subparagraph has not materially altered it and will not use it in a manner that is inconsistent with the conditions of the Department's letter.

(D) The requirements of paragraph (b)(1)(A) shall not apply with regard to the following retail communications, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to Rules 3110(b) and 3110.06 through .09:

(i) any retail communication that is excepted from the definition of "research report" pursuant to Rule 2241(a)(11)(A) or "debt research report" under Rule 2242(a)(3)(A), unless the communication makes any financial or investment recommendation;

(ii) any retail communication that is posted on an online interactive electronic forum; and

(iii) any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

(E) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (b)(1)(A) for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

(F) Notwithstanding any other provision of this Rule, an appropriately qualified principal must approve a communication prior to a member filing the communication with the Department.

(2) Correspondence All correspondence is subject to the supervision and review requirements of Rules 3110(b) and 3110.06 through .09.

(3) Institutional Communications Each member shall establish written procedures that are appropriate to its business, size, structure, and customers for the review by an appropriately qualified registered principal of institutional communications used by the member and its associated persons. Such procedures must be reasonably designed to ensure that institutional communications comply with applicable standards. When such procedures do not require review of all institutional communications prior to first use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing institutional communications, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to.

Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

(4) Recordkeeping

(A) Members must maintain all retail communications and institutional communications for the retention period required by SEA Rule 17a-4(b) and in a format and media that comply with SEA Rule 17a-4. The records must include:

(i) a copy of the communication and the dates of first and (if applicable) last use of such communication;

(ii) the name of any registered principal who approved the communication and the date that approval was given;

(iii) in the case of a retail communication or an institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;

(iv) information concerning the source of any statistical table, chart, graph or other illustration used in the communication;

(v) for any retail communication for which principal approval is not required pursuant to paragraph (b)(1)(C), the name of the member that filed the retail communication with the Department, and a copy of the corresponding review letter from the Department; and

(vi) for any retail communication that includes or incorporates a performance ranking or performance comparison of a registered investment company, a copy of the ranking or performance used in the retail communication.

(B) Members must maintain all correspondence in accordance with the record-keeping requirements of Rules 3110.09 and 4511.

(c) Filing Requirements and Review Procedures

(1) Requirement for Certain Members to File Retail Communications Prior to First Use

(A) For a period of one year beginning on the date reflected in the Central Registration Depository (CRD®) system as the date that FINRA membership became effective, the member must file with the Department at least 10 business days prior to first use any retail communication that is published or used in any electronic or other public media, including any generally accessible website, newspaper, magazine or other periodical, radio, television, telephone or audio recording, video display, signs or billboards, motion pictures, or telephone directories (other than routine listings). To the extent any retail communication that is subject to this filing requirement is a free writing prospectus that has been filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii), the member may file such retail communication within 10 business days of first use rather than at least 10 business days prior to first use.

(B) Notwithstanding the foregoing provisions, if the Department determines that a member has departed from the standards of this Rule, it may require that such member file all communications, or the portion of such member's communications that is related to any specific types or classes of securities or services, with the Department at least 10 business days prior to first use. The Department will notify the member in writing of the types of communications to be filed and the length of time such requirement is to be in effect. Any filing requirement imposed under this subparagraph will take effect 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

(2) Requirement to File Certain Retail Communications Prior to First Use At least 10 business days prior to first use or publication (or such shorter period as the Department may allow), a member must file the following retail communications with the Department and withhold them from publication or circulation until any changes specified by the Department have been made:

(A) Retail communications concerning registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds and unit investment trusts) that include or incorporate performance rankings or performance comparisons of the investment company with other investment companies when the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate. Such filings must include a copy of the data on which the ranking or comparison is based.

(B) Retail communications concerning security futures. The requirements of this paragraph (c)(2)(B) shall not be applicable to:

(i) retail communications concerning security futures that are submitted to another self-regulatory organization having comparable standards pertaining to such retail communications; and

(ii) retail communications in which the only reference to security futures is contained in a listing of the services of a member.

(3) Requirement to File Certain Retail Communications Within 10 business days of first use or publication, a member must file the following communications with the Department:

(A) Retail communications that promote or recommend a specific registered investment company or family of registered investment companies (including mutual funds, exchange-traded funds, variable insurance products, closed-end funds, and unit investment trusts) not included within the requirements of paragraphs (c)(1) or (c)(2).

(B) Retail communications concerning public direct participation programs (as defined in Rule 2310).

(C) Retail communications concerning collateralized mortgage obligations registered under the Securities Act.

(D) Retail communications concerning any security that is registered under the Securities Act and that is derived from or based on a single security, a basket of securities, an index, a commodity, a debt issuance or a foreign currency, not included within the requirements of paragraphs (c)(1), (c)(2) or subparagraphs (A) through (C) of paragraph (c)(3).

(4) Filing of Television or Video Retail Communications If a member has filed a draft version or "story board" of a television or video retail communication pursuant to a filing requirement, then the member also must file the final filmed version within 10 business days of first use or broadcast.

(5) Date of First Use and Approval Information A member must provide with each filing the actual or anticipated date of first use, the name, title and Central Registration Depository (CRD®) number of the registered principal who approved the retail communication, and the date that the approval was given.

(6) Spot-Check Procedures In addition to the foregoing requirements, each member's written (including electronic) communications may be subject to a spot-check procedure. Upon written request from the Department, each member must submit the material requested in a spot-check procedure within the time frame specified by the Department.

(7) Exclusions from Filing Requirements The following communications are excluded from the filing requirements of paragraphs (c)(1) through (c)(4):

(A) Retail communications that previously have been filed with the Department and that are to be used without material change.

(B) Retail communications that are based on templates that were previously filed with the Department the changes to which are limited to:

(i) updates of more recent statistical or other non-narrative information; and

(ii) non-predictive narrative information that describes market events during the period covered by the communication or factual changes in portfolio composition or is sourced from a registered investment company's regulatory documents filed with the SEC.

(C) Retail communications that do not make any financial or investment recommendation or otherwise promote a product or service of the member.

(D) Retail communications that do no more than identify a national securities exchange symbol of the member or identify a security for which the member is a registered market maker.

(E) Retail communications that do no more than identify the member or offer a specific security at a stated price.

(F) Prospectuses, preliminary prospectuses, fund profiles, offering circulars, annual or semi-annual reports and similar documents that have been filed with the SEC or any state in compliance with applicable requirements, similar offering documents concerning securities offerings that are exempt from SEC and state registration requirements, and free writing prospectuses that are exempt from filing with the SEC, except that an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii) will not be considered a prospectus for purposes of this exclusion.

(G) Retail communications prepared in accordance with Section 2(a)(10)(b) of the Securities Act, as amended, or any rule thereunder, such as Rule 134, and announcements as a matter of record that a member has participated in a private placement, unless the retail communications are related to publicly offered direct participation programs or securities issued by registered investment companies.

(H) Press releases that are made available only to members of the media.

(I) Any reprint or excerpt of any article or report issued by a publisher ("reprint"), provided that:

(i) the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint that the member is promoting;

(ii) neither the member using the reprint nor any underwriter or issuer of a security mentioned in the reprint has commissioned the reprinted article or report; and

(iii) the member using the reprint has not materially altered its contents except as necessary to make the reprint consistent with applicable regulatory standards or to correct factual errors.

(J) Correspondence.

(K) Institutional communications.

(L) Communications that refer to types of investments solely as part of a listing of products or services offered by the member.

(M) Retail communications that are posted on an online interactive electronic forum.

(N) Press releases issued by closed-end investment companies that are listed on the New York Stock Exchange (NYSE) pursuant to section 202.06 of the NYSE Listed Company Manual (or any successor provision).

(O) Research reports as defined in Rule 2241 that concern only securities that are listed on a national securities exchange, other than research reports required to be filed with the Commission pursuant to Section 24(b) of the Investment Company Act.

(P) Any covered investment fund research report that is deemed for the purposes of sections 2(a)(10) and 5(c) of the Securities Act not to constitute an offer for sale or offer to sell a security under Securities Act Rule 139b.

(8) Communications Deemed Filed with FINRA Although the communications described in paragraphs (c)(7)(H) through (K) are excluded from the foregoing filing requirements, investment company communications described in those paragraphs shall be deemed filed with FINRA for purposes of Section 24(b) of the Investment Company Act and Rule 24b-3 thereunder.

(9) Filing Exemptions

(A) Pursuant to the Rule 9600 Series, FINRA may exempt a member from the pre-use filing requirements of paragraph (c)(1)(A) for good cause shown.

(B) Pursuant to the Rule 9600 Series, FINRA may conditionally or unconditionally grant an exemption from paragraph (c)(3) for good cause shown after taking into consideration all relevant factors, to the extent such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

(d) Content Standards

(1) General Standards

(A) All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.

(B) No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

(C) Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.

(D) Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.

(E) Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.

(F) Communications may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast; provided, however, that this paragraph (d)(1)(F) does not prohibit:

(i) A hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy;

(ii) An investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of Rule 2214; and

(iii) A price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.

(2) Comparisons Any comparison in retail communications between investments or services must disclose all material differences between them, including (as applicable) investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features.

(3) Disclosure of Member's Name All retail communications and correspondence must:

(A) prominently disclose the name of the member, or the name under which the member's broker-dealer business primarily is conducted as disclosed on the member's Form BD, and may also include a fictional name by which the member is commonly recognized or which is required by any state or jurisdiction;

(B) reflect any relationship between the member and any non-member or individual who is also named; and

(C) if it includes other names, reflect which products or services are being offered by the member.

This paragraph (d)(3) does not apply to so-called "blind" advertisements used to recruit personnel.

(4) Tax Considerations

(A) In retail communications and correspondence, references to tax-free or tax-exempt income must indicate which income taxes apply, or which do not, unless income is free from all applicable taxes. If income from an investment company investing in municipal bonds is subject to state or local income taxes, this fact must be stated, or the illustration must otherwise make it clear that income is free only from federal income tax.

(B) Communications may not characterize income or investment returns as tax-free or exempt from income tax when tax liability is merely postponed or deferred, such as when taxes are payable upon redemption.

(C) A comparative illustration of the mathematical principles of tax-deferred versus taxable compounding must meet the following requirements:

(i) The illustration must depict both the taxable investment and the tax-deferred investment using identical investment amounts and identical assumed gross investment rates of return, which may not exceed 10 percent per annum.

(ii) The illustration must use and identify actual federal income tax rates.

(iii) The illustration may reflect an actual state income tax rate, provided that the communication prominently discloses that the illustration is applicable only to investors that reside in the identified state.

(iv) Tax rates used in an illustration that is intended for a target audience must reasonably reflect its tax bracket or brackets as well as the tax character of capital gains and ordinary income.

(v) If the illustration covers the payout period for an investment, the illustration must reflect the impact of taxes during this period.

(vi) The illustration may not assume an unreasonable period of tax deferral.

(vii) The illustration must disclose, as applicable:

a. the degree of risk in the investment's assumed rate of return, including a statement that the assumed rate of return is not guaranteed;

b. the possible effects of investment losses on the relative advantage of the taxable versus the tax-deferred investments;

c. the extent to which tax rates on capital gains and dividends would affect the taxable investment's return;

d. the fact that ordinary income tax rates will apply to withdrawals from a tax-deferred investment;

e. its underlying assumptions;

f. the potential impact resulting from federal or state tax penalties (e.g., for early withdrawals or use on non-qualified expenses); and

g. that an investor should consider his or her current and anticipated investment horizon and income tax bracket when making an investment decision, as the illustration may not reflect these factors.

(5) Disclosure of Fees, Expenses and Standardized Performance

(A) Retail communications and correspondence that present non-money market fund open-end management investment company performance data as permitted by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act must disclose:

(i) the standardized performance information mandated by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act; and

(ii) to the extent applicable:

a. the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company's prospectus current as of the date of distribution or submission for publication of a communication; and

b. the total annual fund operating expense ratio, gross of any fee waivers or expense reimbursements, as stated in the fee table of the investment company's prospectus described in paragraph (d)(5)(A)(ii)(a).

(B) All of the information required by paragraph (d)(5)(A) must be set forth prominently, and in any print advertisement, in a prominent text box that contains only the required information and, at the

member's option, comparative performance and fee data and disclosures required by Securities Act Rule 482 and Rule 34b-1 under the Investment Company Act.

(6) Testimonials

(A) If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.

(B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

(i) The fact that the testimonial may not be representative of the experience of other customers.

(ii) The fact that the testimonial is no guarantee of future performance or success.

(iii) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.

(7) Recommendations

(A) Retail communications that include a recommendation of securities must have a reasonable basis for the recommendation and must disclose, if applicable, the following:

(i) that at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis;

(ii) that the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and

(iii) that the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months.

(B) A member must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends a corporate equity security, the member must provide the price at the time the recommendation is made.

(C) A retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person; provided, however, that a retail communication or correspondence may set out or offer to furnish a list of all recommendations as to the same type, kind, grade or classification of securities made by the member within the immediately preceding period of not less than one year, if the communication or list:

(i) states the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date; and

(ii) contains the following cautionary legend, which must appear prominently within the communication or list: “it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list.”

(D)(i) This paragraph (d)(7) does not apply to any communication that meets the definition of "research report" for purposes of Rule 2241 or that meets the definition of "debt research report" for purposes of Rule 2242, and includes all of the disclosures required by Rule 2241 or 2242, as applicable.

(ii) Paragraphs (d)(7)(A) and (d)(7)(C) do not apply to any communication that recommends only registered investment companies or variable insurance products; provided, however, that such communications must have a reasonable basis for the recommendation.

(8) BrokerCheck

(A) Each of a member's websites must include a readily apparent reference and hyperlink to BrokerCheck on:

(i) the initial webpage that the member intends to be viewed by retail investors; and

(ii) any other webpage that includes a professional profile of one or more registered persons who conduct business with retail investors.

(B) The requirements of subparagraph (A) shall not apply to:

(i) a member that does not provide products or services to retail investors; and

(ii) a directory or list of registered persons limited to names and contact information.

(9) Prospectuses Filed with the SEC Prospectuses, preliminary prospectuses, fund profiles and similar documents that have been filed with the SEC and free writing prospectuses that are exempt from filing with the SEC are not subject to the standards of this paragraph (d); provided, however, that the standards of this paragraph (d) shall apply to an investment company prospectus published pursuant to Securities Act Rule 482 and a free writing prospectus that is required to be filed with the SEC pursuant to Securities Act Rule 433(d)(1)(ii).

(e) Limitations on Use of FINRA's Name and Any Other Corporate Name Owned by FINRA Members may indicate FINRA membership in conformity with Article XV, Section 2 of the FINRA By-Laws in one or more of the following ways:

(1) in any communication that complies with the applicable standards of this Rule and neither states nor implies that FINRA, or any other corporate name or facility owned by FINRA, or any other regulatory organization endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered, or any specific security, and provided further that any reference to the Department's review of a communication is limited to either "Reviewed by FINRA" or "FINRA Reviewed";

(2) in a confirmation statement for an over-the-counter transaction that states: "This transaction has been executed in conformity with the FINRA Uniform Practice Code"; and

(3) on a member's website, provided that the member provides a hyperlink to FINRA's internet home page, www.finra.org, in close proximity to the member's indication of FINRA membership. A member is not required to provide more than one such hyperlink on its website. If the member's website contains more than one indication of FINRA membership, the member may elect to provide any one hyperlink in close proximity to any reference reasonably designed to draw the public's attention to FINRA membership. This provision also shall apply to an internet website relating to the member's investment banking or securities business maintained by or on behalf of any person associated with a member.

(f) Public Appearances

(1) When sponsoring or participating in a seminar, forum, radio or television interview, or when otherwise engaged in public appearances or speaking activities that are unscripted and do not constitute retail communications, institutional communications or correspondence ("public appearance"), persons associated with members must follow the standards of paragraph (d)(1).

(2) If an associated person recommends a security in a public appearance, the associated person must have a reasonable basis for the recommendation. The associated person also must disclose, as applicable:

(A) that the associated person has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and

(B) any other actual, material conflict of interest of the associated person or member of which the associated person knows or has reason to know at the time of the public appearance.

(3) Each member shall establish written procedures that are appropriate to its business, size, structure, and customers to supervise its associated persons' public appearances. Such procedures must provide for the education and training of associated persons who make public appearances as to the firm's procedures, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

(4) Any scripts, slides, handouts or other written (including electronic) materials used in connection with public appearances are considered communications for purposes of this Rule, and members must comply with all applicable provisions of this Rule based on those communications' audience, content and use.

(5) Paragraph (f)(2) does not apply to any public appearance by a research analyst for purposes of Rule 2241 or by a debt research analyst for purposes of Rule 2242 that includes all of the disclosures required by Rule 2241 or 2242, as applicable. Paragraph (f)(2) also does not apply to a recommendation of investment company securities or variable insurance products; provided, however, that the associated person must have a reasonable basis for the recommendation.

(g) Violation of Other Rules Any violation by a member of any rule of the SEC, the Securities Investor Protection Corporation or the Municipal Securities Rulemaking Board applicable to member communications will be deemed a violation of this Rule 2210.

Cross Reference—

SEC Rules Concerning Investment Company Sales Literature and Advertising.

[Amended eff. Aug. 2, 1983; June 5, 1987; July 1, 1988; Nov. 28, 1988; June 26, 1990; Mar. 27, 1991; Sept. 13, 1991; Nov. 16, 1992; amended by SR-NASD-92-53 eff. July 1, 1993; amended by SR-NASD-93-66 eff. Mar. 17, 1994;amended by SR-NASD-95-12 eff. Aug. 9, 1995; amended by SR-NASD-95-39 eff. Aug 20, 1996; amended by SRNASD-97-33 eff. May 9, 1997; amended by SR-NASD-97-28 eff. Aug. 7, 1997; amended by SR-NASD-98-28 eff. July 15, 1998; amended by SR-NASD-98-29 eff. Nov. 16, 1998; amended by SR-NASD-98-86 eff. Nov. 19, 1998; amended by SR-NASD-98-57 eff. March 26, 1999; amended by SR-NASD-98-32 eff. April 1, 2000; amended by SR-NASD-2002-40 eff. Oct. 15, 2002; amended by SRNASD-2000-12 and SR-NASD-2003-94 eff. Nov. 3, 2003; amended by SR-NASD-2003-110 eff. June 28, 2004; amended by SR-NASD-2004-123 eff. Aug. 10, 2004; amended by SR-NASD-2005-087 eff. Aug. 1, 2006; amended by SR-NASD-2006-105 eff. Sept. 7, 2006; amended by SR-NASD-2004-043 eff. April 1, 2007; amended by SR-NASD-2007-042 eff. June 27, 2007 (Implementation date of IM-2210-4(3) is Oct. 31, 2007); amended by SR-NASD-2006-073 eff. July 7, 2007; amended by SR-FINRA-2007-014 eff. Nov. 17, 2007; amended by SR-FINRA-2007-020 eff. March 26, 2008; amended by SR-FINRA-2008-044 eff. Feb. 5, 2009; amended by SR-FINRA-2011-035 eff. Feb. 4, 2013; amended by SR-FINRA-2013-001 eff. Feb. 4, 2013; amended by SR-FINRA-2014-012 eff. July 11, 2014; amended by SR-FINRA-2014-045 eff. Dec. 1, 2014; amended by SR-FINRA-2015-050 eff. Dec. 24, 2015; amended by SR-FINRA-2015-022 eff. June 6, 2016; amended by SR-FINRA-2016-021 eff. July 16, 2016; amended by SR-FINRA-2016-018 eff. Jan. 9, 2017; amended by SR-FINRA-2019-009 eff. May 8, 2019; amended by SR-FINRA-2019-017 eff. Aug. 16, 2019.]

Selected Notices: 98-83, 99-16, 00-15, 00-22, 03-38, 04-36, 04-64, 06-48, 07-02, 07-47, 09-10, 12-29, 14-30, 15-50, 16-41, 19-32.

FINRA Manual, 3110., Financial Industry Regulatory Authority, Supervision

FINRA Manual
FINRA Rule 3110

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(a) Supervisory System Each member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following:

(1) The establishment and maintenance of written procedures as required by this Rule.

(2) The designation, where applicable, of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker-dealer is required.

(3) The registration and designation as a branch office or an office of supervisory jurisdiction (OSJ) of each location, including the main office, that meets the definitions contained in paragraph (f) of this Rule.

(4) The designation of one or more appropriately registered principals in each OSJ and one or more appropriately registered representatives or principals in each non-OSJ branch office with authority to carry out the supervisory responsibilities assigned to that office by the member.

(5) The assignment of each registered person to an appropriately registered representative(s) or principal(s) who shall be responsible for supervising that person's activities.

(6) The use of reasonable efforts to determine that all supervisory personnel are qualified, either by virtue of experience or training, to carry out their assigned responsibilities.

(7) The participation of each registered representative and registered principal, either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by the member at which compliance matters relevant to the activities of the representative(s) and principal(s) are discussed. Such interview or meeting may occur in conjunction with the discussion of other matters and may be conducted at a central or regional location or at the representative's(') or principal's(') place of business.

(b) Written Procedures

(1) General Requirements Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.

(2) Review of Member's Investment Banking and Securities Business The supervisory procedures required by this paragraph (b) shall include procedures for the review by a registered principal, evidenced in writing, of all transactions relating to the investment banking or securities business of the member.

(3) Reserved.

(4) Review of Correspondence and Internal Communications The supervisory procedures required by this paragraph (b) shall include procedures for the review of incoming and outgoing written (including electronic) correspondence and internal communications relating to the member's investment banking or

securities business. The supervisory procedures must be appropriate for the member's business, size, structure, and customers. The supervisory procedures must require the member's review of:

(A) incoming and outgoing written (including electronic) correspondence to properly identify and handle in accordance with firm procedures, customer complaints, instructions, funds and securities, and communications that are of a subject matter that require review under FINRA rules and federal securities laws.

(B) internal communications to properly identify those communications that are of a subject matter that require review under FINRA rules and federal securities laws.

Reviews of correspondence and internal communications must be conducted by a registered principal and must be evidenced in writing, either electronically or on paper.

(5) Review of Customer Complaints The supervisory procedures required by this paragraph (b) shall include procedures to capture, acknowledge, and respond to all written (including electronic) customer complaints.

(6) Documentation and Supervision of Supervisory Personnel The supervisory procedures required by this paragraph (b) shall set forth the supervisory system established by the member pursuant to paragraph (a) above, and shall include:

(A) the titles, registration status, and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and FINRA rules.

(B) a record, preserved by the member for a period of not less than three years, the first two years in an easily accessible place, of the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective.

(C) procedures prohibiting associated persons who perform a supervisory function from:

(i) supervising their own activities; and

(ii) reporting to, or having their compensation or continued employment determined by, a person or persons they are supervising

a. If a member determines, with respect to any of its supervisory personnel, that compliance with subparagraph (i) or (ii) above is not possible because of the member's size or a supervisory personnel's position within the firm, the member must document:

1. the factors the member used to reach such determination; and

2. how the supervisory arrangement with respect to such supervisory personnel otherwise complies with paragraph (a) of this Rule.

(D) procedures reasonably designed to prevent the supervisory system required pursuant to paragraph (a) of this Rule from being compromised due to the conflicts of interest that may be present with respect to the associated person being supervised, including the position of such person, the revenue such person generates for the firm, or any compensation that the associated person conducting the supervision may derive from the associated person being supervised.

(7) Maintenance of Written Supervisory Procedures A copy of a member's written supervisory procedures, or the relevant portions thereof, shall be kept and maintained in each OSJ and at each location where supervisory activities are conducted on behalf of the member. Each member shall promptly amend its written supervisory procedures to reflect changes in applicable securities laws or regulations,

including FINRA rules, and as changes occur in its supervisory system. Each member is responsible for promptly communicating its written supervisory procedures and amendments to all associated persons to whom such written supervisory procedures and amendments are relevant based on their activities and responsibilities.

(c) Internal Inspections

(1) Each member shall conduct a review, at least annually (on a calendar-year basis), of the businesses in which it engages. The review shall be reasonably designed to assist the member in detecting and preventing violations of, and achieving compliance with, applicable securities laws and regulations, and with applicable FINRA rules. Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses. Each member shall also retain a written record of the date upon which each review and inspection is conducted.

(A) Each member shall inspect at least annually (on a calendar-year basis) every OSJ and any branch office that supervises one or more non-branch locations.

(B) Each member shall inspect at least every three years every branch office that does not supervise one or more non-branch locations. In establishing how often to inspect each non-supervisory branch office, the member shall consider whether the nature and complexity of the securities activities for which the location is responsible, the volume of business done at the location, and the number of associated persons assigned to the location require the non-supervisory branch office to be inspected more frequently than every three years. If a member establishes a more frequent inspection cycle, the member must ensure that at least every three years, the inspection requirements enumerated in paragraph (c)(2) have been met. The member's written supervisory and inspection procedures shall set forth the non-supervisory branch office examination cycle, an explanation of the factors the member used in determining the frequency of the examinations in the cycle, and the manner in which a member will comply with paragraph (c)(2) if using more frequent inspections than every three years.

(C) Each member shall inspect on a regular periodic schedule every non-branch location. In establishing such schedule, the member shall consider the nature and complexity of the securities activities for which the location is responsible and the nature and extent of contact with customers. The member's written supervisory and inspection procedures shall set forth the schedule and an explanation regarding how the member determined the frequency of the examination.

(2) An inspection and review by a member pursuant to paragraph (c)(1) must be reduced to a written report and kept on file by the member for a minimum of three years, unless the inspection is being conducted pursuant to paragraph (c)(1)(C) and the regular periodic schedule is longer than a three-year cycle, in which case the report must be kept on file at least until the next inspection report has been written.

(A) If applicable to the location being inspected, that location's written inspection report must include, without limitation, the testing and verification of the member's policies and procedures, including supervisory policies and procedures in the following areas:

(i) safeguarding of customer funds and securities;

(ii) maintaining books and records;

(iii) supervision of supervisory personnel;

(iv) transmittals of funds (e.g., wires or checks, etc.) or securities from customers to third party accounts; from customer accounts to outside entities (e.g., banks, investment companies, etc.); from customer accounts to locations other than a customer's primary residence (e.g., post office

box, "in care of" accounts, alternate address, etc.); and between customers and registered representatives, including the hand-delivery of checks; and

(v) changes of customer account information, including address and investment objectives changes and validation of such changes.

(B) The policies and procedures required by paragraph (c)(2)(A)(iv) must include a means or method of customer confirmation, notification, or follow-up that can be documented. Members may use reasonable risk-based criteria to determine the authenticity of the transmittal instructions.

(C) The policies and procedures required by paragraph (c)(2)(A)(v) must include, for each change processed, a means or method of customer confirmation, notification, or follow-up that can be documented and that complies with SEA Rules 17a-3(a)(17)(i)(B)(2) and 17a-3(a)(17)(i)(B)(3).

(D) If a member does not engage in all of the activities enumerated in paragraphs (c)(2)(A)(i) through (c)(2)(A)(v) at the location being inspected, the member must identify those activities in the member's written supervisory procedures or the location's written inspection report and document in the member's written supervisory procedures or the location's written inspection report that supervisory policies and procedures for such activities must be in place at that location before the member can engage in them.

(3) For each inspection conducted pursuant to paragraph (c), a member must:

(A) have procedures reasonably designed to prevent the effectiveness of the inspections required pursuant to paragraph (c)(1) of this Rule from being compromised due to the conflicts of interest that may be present with respect to the location being inspected, including but not limited to, economic, commercial, or financial interests in the associated persons and businesses being inspected; and

(B) ensure that the person conducting an inspection pursuant to paragraph (c)(1) is not an associated person assigned to the location or is not directly or indirectly supervised by, or otherwise reporting to, an associated person assigned to the location.

(C) If a member determines that compliance with paragraph (c)(3)(B) is not possible either because of a member's size or its business model, the member must document in the inspection report both the factors the member used to make its determination and how the inspection otherwise complies with paragraph (c)(1).

(d) Transaction Review and Investigation

(1) Each member shall include in its supervisory procedures a process for the review of securities transactions that are reasonably designed to identify trades that may violate the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive device that are effected for the:

(A) accounts of the member;

(B) accounts introduced or carried by the member in which a person associated with the member has a beneficial interest or the authority to make investment decisions;

(C) accounts of a person associated with the member that are disclosed to the member pursuant to Rule 3210; and

(D) covered accounts.

(2) Each member must conduct promptly an internal investigation into any such trade to determine whether a violation of those laws or rules has occurred.

(3) A member engaging in investment banking services must file with FINRA, written reports, signed by a senior officer of the member, at such times and, without limitation, including such content, as follows:

(A) within ten business days of the end of each calendar quarter, a written report describing each internal investigation initiated in the previous calendar quarter pursuant to paragraph (d)(2), including the identity of the member, the date each internal investigation commenced, the status of each open internal investigation, the resolution of any internal investigation reached during the previous calendar quarter, and, with respect to each internal investigation, the identity of the security, trades, accounts, associated persons of the member, or associated person of the member's family members holding a covered account, under review, and that includes a copy of the member's policies and procedures required by paragraph (d)(1).

(B) within five business days of completion of an internal investigation pursuant to paragraph (d)(2) in which it was determined that a violation of the provisions of the Exchange Act, the rules thereunder, or FINRA rules prohibiting insider trading and manipulative and deceptive devices had occurred, a written report detailing the completion of the investigation, including the results of the investigation, any internal disciplinary action taken, and any referral of the matter to FINRA, another self-regulatory organization, the SEC, or any other federal, state, or international regulatory authority.

(4) Definitions

For purposes of this Rule:

(A) The term "covered account" shall include any account introduced or carried by the member that is held by:

(i) the spouse of a person associated with the member;

(ii) a child of the person associated with the member or such person's spouse, provided that the child resides in the same household as or is financially dependent upon the person associated with the member;

(iii) any other related individual over whose account the person associated with the member has control; or

(iv) any other individual over whose account the associated person of the member has control and to whose financial support such person materially contributes.

(B) The term "investment banking services" shall include, without limitation, acting as an underwriter, participating in a selling group in an offering for the issuer, or otherwise acting in furtherance of a public offering of the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital or equity lines of credit or serving as placement agent for the issuer or otherwise acting in furtherance of a private offering of the issuer.

(e) Responsibility of Member to Investigate Applicants for Registration Each member shall ascertain by investigation the good character, business reputation, qualifications and experience of an applicant before the member applies to register that applicant with FINRA and before making a representation to that effect on the application for registration.

If the applicant previously has been registered with FINRA or another self-regulatory organization, the member shall review a copy of the applicant’s most recent Form U5, including any amendments thereto, within 60 days of the filing date of an application for registration, or demonstrate to FINRA that it has made

reasonable efforts to do so. In conducting its review of the Form U5, the member shall take such action as may be deemed appropriate.

The member shall also review an applicant's employment experience to determine if the applicant has been recently employed by a Futures Commission Merchant or an Introducing Broker that is notice-registered with the SEC pursuant to Section 15(b)(11) of the Exchange Act. In such a case, the member shall also review a copy of the applicant's most recent CFTC Form 8-T, including any amendments thereto, within 60 days of the filing date of an application for registration, or demonstrate to FINRA that it has made reasonable efforts to do so. In conducting its review of a Form 8-T, the member shall take such action as may be deemed appropriate.

In addition, each member shall establish and implement written procedures reasonably designed to verify the accuracy and completeness of the information contained in an applicant's initial or transfer Form U4 no later than 30 calendar days after the form is filed with FINRA. Such procedures shall, at a minimum, provide for a search of reasonably available public records to be conducted by the member, or a third-party service provider, to verify the accuracy and completeness of the information contained in the applicant's initial or transfer Form U4.

(f) Definitions

(1) "Office of Supervisory Jurisdiction" means any office of a member at which any one or more of the following functions take place:

(A) order execution or market making;

(B) structuring of public offerings or private placements;

(C) maintaining custody of customers' funds or securities;

(D) final acceptance (approval) of new accounts on behalf of the member;

(E) review and endorsement of customer orders, pursuant to paragraph (b)(2) above;

(F) final approval of retail communications for use by persons associated with the member, pursuant to Rule 2210(b)(1), except for an office that solely conducts final approval of research reports; or

(G) responsibility for supervising the activities of persons associated with the member at one or more other branch offices of the member.

(2)

(A) A "branch office" is any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security, or is held out as such, excluding:

(i) Any location that is established solely for customer service or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office;

(ii) Any location that is the associated person's primary residence; provided that

a. Only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location;

b. The location is not held out to the public as an office and the associated person does not meet with customers at the location;

c. Neither customer funds nor securities are handled at that location;

d. The associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, retail communications and other communications to the public by such associated person;

e. The associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with this Rule

f. Electronic communications (e.g., e-mail) are made through the member's electronic system;

g. All orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office;

h. Written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and

i. A list of the residence locations is maintained by the member;

(iii) Any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided the member complies with the provisions of subparagraphs (2)(A)(ii)a. through h. above;

(iv) Any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; [*]

(v) Any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year; provided that any retail communication identifying such location also sets forth the address and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised;

(vi) The Floor of a registered national securities exchange where a member conducts a direct access business with public customers; or

(vii) A temporary location established in response to the implementation of a business continuity plan.

(B) Notwithstanding the exclusions in subparagraph (2)(A), any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered to be a branch office.

(C) The term "business day" as used in paragraph (f)(2)(A) of this Rule shall not include any partial business day provided that the associated person spends at least four hours on such business day at his or her designated branch office during the hours that such office is normally open for business.

• • • Supplementary Material:

.01 Registration of Main Office. A member's main office location is required to be registered and designated as a branch office or OSJ if it meets the definitions of a "branch office" or "office of supervisory jurisdiction" as set forth in Rule 3110(f). In general, the nature of activities conducted at a main office will satisfy the requirements of such terms.

.02 Designation of Additional OSJs. In addition to the locations that meet the definition of OSJ in Rule 3110(f), each member shall also register and designate other offices as OSJs as is necessary to supervise its associated persons in accordance with the standards set forth in Rule 3110. In making a determination as to whether to designate a location as an OSJ, the member should consider the following factors:

(a) whether registered persons at the location engage in retail sales or other activities involving regular contact with public customers;

(b) whether a substantial number of registered persons conduct securities activities at, or are otherwise supervised from, such location;

(c) whether the location is geographically distant from another OSJ of the firm;

(d) whether the member's registered persons are geographically dispersed; and

(e) whether the securities activities at such location are diverse or complex.

.03 Supervision of Multiple OSJs by a Single Principal. Rule 3110(a)(4) requires a member to designate one or more appropriately registered principals in each OSJ with the authority to carry out the supervisory responsibilities assigned to that office ("on-site principal"). The designated on-site principal for each OSJ must have a physical presence, on a regular and routine basis, at each OSJ for which the principal has supervisory responsibilities. Consequently, there is a general presumption that a principal will not be designated and assigned to be the on-site principal pursuant to Rule 3110(a)(4) to supervise more than one OSJ. If a member determines it is necessary to designate and assign one appropriately registered principal to be the on-site principal pursuant to Rule 3110(a)(4) to supervise two or more OSJs, the member must take into consideration, among others, the following factors:

(a) whether the on-site principal is qualified by virtue of experience and training to supervise the activities and associated persons in each location;

(b) whether the on-site principal has the capacity and time to supervise the activities and associated persons in each location;

(c) whether the on-site principal is a producing registered representative;

(d) whether the OSJ locations are in sufficiently close proximity to ensure that the on-site principal is physically present at each location on a regular and routine basis; an

(e) the nature of activities at each location, including size and number of associated persons, scope of business activities, nature and complexity of products and services offered, volume of business done, the disciplinary history of persons assigned to such locations, and any other indicators of irregularities or misconduct.

The member must establish, maintain, and enforce written supervisory procedures regarding the supervision of all OSJs. In all cases where a member designates and assigns one on-site principal to supervise more than one OSJ, the member must document in the member's written supervisory and inspection procedures the factors used to determine why the member considers such supervisory structure to be reasonable and the determination by the member will be subject to scrutiny.

.04 Annual Compliance Meeting. A member is not required to conduct in-person meetings with each registered person or group of registered persons to comply with the annual compliance meeting (or interview) required by Rule 3110(a)(7). A member that chooses to conduct compliance meetings using other methods (e.g., on-demand webcast or course, video conference, interactive classroom setting, telephone, or other electronic means) must ensure, at a minimum, that each registered person attends the entire meeting (e.g., an on-demand annual compliance webcast would require each registered person to use a unique user ID and password to gain access and use a technology platform to track the time spent on the webcast, provide click-as-you go confirmation, and have an attestation of completion at the end of a webcast) and is able to ask questions regarding the presentation and receive answers in a timely fashion (e.g., an on-demand annual compliance webcast that allows registered persons to ask questions via an email to a presenter or a centralized address or via a telephone hotline and receive timely responses directly or view such responses on the member's intranet site).

.05 Risk-based Review of Member's Investment Banking and Securities Business. A member may use a risk-based review system to comply with Rule 3110(b)(2)'s requirement that a registered principal review, all transactions relating to the investment banking or securities business of the member. A member is not required

to conduct detailed reviews of each transaction if a member is using a reasonably designed risk-based review system that provides a member with sufficient information that permits the member to focus on the areas that pose the greatest numbers and risks of violation.

.06 Risk-based Review of Correspondence and Internal Communications. By employing risk-based principles, a member must decide the extent to which additional policies and procedures for the review of:

(a) incoming and outgoing written (including electronic) correspondence that fall outside of the subject matters listed in Rule 3110(b)(4) are necessary for its business and structure. If a member's procedures do not require that all correspondence be reviewed before use or distribution, the procedures must provide for:

(1) the education and training of associated persons regarding the firm's procedures governing correspondence;
(2) the documentation of such education and training; and
(3) surveillance and follow-up to ensure that such procedures are implemented and followed.

(b) internal communications that are not of a subject matter that require review under FINRA rules and federal securities laws are necessary for its business and structure.

.07 Evidence of Review of Correspondence and Internal Communications. The evidence of review required in Rule 3110(b)(4) must be chronicled either electronically or on paper and must clearly identify the reviewer, the internal communication or correspondence that was reviewed, the date of review, and the actions taken by the member as a result of any significant regulatory issues identified during the review. Merely opening a communication is not sufficient review.

.08 Delegation of Correspondence and Internal Communication Review Functions. In the course of the supervision and review of correspondence and internal communications required by Rule 3110(b)(4), a supervisor/principal may delegate certain functions to persons who need not be registered. However, the supervisor/principal remains ultimately responsible for the performance of all necessary supervisory reviews, irrespective of whether he or she delegates functions related to the review. Accordingly, supervisors/principals must take reasonable and appropriate action to ensure delegated functions are properly executed and should evidence performance of their procedures sufficiently to demonstrate overall supervisory control.

.09 Retention of Correspondence and Internal Communications. Each member shall retain the internal communications and correspondence of associated persons relating to the member's investment banking or securities business for the period of time and accessibility specified in SEA Rule 17a-4(b). The names of the persons who prepared outgoing correspondence and who reviewed the correspondence shall be ascertainable from the retained records, and the retained records shall be readily available to FINRA, upon request.

.10 Supervision of Supervisory Personnel. A member's determination that it is not possible to comply with paragraphs (b)(6)(C)(i) or (b)(6)(C)(ii) of Rule 3110 prohibiting supervisory personnel from supervising their own activities and from reporting to, or otherwise having compensation or continued employment determined by, a person or persons they are supervising generally will arise in instances where:

(a) the member is a sole proprietor in a single-person firm;

(b) a registered person is the member's most senior executive officer (or similar position); or

(c) a registered person is one of several of the member's most senior executive officers (or similar positions).

.11 Use of Electronic Media to Communicate Written Supervisory Procedures. A member may use electronic media to satisfy its obligation to communicate its written supervisory procedures, and any amendment thereto, pursuant to Rule 3110(b)(7), provided that: (1) the written supervisory procedures have been promptly communicated to, and are readily accessible by, all associated persons to whom such supervisory procedures apply based on their activities and responsibilities through, for example, the member's intranet system; (2) all amendments to the written supervisory procedures are promptly posted to the member's electronic media; (3) associated persons are notified that amendments relevant to their activities and responsibilities have been made to the written supervisory procedures; (4) the member has reasonable procedures to monitor and maintain the

security of the material posted to ensure that it cannot be altered by unauthorized persons; and (5) the member retains current and prior versions of its written supervisory procedures in compliance with the applicable record retention requirements of SEA Rule 17a-4(e)(7).

.12 Standards for Reasonable Review. In fulfilling its obligations under Rule 3110(c), each member must conduct a review, at least annually, of the businesses in which it engages. The review must be reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations and with FINRA rules. Each member shall establish and maintain supervisory procedures that must take into consideration, among other things, the firm's size, organizational structure, scope of business activities, number and location of the firm's offices, the nature and complexity of the products and services offered by the firm, the volume of business done, the number of associated persons assigned to a location, the disciplinary history of registered representatives or associated persons, and any indicators of irregularities or misconduct (i.e., "red flags"), etc. The procedures established and reviews conducted must provide that the quality of supervision at remote locations is sufficient to ensure compliance with applicable securities laws and regulations and with FINRA rules. A member must be especially diligent in establishing procedures and conducting reasonable reviews with respect to a non-branch location where a registered representative engages in securities activities. Based on the factors outlined above, members may need to impose reasonably designed supervisory procedures for certain locations or may need to provide for more frequent reviews of certain locations.

.13 General Presumption of Three-Year Limit for Periodic Inspection Schedules. Rule 3110(c)(1)(C) requires a member to inspect on a regular periodic schedule every non-branch location. In establishing a non-branch location inspection schedule, there is a general presumption that a non-branch location will be inspected at least every three years, even in the absence of any indicators of irregularities or misconduct (i.e., "red flags"). If a member establishes a longer periodic inspection schedule, the member must document in its written supervisory and inspection procedures the factors used in determining that a longer periodic inspection cycle is appropriate.

.14 Exception to Persons Prohibited from Conducting Inspections. A member's determination that it is not possible to comply with Rule 3110(c)(3)(B) with respect to who is not allowed to conduct a location's inspection will generally arise in instances where:

(a) the member has only one office; or

(b) the member has a business model where small or single-person offices report directly to an OSJ manager who is also considered the offices' branch office manager.

.15 Temporary Program to Address Underreported Form U4 Information. FINRA is establishing a temporary program that will issue a refund to members of Late Disclosure Fees assessed for the late filing of responses to Form U4 Question 14M (unsatisfied judgments or liens) if the Form U4 amendment is filed between April 24, 2014 and December 1, 2015 and one of the following conditions is met: (1) the judgment or lien has been satisfied, and at the time it was unsatisfied, it was under $5,000 and the date the judgment or lien was filed with a court (as reported on Form U4 Judgment/Lien DRP, Question 4.A.) was on or before August 13, 2012; or (2) the unsatisfied judgment or lien was satisfied within 30 days after the individual learned of the judgment or lien (as reported on Form U4 Judgment/Lien DRP, Question 4.B.). This program has a retroactive effective date of April 24, 2014, and it will automatically sunset on December 1, 2015. Members will not be able to use the program after December 1, 2015.

.16 Temporary Extension of Time to Complete Office Inspections. Each member obligated to complete an inspection of an office of supervisory jurisdiction, branch office or non-branch location in calendar year 2020 pursuant to, as applicable, paragraphs (c)(1)(A), (B) and (C) under Rule 3110, shall be deemed to have satisfied such obligation if the applicable inspection is completed on or before March 31, 2021.

.17 Temporary Relief to Allow Remote Inspections for Calendar Year 2020 and Calendar Year 2021

(a) **Use of Remote Inspections.** Each member obligated to conduct an inspection of an office of supervisory jurisdiction, branch office or non-branch location in calendar year 2020 and calendar year 2021 pursuant to, as applicable, paragraphs (c)(1)(A), (B) and (C) under Rule 3110 may, subject to the requirements of this Rule 3110.17, satisfy such obligation by conducting the applicable inspection remotely, without an on-site visit to the office or location. In accordance with Rule 3110.16, inspections for calendar year 2020 must be completed on or before March 31, 2021 and inspections for calendar year 2021 must be completed on or before December 31, 2021. Notwithstanding Rule 3110.17, a member shall remain subject to the other requirements of Rule 3110(c).

(b) **Written Supervisory Procedures for Remote Inspections.** Consistent with a member's obligation under Rule 3110(b)(1), a member that elects to conduct each of its calendar year 2020 or calendar year 2021 inspections remotely must amend or supplement its written supervisory procedures to provide for remote inspections that are reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations, and with applicable FINRA rules. Reasonably designed procedures for conducting remote inspections of offices or locations should include, among other things: (1) a description of the methodology, including technologies permitted by the member, that may be used to conduct remote inspections; and (2) the use of other risk-based systems employed generally by the member firm to identify and prioritize for review those areas that pose the greatest risk of potential violations of applicable securities laws and regulations, and of applicable FINRA rules.

(c) **Effective Supervisory System.** The requirement to conduct inspections of offices and locations is one part of the member's overall obligation to have an effective supervisory system and therefore, the member must continue with its ongoing review of the activities and functions occurring at all offices and locations, whether or not the member conducts inspections remotely. A member's use of a remote inspection of an office or location will be held to the same standards for review as set forth under Rule 3110.12. Where a member's remote inspection of an office or location identifies any indicators of irregularities or misconduct (i.e., "red flags"), the member may need to impose additional supervisory procedures for that office or location or may need to provide for more frequent monitoring of that office or location, including potentially a subsequent physical, on-site visit on an announced or unannounced basis when the member's operational difficulties associated with COVID-19 abate, nationally or locally as relevant, and the challenges a member is facing in light of the public health and safety concerns make such on-site visits feasible using reasonable best efforts. The temporary relief provided by this Rule 3110.17 does not extend to a member's inspection requirements beyond calendar year 2021 and such inspections must be conducted in compliance with Rule 3110(c).

(d) **Documentation Requirement.** A member must maintain and preserve a centralized record for each of calendar year 2020 and calendar year 2021 that separately identifies: (1) all offices or locations that had inspections that were conducted remotely; and (2) any offices or locations for which the member determined to impose additional supervisory procedures or more frequent monitoring, as provided in Rule 3110.17(c). A member's documentation of the results of a remote inspection for an office or location must identify any additional supervisory procedures or more frequent monitoring for that office or location that were imposed as a result of the remote inspection.

[Amended eff. June 12, 1989; Apr. 30, 1992; amended by SR-NASD-97-41 eff. Sept. 4, 1997; amended by SR-NASD-97-24 eff. Feb. 15, 1998; amended by SR-NASD-98-10 postponed eff. date; amended by SR-NASD-98-31 eff. Apr. 7, 1998, postponed eff. date of provision in Notice to Members; amended by SR-NASD-98-45 postponed eff. date of provision in Notice to Members 98-11; amended by SR-NASD-97-69 eff. August 17, 1998.Amended by SR-NASD-98-86 eff. Nov. 19, 1998; amended by SR-NASD-98-52 eff. March 15, 1999; amended by SR-NASD-99-28 eff. Aug. 16, 1999; amended by SR-NASD-2002-04 eff. Oct. 14, 2002; amended by SR-NASD-2002-40 eff. Oct. 15, 2002; amended by SR-NASD-2002-162 and SR-NASD-2004-116 eff. Jan. 31, 2005; amended by SR-NASD-2005-004 eff. July 25, 2005; amended by SR-NASD-2005-033 eff. Aug. 1, 2005; amended by SR-NASD-2006-037 eff. July 3, 2006; amended by SR-FINRA-2007-008 eff. Dec. 19, 2007; amended by SR-FINRA-2013-001 eff. Feb. 4, 2013; amended by SR-FINRA-2014-038 eff. April 24, 2014; amended by SR-FINRA-2013-025 eff. Dec. 1, 2014; amended by SR-FINRA-2014-038 eff. July 1, 2015; amended by SR-FINRA-2015-005 eff. July 31, 2015; amended by SR-FINRA-2017-004 eff. April 3, 2017; amended by SR-FINRA-2020-019 eff. June 19, 2020; amended by SR-FINRA-2020-040 eff. Nov. 6, 2020.]

Selected Notices: 86-65, 88-84, 89-34, 89-57, 91-48, 92-18, 96-33, 96-59, 96-82, 98-11, 98-18, 98-38, 98-52, 98-96, 99-03, 99-45, 04-71, 05-67, 06-13, 07-64, 14-10, 15-05.

Footnotes

* Where such office of convenience is located on bank premises, signage necessary to comply with applicable federal and state laws, rules and regulations and applicable rules and regulations of other self-regulatory organizations, and securities and banking regulators may be displayed and shall not be deemed “holding out” for purposes of this section.

FINRA Manual, 3270., Financial Industry Regulatory Authority, Outside Business Activities of Registered Persons

FINRA Manual
FINRA Rule 3270

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No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of Rule 3280 shall be exempted from this requirement.

• • • Supplementary Material:

.01 Obligations of Member Receiving Notice. Upon receipt of a written notice under Rule 3270, a member shall consider whether the proposed activity will: (1) interfere with or otherwise compromise the registered person's responsibilities to the member and/or the member's customers or (2) be viewed by customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered. Based on the member's review of such factors, the member must evaluate the advisability of imposing specific conditions or limitations on a registered person's outside business activity, including where circumstances warrant, prohibiting the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of Rule 3280. A member must keep a record of its compliance with these obligations with respect to each written notice received and must preserve this record for the period of time and accessibility specified in SEA Rule 17a-4(e)(1).

[Adopted by SR-NASD-88-34 eff. Oct. 13, 1988; amended by SR-FINRA-2009-042 eff. Dec. 15, 2010; amended by SR-FINRA-2015-030 eff. Sept. 21, 2015.]

Selected Notices: 88-5, 88-45, 88-86, 89-39, 90-37, 94-44, 94-93, 96-33, 01-79, 10-49.

FINRA Manual, 4511., Financial Industry Regulatory Authority, General Requirements

FINRA Manual
FINRA Rule 4511

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(a) Members shall make and preserve books and records as required under the FINRA rules, the Exchange Act and the applicable Exchange Act rules.

(b) Members shall preserve for a period of at least six years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules.

(c) All books and records required to be made pursuant to the FINRA rules shall be preserved in a format and media that complies with SEA Rule 17a-4.

[Adopted by SR-FINRA-2010-052 eff. Dec. 5, 2011.]

Selected Notice: 11-19.

2002 WL 1315702 (IRS FSA)

Internal Revenue Service (I.R.S.)

IRS FSA
Field Service Advisory

Added Date: 2002

[EDITOR'S NOTE: No date specified by the IRS
to: ARC Examination, Central Region

Attn: Ms. Shenita Hicks

from: Chief, Branch 2 Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations) CC:EBEO

subject: Business Expenses of Statutory Employee - Rev. Rul. 90-93

This is in response to the information faxed to our office on July 8, 1993, concerning common law employees claiming to be statutory employees to take advantage of Rev. Rul. 90-93, 1990-2 C.B. 33 and avoid the 2-percent floor on miscellaneous itemized business deductions.

Section 3121(d) of the Internal Revenue Code describes the four categories of individuals who are treated as employees for purposes of the Federal Insurance Contributions Act (FICA): (1) officers of a corporation; (2) common law employees; (3) individuals in specified occupational groups who are not common law employees; and (4) certain nonfederal governmental workers. Employees in the third category are commonly referred to as "statutory employees." Statutory employees include (1) an agent-driver or commission driver; (2) a full-time life insurance salesman; (3) a home worker; and (4) a traveling or city salesman.

In Rev. Rul. 90-93 the Service ruled that a full-time life insurance salesman who is treated as a statutory employee for FICA purposes under section 3121(d)(3) of the Code was not an employee for purposes of sections 62 and 67. Thus, the taxpayer could use Schedule C of the Form 1040 to determine net profit or loss from doing business. Further, the taxpayer's trade or business expenses related to being a full-time life insurance salesman were not subject to the 2-percent floor for miscellaneous itemized deductions. Rev. Rul. 90-93 does not directly or indirectly suggest that a taxpayer who meets the test of a common law employee under section 3121(d)(2) may claim to be a statutory employees under 3121(d)(3).

A common law employee under section 3121(d)(2) of the Code cannot also be a statutory employee under section 3121(d)(3). Section 3121(d)(3) expressly excludes common law employees from the definition of statutory employee by providing that a "statutory employee" is "any individual (other than an employee under paragraph (1) or (2))" who performs certain defined services (emphasis added). Paragraph (2) of 3121(d) defines an employee as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Thus, section 3121(d)(3) does not apply if an individual first meets the definition of a common law employee in section 3121(d)(2).

The purpose of section 3121(d)(3) was described as follows by the Senate Finance Committee:

> Your committee believes that the usual common-law rules for determining the employer-employee relationship fall short of covering certain individuals who should be taxed at the employee rate under the old-age and survivors insurance program. The statutory provisions set forth in paragraph (3) are designed to

> extend the definition to include those individuals who, although not employees under the usual common-law rules, occupy substantially the same status as those who are employees under such rules. (emphasis added)

S. Rep. No. 1669, 81st Cong., 2d Sess. 144 (1950), 1950-2 C.B. 346, 347. Thus, the legislative history indicates that the statutory employee provision was intended to be a relief provision for the benefit of a described class of workers that were not common law employees. Congress did not intend the definition of statutory employees to cover individuals already defined as employees under the common law definition.

If you have any questions or we can be of any further assistance, please contact David N. Pardys of my staff. Mr. Pardys can be reached at (202) 622-6040.

Jerry E. Holmes

Section 6110(j)(3) of the Internal Revenue CodeThis document may not be used or cited as precedent. .

2002 WL 1315702 (IRS FSA)

Internal Revenue Manual

Part 4 - Examining Process

Chapter 4.23 - Employment Tax Handbook

4.23.5 - Technical Guidelines for Employment Tax Issues

*1 4.23.5.6 - Categories of Employees (02-01-2003)

(1) IRC 3121(d) contains four separate and independent categories of employees:

- Common law employee,
- Corporate officer,
- Certain statutory employee, and
- Employee covered by an agreement under Section 218 of the Social Security Act.

See Exhibit 4.23.5-2, Employment Tax Treatment for Various Categories of Workers

of the Code, as amended by section 205(a) of the bill. For an explanation of the amendment of section 1621(a)(9), see the explanation in this report of the amendment of section 1426(b)(9) made by section 205(a) of the bill. Section 208(c)(2) of the bill also amends section 1621(a) of the Code by adding thereto a new paragraph (10), relating to the exclusion from the definition of the term "wages" of remuneration paid for services performed by newspaper carriers and newspaper and magazine vendors, which provision conforms to the provisions of section 1426(b)(15) of the Code, redesignated section 1426(b)(16) by section 205(a) of the bill. Section 208(c)(2) of the bill also adds at the end of section 1621(a) of the Code a provision relating to the treatment as remuneration paid by the employer of tips and other cash remuneration customarily received by an employee in the course of his employment from persons other than the person employing him. This provision is identical with the provision at the end of the section 1426(a) of the Code, as amended by section 204(a) of the bill. For an explanation of the provision, see the explanation in this report of the amendment by section 204(a) of the bill. These amendments are applicable only with respect to remuneration paid after December 31, 1949.

Section 1403(b) of the Code provides a civil penalty of not more than $5 for each willful failure of an employer to furnish to an employee a wage statement as required by section 1403(a) of the Code. Section 208(d) of the bill amends section 1403(b) so as to make the penalty for each such willful failure exactly $5, and to provide that such penalty shall be assessed and collected in the same manner as the tax imposed by section 1410 of the Code. The amendment is effective with respect to violations of section 1403(a) occurring on or after January 1, 1950.

1950–22–13469

SOCIAL SECURITY ACT AMENDMENTS OF 1950

[Senate Report No. 1669, Eighty-first Congress, Second Session. Calendar No. 1680]

[May 17 (legislative day, March 29), 1950]

Mr. George, from the Committee on Finance, submitted the following report [to accompany H. R. 6000]:

The Committee on Finance, to whom was referred the bill (H. R. 6000) to extend and improve the Federal old-age and survivors insurance system, to amend the public assistance and child-welfare provisions of the Social Security Act, and for other purposes, having considered the same, report favorably thereon with an amendment in the nature of a substitute and recommend that the bill as amended do pass.

INTRODUCTION AND SUMMARY

I. PURPOSE AND SCOPE OF THE BILL

More than a decade has passed since the Congress amended the Social Security Act and established the present benefit provisions under old-age and survivors insurance. In the interim, tremendous changes have taken place in our economy. The onrush of broad social and economic developments has completely unbalanced the Nation's social security system. Congressional action is, therefore, urgently needed to reestablish the proper relationship among the basic programs in this system.

Your committee is greatly disturbed by the increasing burden on the general revenues caused by dependency in the United States. Currently Federal expenditures are running at a rate of $1.1 billion a year for public assistance as contrasted to expenditures of less than $800 million under the old-age and survivors insurance program.

* * * * * * * * * *

We recommend particularly that further extension of coverage to farm groups be given attention. In the absence of clear-cut expressions on the part of farm operators that they want this protection the provisions of the committee-approved bill seem to us to be as far as it is desirable to go without fuller consultation with the farm groups. This should be a matter for further study.

Another question which is not resolved by this bill but which will be a matter of increasing importance is the relationship of the public social security program to

private pension plans, particularly those now being established through collective bargaining to cover major groups of industrial workers. Your committee is aware that there are many disadvantages in the collective-bargaining approach to retirement plans. From the standpoint of the worker, as well as the economy, these plans have serious weaknesses. Most of these plans do not give the worker rights which he can take with him from job to job. They tend to discourage the hiring of older workers. They require long periods of service with one employer and, in addition, employment with the particular employer just before retirement. Most younger workers will never qualify for benefits because they will not meet these long-service requirements. The long-run relationship between the Federal program and the movement in collective bargaining deserves the most careful study.

* * * * * * *

Your committeee believes that further study should also be given to the problems involved in the long-range financing of an old-age and survivors insurance system, particularly the issue of reserve financing versus pay-as-you-go.

Although your committee recognizes that the bill does not solve all the problems, we believe that its passage would constitute a very significant step forward in the establishment of a sound social security program.

II. BACKGROUND AND HISTORY OF LEGISLATION

* * * * * * *

F. Hearings of 1949–50.

H. R. 6000 was referred to your committee on October 6, 1949. Its passage by the House of Representatives followed extensive hearings on social security before the Committee on Ways and Means. These hearings lasted from February 28 through April 27, 1949, and consideration by the House committee in executive session continued for a period of 16 weeks.

This year, your committee conducted public hearings from January 17 through March 23. Your committee has received and printed 2,383 pages of testimony and additional information submitted for the record by individuals and groups interested in various phases of welfare activities and old-age and survivors insurance and considered the bill in executive session from April 3 through May 17.

In considering the House-approved bill your committee also had the benefit of a comprehensive report prepared by an outstanding advisory council appointed under authority of a Senate resolution of June 23, 1947.

III. SUMMARY OF PRINCIPAL PROVISIONS OF THE COMMITTEE-APPROVED BILL

A. Old-age and survivors insurance.

1. *Extension of coverage.*—Old-age and survivors insurance coverage would be extended to about 10 million persons during the course of an average week; 8.3 million of them would be covered on a compulsory basis, and the remainder on a voluntary basis (at the election of the employer). The specific additions to coverage are as follows:

(*a*) Nonfarm self-employed: Covered if self-employment yields annual net income of at least $400, except for physicians, lawyers, dentists, osteopaths, chiropractors, optometrists, Christian Science practitioners, naturopaths, veterinarians, certified public accountants, architects, and professional engineers.

(*b*) Agricultural workers: Covered if on a farm and regularly employed. (defined as employment by a single employer for at least 60 days in a calendar quarter, with cash wages of at least $50 for services in the quarter). Certain agricultural processing work off the farm and certain essentially commercial or industrial border-line agricultural labor are also covered.

(*c*) Domestic workers: Covered if in a private home (but not on a farm operated for profit) and if employed by a single employer for at least 24 days in a calendar quarter with cash wages of at least $50 for service in the quarter. (If employed on a farm operated for profit, would be covered as agricultural workers—see above.)

(*d*) Employees of nonprofit organizations: Covered on a compulsory basis both as to employers and employees, except for employees of religious denominations and of organizations owned and operated by a religious denomination. A religious denomination would be afforded an opportunity to obtain coverage