

**SECURITIES AND EXCHANGE
COMMISSION**

17 CFR Part 275 and 279

[Release No. IA-5653; File No. S7-21-19]

RIN 3235-AM08

Investment Adviser Marketing

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the “Commission” or the “SEC”) is adopting amendments under the Investment Advisers Act of 1940 (the “Advisers Act” or the “Act”) to update rules that govern investment adviser marketing. The amendments will create a merged rule that will replace both the current advertising and cash solicitation rules. These amendments reflect market developments and regulatory changes since the advertising rule’s adoption in 1961 and the cash solicitation rule’s adoption in 1979. The Commission is also adopting amendments to Form ADV to provide the Commission with additional information about advisers’ marketing practices. Finally, the Commission is adopting amendments to the books and records rule under the Advisers Act.

DATES:

Effective date: This rule is effective May 4, 2021.

Compliance dates: The applicable compliance dates are discussed in section II.K.

FOR FURTHER INFORMATION CONTACT:

Juliet Han, Emily Rowland, Aaron Russ, or Christine Schleppegrell, Senior Counsels; Thoreau Bartmann or Melissa Rovers Harke, Senior Special Counsels; or Melissa Gainor, Assistant Director, at (202) 551-6787 or *IM-Rules@sec.gov*, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to 17 CFR 275.206(4)-1 (rule 206(4)-1) and 17 CFR 275.204-2 (rule 204-2) under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 *et seq.*],¹ and amendments to 17 CFR 279.1 (Form ADV) under the

¹ Unless otherwise noted, when we refer to the Advisers Act, or any section of the Advisers Act, we are referring to 15 U.S.C. 80b, at which the Advisers Act is codified. When we refer to rules under the Advisers Act, or any section of those rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR part 275], in which these rules are published.

Advisers Act. The Commission is rescinding 17 CFR 275.206(4)-3 (rule 206(4)-3) under the Advisers Act.

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I. Introduction

We are adopting an amended rule, rule 206(4)-1, under the Advisers Act, which addresses advisers marketing their services to clients and investors (the “marketing rule”). The marketing rule amends existing rule 206(4)-1 (the “advertising rule”), which we adopted

to clients of smaller firms as well as larger firms.

We also believe that the rule's disqualification provisions with respect to testimonials and endorsements will result in transparency and consistency for advisory clients, promoters, and advisers, as the provisions will generally eliminate the need for advisers to seek separate relief from the rule. In addition, as discussed above, we believe that our final rule's placing guardrails on displays of performance will increase investor protection and the utility of the information provided and decrease the likelihood that it is misleading. Establishing different promoter disqualification provisions or performance provisions for large and small advisers would negate these benefits. Also, as discussed above, our staff will use the corresponding information that advisers report on the amended Form ADV to help prepare for examinations of investment advisers. Establishing different conditions for large and small advisers that advertise their services to investors would negate these benefits.

Regarding the second alternative, we believe the final rule is clear and that further clarification, consolidation, or simplification of the compliance requirements is not necessary. As discussed above, the final rule will provide general anti-fraud principles applicable to all advertisements under the rule; will provide further restrictions and conditions on certain specific types of presentations, such as testimonials and endorsements; and will provide additional conditions for advertisements containing certain performance information. These provisions will address a number of common advertising practices that have not been explicitly addressed or broadly restricted (*e.g.*, the current advertising rule prohibits testimonials concerning the investment adviser or its services, and direct or indirect references to specific profitable recommendations that the investment adviser has made in the past). The proposed provisions will clarify and modernize the advertising regime, which has come to depend on a large number of no-action letters over the years to fill the gaps.

Regarding the third alternative, we determined to use a combination of performance and design standards. The general prohibitions will be principles-based and will give advisers a broad framework within which to determine how best to present advertisements so they are not false or misleading. There will also be the principles-based requirement that an adviser must have a reasonable basis for believing that a

person providing a testimonial or endorsement has complied with the final rule. We believe that providing advisers with the flexibility to determine how to implement the requirements of the rule allows them the opportunity to tailor these obligations to the facts and circumstances of their particular arrangements. The final rule will also contain design standards, as it contains additional conditions for certain third-party statements, and certain restrictions and conditions on performance claims. These restrictions and conditions are narrowly tailored to prevent certain types of advertisements that are not a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act from misleading investors. The corresponding changes to rule 204-2 and Form ADV are also narrowly tailored to reflect the final rule.

We also considered an alternative that would not have included design standards, and that would have relied entirely on performance standards. In this alternative, as discussed in the Economic Analysis at section III above, we would reduce the limitations on investment adviser advertising, and rely on the general prohibitions to achieve the programmatic costs and benefits of the rule. As discussed in the Economic Analysis, we believe that many of the types of advertisements that would be prohibited by the final rule's limitations have the potential to be fraudulent or misleading. We do not believe that removal of the limitations on advertisements we are adopting would, in comparison with the final rule, permit advertisements that would not be inherently fraudulent or misleading. In addition, we believe that the removal of limitations may create uncertainty about what types of advertisements would fall under the general prohibitions.

Statutory Authority

The Commission is adopting amendments to rule 206(4)-1 under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a), and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-3(d), 10b-6(4) and 80b-11(a) and (h)]. The Commission is rescinding rule 206(4)-3 under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a), and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-2(d), 80b-6(4), and 80b-11(a) and (h)]. The Commission is adopting amendments to rule 204-2 under the Advisers Act under the authority set forth in sections 204 and 211 of the Investment Advisers Act of

1940 [15 U.S.C. 80b-4 and 80b-11]. The Commission is adopting amendments to Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934 [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act of 1940 [15 U.S.C. 80a-37(a)], and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-3(c)(1), 80b-4, and 80b-11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

Text of Amendments

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

Section 275.204-2 is also issued under 15 U.S.C 80b-6.

* * * * *

■ 2. Amend § 275.204-2 by
 ■ a. Revising paragraphs (a)(7)(iv), (a)(11), (15), and (16); and
 ■ b. Adding paragraph (a)(19).

The revisions and addition read as follows:

§ 275.204-2 Books and records to be maintained by investment advisers.

(a) * * *

(7) * * *

(iv) Predecessor performance (as defined in § 275.206(4)-1(e)(12) of this chapter) and the performance or rate of return of any or all managed accounts, portfolios (as defined in § 275.206(4)-1(e)(11) of this chapter), or securities recommendations; Provided, however:

(A) That the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser; and

(B) That if the investment adviser sends any notice, circular, or other advertisement (as defined in § 275.206(4)-1(e)(1) of this chapter)

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

* * * * *

(11) (i) A copy of each

(A) Advertisement (as defined in § 275.206(4)–1(e)(1) of this chapter) that the investment adviser disseminates, directly or indirectly, except:

(1) For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement; and

(2) For compensated oral testimonials and endorsements (as defined in § 275.206(4)–1(e)(17) and (5) of this chapter), the adviser may instead make and keep a record of the disclosures provided to clients or investors pursuant to § 275.206(4)–1(b)(1) of this chapter; and

(B) Notice, circular, newspaper article, investment letter, bulletin, or other communication that the investment adviser disseminates, directly or indirectly, to ten or more persons (other than persons associated with such investment adviser); and

(C) If such notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication recommends the purchase or sale of a specific security and does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor; and

(ii) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement in the event the adviser obtains a copy of the questionnaire or survey.

* * * * *

(15) (i) If not included in the advertisement, a record of the disclosures provided to clients or investors pursuant to § 275.206(4)–1(b)(1)(ii) and (iii) of this chapter;

(ii) Documentation substantiating the adviser's reasonable basis for believing that a testimonial or endorsement (as defined in § 275.206(4)–1(e)(17) and (5) of this chapter) complies with § 275.206(4)–1 and that the third-party rating (as defined in § 275.206(4)–1(e)(18) of this chapter) complies with § 275.206(4)–1(c)(1) of this chapter.

(iii) A record of the names of all persons who are an investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person pursuant to § 275.206(4)–1(b)(4)(ii) of this chapter.

(16) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of any performance or rate of return of any or all managed accounts, portfolios (as defined in § 275.206(4)–1(e)(11) of this chapter), or securities recommendations presented in any notice, circular, advertisement (as defined in § 275.206(4)–1(e)(1) of this chapter), newspaper article, investment letter, bulletin, or other communication that the investment adviser disseminates, directly or indirectly, to any person (other than persons associated with such investment adviser), including copies of all information provided or offered pursuant to § 275.206(4)–1(d)(6) of this chapter; provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's or investor's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.

* * * * *

(19) A record of who the "intended audience" is pursuant to § 275.206(4)–1(d)(6) and (e)(10)(ii)(B) of this chapter.

* * * * *

■ 3. Revise § 275.206(4)–1 to read as follows:

§ 275.206(4)–1 Investment Adviser Marketing.

As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)), it is unlawful for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), directly or indirectly, to disseminate any advertisement that violates any of paragraphs (a) through (d) of this section.

(a) *General prohibitions.* An advertisement may not:

(1) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the

statement made, in the light of the circumstances under which it was made, not misleading;

(2) Include a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the Commission;

(3) Include information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser;

(4) Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits;

(5) Include a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced;

(6) Include or exclude performance results, or present performance time periods, in a manner that is not fair and balanced; or

(7) Otherwise be materially misleading.

(b) *Testimonials and endorsements.* An advertisement may not include any testimonial or endorsement, and an adviser may not provide compensation, directly or indirectly, for a testimonial or endorsement, unless the investment adviser complies with the conditions in paragraphs (b)(1) through (3) of this section, subject to the exemptions in paragraph (b)(4) of this section.

(1) *Required disclosures.* The investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement discloses, the following at the time the testimonial or endorsement is disseminated:

(i) Clearly and prominently:
(A) That the testimonial was given by a current client or investor, and the *endorsement* was given by a person other than a current client or investor, as applicable;

(B) That cash or non-cash compensation was provided for the *testimonial* or *endorsement*, if applicable; and

(C) A brief statement of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from the investment adviser's relationship with such person;

(ii) The material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or

indirectly, to the person for the *testimonial* or *endorsement*; and

(iii) A description of any material conflicts of interest on the part of the person giving the *testimonial* or *endorsement* resulting from the investment adviser's relationship with such person and/or any compensation arrangement.

(2) *Adviser oversight and compliance.*

The investment adviser must have:

(i) A reasonable basis for believing that the *testimonial* or *endorsement* complies with the requirements of this section, and

(ii) A written agreement with any person giving a *testimonial* or *endorsement* that describes the scope of the agreed-upon activities and the terms of compensation for those activities.

(3) *Disqualification.* An investment adviser may not compensate a person, directly or indirectly, for a *testimonial* or *endorsement* if the adviser knows, or in the exercise of reasonable care should know, that the person giving the *testimonial* or *endorsement* is an ineligible person at the time the *testimonial* or *endorsement* is disseminated. This paragraph shall not disqualify any person for any matter(s) that occurred prior to May 4, 2021, if such matter(s) would not have disqualified such person under § 275.206(4)–3(a)(1)(ii) of this chapter, as in effect prior to May 4, 2021.

(4) *Exemptions.* (i) A *testimonial* or *endorsement* disseminated for no compensation or *de minimis compensation* is not required to comply with paragraphs (b)(2)(ii) and (3) of this section;

(ii) A *testimonial* or *endorsement* by the investment adviser's partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person is not required to comply with paragraphs (b)(1) and (2)(ii) of this section, provided that the affiliation between the investment adviser and such person is readily apparent to or is disclosed to the client or investor at the time the *testimonial* or *endorsement* is disseminated and the investment adviser documents such person's status at the time the *testimonial* or *endorsement* is disseminated;

(iii) A *testimonial* or *endorsement* by a broker or dealer registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(a)) is not required to comply with:

(A) Paragraph (b)(1) of this section if the *testimonial* or *endorsement* is a recommendation subject to § 240.151–1

of this chapter (Regulation Best Interest) under that Act;

(B) Paragraphs (b)(1)(ii) and (iii) of this section if the *testimonial* or *endorsement* is provided to a person that is not a retail customer (as that term is defined in § 240.151–1 of this chapter (Regulation Best Interest) under the Securities Exchange Act of 1934 (15 U.S.C. 78o(a))); and

(C) Paragraph (b)(3) of this section if the broker or dealer is not subject to statutory disqualification, as defined under section 3(a)(39) of that Act; and

(iv) A *testimonial* or *endorsement* by a person that is covered by rule 506(d) of Regulation D under the Securities Act of 1933 (§ 230.506(d) of this chapter) with respect to a rule 506 securities offering under the Securities Act of 1933 (§ 230.506 of this chapter) and whose involvement would not disqualify the offering under that rule is not required to comply with paragraph (b)(3) of this section.

(c) *Third-party ratings.* An advertisement may not include any third-party rating, unless the investment adviser:

(1) Has a reasonable basis for believing that any questionnaire or survey used in the preparation of the third-party rating is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result; and

(2) Clearly and prominently discloses, or the investment adviser reasonably believes that the third-party rating clearly and prominently discloses:

(i) The date on which the rating was given and the period of time upon which the rating was based;

(ii) The identity of the third party that created and tabulated the rating; and

(iii) If applicable, that compensation has been provided directly or indirectly by the adviser in connection with obtaining or using the third-party rating.

(d) *Performance.* An investment adviser may not include in any advertisement:

(1) Any presentation of gross performance, unless the advertisement also presents net performance:

(i) With at least equal prominence to, and in a format designed to facilitate comparison with, the gross performance; and

(ii) Calculated over the same time period, and using the same type of return and methodology, as the gross performance.

(2) Any performance results, of any portfolio or any composite aggregation of related portfolios, in each case other than any private fund, unless the

advertisement includes performance results of the same portfolio or composite aggregation for one-, five-, and ten-year periods, each presented with equal prominence and ending on a date that is no less recent than the most recent calendar year-end; except that if the relevant portfolio did not exist for a particular prescribed period, then the life of the portfolio must be substituted for that period.

(3) Any statement, express or implied, that the calculation or presentation of performance results in the advertisement has been approved or reviewed by the Commission.

(4) Any related performance, unless it includes all related portfolios; provided that related performance may exclude any related portfolios if:

(i) The advertised performance results are not materially higher than if all related portfolios had been included; and

(ii) The exclusion of any related portfolio does not alter the presentation of any applicable time periods prescribed by paragraph (d)(2) of this section.

(5) Any extracted performance, unless the advertisement provides, or offers to provide promptly, the performance results of the total portfolio from which the performance was extracted.

(6) Any hypothetical performance unless the investment adviser:

(i) Adopts and implements policies and procedures reasonably designed to ensure that the hypothetical performance is relevant to the likely financial situation and investment objectives of the intended audience of the advertisement;

(ii) Provides sufficient information to enable the intended audience to understand the criteria used and assumptions made in calculating such hypothetical performance; and

(iii) Provides (or, if the intended audience is an investor in a private fund, provides, or offers to provide promptly) sufficient information to enable the intended audience to understand the risks and limitations of using such hypothetical performance in making investment decisions; Provided that the investment adviser need not comply with the other conditions on performance in paragraphs (d)(2), (4), and (5) of this section.

(7) Any predecessor performance unless:

(i) The person or persons who were primarily responsible for achieving the prior performance results manage accounts at the advertising adviser;

(ii) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts

managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;

(iii) All accounts that were managed in a substantially similar manner are advertised unless the exclusion of any such account would not result in materially higher performance and the exclusion of any account does not alter the presentation of any applicable time periods prescribed in paragraph (d)(2) of this section; and

(iv) The advertisement clearly and prominently includes all relevant disclosures, including that the performance results were from accounts managed at another entity.

(e) *Definitions.* For purposes of this section:

(1) *Advertisement* means:

(i) Any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser, but does not include:

(A) Extemporaneous, live, oral communications;

(B) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or

(C) A communication that includes hypothetical performance that is provided:

(1) In response to an unsolicited request for such information from a prospective or current client or investor in a private fund advised by the investment adviser; or

(2) To a prospective or current investor in a private fund advised by the investment adviser in a one-on-one communication; and

(ii) Any endorsement or testimonial for which an investment adviser provides compensation, directly or indirectly, but does not include any information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication.

(2) *De minimis compensation* means compensation paid to a person for providing a *testimonial* or *endorsement* of a total of \$1,000 or less (or the equivalent value in non-cash compensation) during the preceding 12 months.

(3) A *disqualifying Commission action* means a Commission opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws.

(4) A *disqualifying event* is any of the following events that occurred within ten years prior to the person disseminating an endorsement or testimonial:

(i) A conviction by a court of competent jurisdiction within the United States of any felony or misdemeanor involving conduct described in paragraph (2)(A) through (D) of section 203(e) of the Act;

(ii) A conviction by a court of competent jurisdiction within the United States of engaging in, any of the conduct specified in paragraphs (1), (5), or (6) of section 203(e) of the Act;

(iii) The entry of any final order by any entity described in paragraph (9) of section 203(e) of the Act, or by the U.S. Commodity Futures Trading Commission or a self-regulatory organization (as defined in the Form ADV Glossary of Terms), of the type described in paragraph (9) of section 203(e) of the Act;

(iv) The entry of an order, judgment or decree described in paragraph (4) of section 203(e) of the Act, and still in effect, by any court of competent jurisdiction within the United States; and

(v) A Commission order that a person cease and desist from committing or causing a violation or future violation of:

(A) Any scienter-based anti-fraud provision of the Federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and § 240.10b-5 of this chapter, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(c)(1)), and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e);

(vi) A disqualifying event does not include an event described in paragraphs (e)(4)(i) through (v) of this section with respect to a person that is also subject to:

(A) An order pursuant to section 9(c) of the Investment Company Act of 1940

(15 U.S.C. 80a-9) with respect to such event; or

(B) A Commission opinion or order with respect to such event that is not a disqualifying Commission action; provided that for each applicable type of order or opinion described in paragraphs (e)(4)(vi)(A) and (B) of this section:

(1) The person is in compliance with the terms of the order or opinion, including, but not limited to, the payment of disgorgement, prejudgment interest, civil or administrative penalties, and fines; and

(2) For a period of ten years following the date of each order or opinion, the advertisement containing the testimonial or endorsement must include a statement that the person providing the testimonial or endorsement is subject to a Commission order or opinion regarding one or more disciplinary action(s), and include the order or opinion or a link to the order or opinion on the Commission's website.

(5) *Endorsement* means any statement by a person other than a current client or investor in a private fund advised by the investment adviser that:

(i) Indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person's experience with the investment adviser or its supervised persons;

(ii) Directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or

(iii) Refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser.

(6) *Extracted performance* means the performance results of a subset of investments extracted from a portfolio.

(7) *Gross performance* means the performance results of a portfolio (or portions of a *portfolio* that are included in extracted performance, if applicable) before the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio.

(8) *Hypothetical performance* means performance results that were not actually achieved by any portfolio of the investment adviser.

(i) Hypothetical performance includes, but is not limited to;

(A) Performance derived from model portfolios;

(B) Performance that is backtested by the application of a strategy to data from

prior time periods when the strategy was not actually used during those time periods; and

(C) Targeted or projected performance returns with respect to any portfolio or to the investment advisory services with regard to securities offered in the advertisement, however:

(ii) Hypothetical performance does not include:

(A) An interactive analysis tool where a client or investor, or prospective client, or investor, uses the tool to produce simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices; provided that the investment adviser:

(1) Provides a description of the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;

(2) Explains that the results may vary with each use and over time;

(3) If applicable, describes the universe of investments considered in the analysis, explains how the tool determines which investments to select, discloses if the tool favors certain investments and, if so, explains the reason for the selectivity, and states that other investments not considered may have characteristics similar or superior to those being analyzed; and

(4) Discloses that the tool generates outcomes that are hypothetical in nature; or

(B) Predecessor performance that is displayed in compliance with paragraph (d)(7) of this section.

(9) *Ineligible person* means a person who is subject to a disqualifying Commission action or is subject to any disqualifying event, and the following persons with respect to the ineligible person:

(i) Any employee, officer, or director of the ineligible person and any other individuals with similar status or functions within the scope of association with the ineligible person;

(ii) If the ineligible person is a partnership, all general partners; and

(iii) If the ineligible person is a limited liability company managed by elected managers, all elected managers.

(10) *Net performance* means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's

investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:

(i) May reflect the exclusion of custodian fees paid to a bank or other third-party organization for safekeeping funds and securities; and/or

(ii) If using a model fee, must reflect one of the following:

(A) The deduction of a model fee when doing so would result in performance figures that are no higher than if the actual fee had been deducted; or

(B) The deduction of a model fee that is equal to the highest fee charged to the intended audience to whom the advertisement is disseminated.

(11) *Portfolio* means a group of investments managed by the investment adviser. A portfolio may be an account or a private fund and includes, but is not limited to, a portfolio for the account of the investment adviser or its advisory affiliate (as defined in the Form ADV Glossary of Terms).

(12) *Predecessor performance* means investment performance achieved by a group of investments consisting of an account or a private fund that was not advised at all times during the period shown by the investment adviser advertising the performance.

(13) *Private fund* has the same meaning as in section 202(a)(29) of the Act.

(14) *Related performance* means the performance results of one or more related portfolios, either on a portfolio-by-portfolio basis or as a composite aggregation of all portfolios falling within stated criteria.

(15) *Related portfolio* means a portfolio with substantially similar investment policies, objectives, and strategies as those of the services being offered in the advertisement.

(16) *Supervised person* has the same meaning as in section 202(a)(25) of the Act.

(17) *Testimonial* means any statement by a current client or investor in a private fund advised by the investment adviser:

(i) About the client or investor's experience with the investment adviser or its supervised persons;

(ii) That directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or

(iii) That refers any current or prospective client or investor to be a

client of, or an investor in a private fund advised by, the investment adviser.

(18) *Third-party rating* means a rating or ranking of an investment adviser provided by a person who is not a related person (as defined in the Form ADV Glossary of Terms), and such person provides such ratings or rankings in the ordinary course of its business.

§ 275.206(4)–3 [Removed and reserved]

■ 4. Remove and reserve § 275.206(4)–3.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 5. The authority citation for part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*, Pub. L. 111–203, 124 Stat. 1376.

■ 6. Amend Form ADV (referenced in § 279.1) by:

■ a. Adding Item 5.L to Part 1A;

■ b. Revising the instructions to the form, in the section entitled “Form ADV: Glossary of Terms;”

■ c. Revising the instructions to the form, in the section entitled “Part 2A of Form ADV: Firm Brochure,” by removing the phrase “SEC rule 206(4)–3” in the Note in Item 14.B. and adding, in its place, “SEC rule 206(4)–1.”

The addition and revision read as follows:

Note: The text of Form ADV does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM ADV (Paper Version)

• UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND

• REPORT BY EXEMPT REPORTING ADVISERS PART IA

* * * * *

Item 5: Information About Your Advisory Business

ADVISORY ACTIVITIES

L. Marketing Activities

(1) Do any of your *advertisements* include:

a. Performance results?

Y N

b. A reference to specific investment advice provided by you (as that phrase is used in rule 206(4)–1(a)(5))?

Y N

c. *Testimonials* (other than those that satisfy rule 206(4)–1(b)(4)(ii))?

Y N

d. *Endorsements* (other than those that satisfy rule 206(4)–1(b)(4)(ii))?

Y N

e. *Third-party ratings*?

(j) Credit for Previous Actions

You make take credit for the actions required by paragraph (g)(1) of this AD if the inspection for leaks was performed before the effective date of this AD using the Accomplishment Instructions, paragraph 3., of Pratt & Whitney Special Instruction No. 255F–21, dated December 22, 2021.

(k) Special Flight Permit

Special flight permits, as described in 14 CFR 21.197 and 21.199, are permitted prior to compliance with paragraph (g)(1) of this AD, provided that the air/oil heat exchanger has first passed an inspection, performed within 60 days of the flight, performed in accordance with:

- (1) The Accomplishment Instructions, paragraph 3., of Pratt & Whitney Special Instruction No. 255F–21, dated December 22, 2021, before the effective date of this AD, or
- (2) The Accomplishment Instructions, paragraph 3., of Pratt & Whitney Special Instruction No. 255F–21A, dated February 15, 2022.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (m) of this AD and email to: ANE-AD-AMOC@faa.gov.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(m) Related Information

For more information about this AD, contact Carol Nguyen, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7655; email: carol.nguyen@faa.gov.

(n) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Pratt & Whitney Special Instruction No. 255F–21A, dated February 15, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact Pratt & Whitney Division, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: help24@prattwhitney.com; website: <https://connect.prattwhitney.com>.

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: fr.inspection@nara.gov, or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued on March 31, 2022.

Derek Morgan,

Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2022–08045 Filed 4–14–22; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 270, 274, 275, and 279

[Release No. 33–11047; IA–5985; IC–34547]

Technical Amendments to Commission Rules and Forms

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendments.

SUMMARY: The Securities and Exchange Commission (“Commission”) is adopting technical amendments to various rules and forms under the Securities Act of 1933 (the “Securities Act”), the Investment Company Act of 1940 (the “Investment Company Act”), and the Investment Advisers Act of 1940 (the “Investment Advisers Act”). These revisions make technical changes to correct typographical errors and erroneous cross-references, as well as to clarify instructions.

DATES: Effective April 15, 2022.

FOR FURTHER INFORMATION CONTACT: For the rules and forms under the Investment Advisers Act, Christopher Staley, Branch Chief, at (202) 551–6999, Investment Adviser Regulation Office, Division of Investment Management; and for the rules and forms under the Investment Company Act, Mykaila DeLesDernier or James Maclean, Senior Counsel, at (202) 551–6792, Investment Company Regulation Office, Division of Investment Management, at the Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is amending the following rules and forms:

Commission reference	CFR citation (17 CFR)
Regulation S–T:	
Rule 405	232.405
Securities Act and Investment Company Act ¹ :	
Form N–2	239.14 and 274.11a–1
Form N–1A	239.15A and 274.11A
Form N–3	239.17a and 274.11b
Form N–5	239.24 and 274.5
Investment Company Act:	
Rule 18f–4	270.18f–4
Rule 20a–1	270.20a–1
Rule 22c–1	270.22c–1
Rule 22e–3	270.22e–3
Rule 32a–1	270.32a–1
Form N–CEN	274.101
Form N–PX	274.129
Form N–MFP	274.201
Investment Advisers Act ² :	
Form ADV	279.1
Rule 204–2	275.204–2
Rule 204–3	275.204–3

while it is in the possession of the Commission or its staff. After completing its review of the supplemental information, the Commission or its staff will return or destroy it, if the Registrant complies with the procedures outlined in Rule 418 under the Securities Act [17 CFR 230.418].

7. Each exhibit identified in the exhibit index (other than an exhibit filed in eXtensible Business Reporting Language) must include an active link to an exhibit that is filed with the registration statement or, if the exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on EDGAR. If the registration statement is amended, each amendment must include active hyperlinks to the exhibits required with the amendment.”

* * * * *

Note: The text of Form N-3 does not, and these amendments will not, appear in the *Code of Federal Regulations*.

■ 13. Amend Form N-3 (referenced in §§ 239.17a and 274.11b), Cover Page, by adding a new paragraph immediately after the sentence [“t]he Commission also may use the information provided on Form N-3 in its regulatory, disclosure review, inspection, and policy making roles” To read as follows:

* * * * *

A Registrant is required to disclose the information specified by Form N-3, and the Commission will make this information public. A Registrant is not required to respond to the collection of information contained in Form N-3 unless the Form displays a currently valid Office of Management and Budget (“OMB”) control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. 3507.

* * * * *

Note: The text of Form N-CEN does not, and these amendments will not, appear in the *Code of Federal Regulations*.

■ 14. Amend Form N-CEN (referenced in § 274.101) by replacing the Instruction following Item F.3 and replacing Item F.18 to read as follows:

* * * * *

Part F: Additional Questions for Unit Investment Trusts

* * * * *

Item F.3. * * *

Instruction. If the answer to Item F.3 is yes, respond to Item F.12 through Item F.19. If the answer to Item F.3 is no, respond to Item F.4 through Item F.11, and Item F.17 through Item F.19.

* * * * *

Item F. 18. Reliance on rule 12d1-4. Did the Registrant rely on rule 12d1-4 under the Act (17 CFR 270.12d1-4) during the reporting period? [Y/N]

* * * * *

Note: The text of Form N-PX does not, and these amendments will not, appear in the *Code of Federal Regulations*.

■ 15. Amend Form N-PX (referenced in § 274.129), Cover Page by removing “§§ 239.24 and 274.5 of this chapter” and adding, in its place, “17 CFR 239.24 and 274.5”.

Note: The text of Form N-MFP does not, and these amendments will not, appear in the *Code of Federal Regulations*.

■ 16. Amend Form N-MFP (referenced in § 274.201), in Item A.14.c. by removing the term “A.14.a-c.” and adding, in its place, the term “A.14.a-b.”

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 17. The authority for part 275 continues to read, in part, as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

Section 275.204-2 is also issued under 15 U.S.C. 80b-6.

* * * * *

Section 275.204-5 is also issued under sec. 913, Public Law 111-203, sec. 124 Stat. 1827-28 (2010).

* * * * *

§ 275.204-2 [Amended]

■ 18. In § 275.204-2 amend paragraph (a)(15)(ii) by removing “.” and adding, in its place, “; and”.

§ 275.204-3 [Amended]

■ 19. In § 275.204-3 amend paragraph (b) by removing “Subject to paragraph (g), you” and adding, in its place, “You”.

§ 275.204-5 [Amended]

■ 20. In § 275.204-5 amend paragraph (e)(1) by removing “§ 275.204-1(b)(3)” and adding, in its place “§ 275.204-1(b)”.

§ 275.206(4)-1 [Amended]

■ 21. In § 275.206(4)-1 amend paragraph (b)(2)(i) by removing “,” and adding in its place “;”.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 22. The authority for part 279 continues to read, in part, as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b-1, *et seq.*, Public Law 111-203, 124 Stat. 1376.

Note: The text of Form ADV does not, and these amendments will not, appear in the *Code of Federal Regulations*.

■ 23. Amend Form ADV (referenced in § 279.1) by:

■ a. In General Instruction 4 to Form ADV removing “Section 10 of Schedule R” and adding, in its place, “Section 4 of Schedule R”; and

■ b. In the Instruction to Section 4.B.7 of Schedule R removing “pre-fill Schedule B with the same indirect owners you have provided in Schedule B” and adding, in its place, “pre-fill the chart below with the same indirect owners you have provided in Schedule B for your *filing adviser*”.

* * * * *

Dated: March 29, 2022.

Vanessa A. Countryman,
Secretary.

[FR Doc. 2022-06972 Filed 4-14-22; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 79

Office of the Secretary of the Interior

43 CFR Part 3

[NPS-WASO-CR-33054; PPWOCRADIO, PCU00RP14R50000]

RIN 1024-AE58

Curation of Federally Owned or Administered Archeological Collections

AGENCY: National Park Service, Interior.
ACTION: Final rule.

SUMMARY: The National Park Service amends regulations governing the curation of federally owned or administered archeological collections to establish definitions, standards, and procedures to dispose of material remains that have insufficient archeological interest. This rule promotes more efficient and effective curation of archeological collections.

DATES: This rule is effective May 16, 2022.

Securities and Exchange Commission

§ 275.204-1

§ 275.203A-3 Definitions.

For purposes of section 203A of the Act (15 U.S.C. 80b-3a) and the rules thereunder:

(a)(1) *Investment adviser representative*. “Investment adviser representative” of an investment adviser means 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).

(2) Notwithstanding paragraph (a)(1) of this section, a supervised person is not an investment adviser representative if the supervised person:

(i) Does not on a regular basis solicit, meet with, or otherwise communicate with clients of the investment adviser; or

(ii) Provides only impersonal investment advice.

(3) For purposes of this section:

(i) “Excepted person” means a natural person who is a qualified client as described in § 275.205-3(d)(1).

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

(4) Supervised persons may rely on the definition of “client” in § 275.202(a)(30)-1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

(b) *Place of business*. “Place of business” of an investment adviser representative means:

(1) An office at which the investment adviser representative regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and

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

(c) *Principal office and place of business*. “Principal office and place of

business” of an investment adviser means the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.

(d) *Assets under management*. Determine “assets under management” by calculating the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services as reported on the investment adviser’s Form ADV (17 CFR 279.1).

(e) *State securities authority*. “State securities authority” means the securities commissioner or commission (or any agency, office or officer performing like functions) of any State.

[62 FR 28134, May 22, 1997, as amended at 63 FR 39715, July 24, 1998; 69 FR 72088, Dec. 10, 2004; 76 FR 43012, July 19, 2011]

§§ 275.203A-4—275.203A-6 [Reserved]

§ 275.204-1 Amendments to Form ADV.

(a) *When amendment is required*. You must amend your Form ADV (17 CFR 279.1):

(1) Parts 1 and 2:

(i) At least annually, within 90 days of the end of your fiscal year; and

(ii) More frequently, if required by the instructions to Form ADV.

(2) Part 3 at the frequency required by the instructions to Form ADV.

(b) *Electronic filing of amendments*. (1) Subject to paragraph (c) of this section, you must file all amendments to Part 1A, Part 2A, and Part 3 of Form ADV electronically with the IARD, unless you have received a continuing hardship exemption under § 275.203-3. You are not required to file with the Commission amendments to brochure supplements required by Part 2B of Form ADV.

(2) If you have received a continuing hardship exemption under § 275.203-3, you must, when you are required to amend your Form ADV, file a completed Part 1A, Part 2A and Part 3 of Form ADV on paper with the SEC by mailing it to FINRA.

(c) *Filing fees*. You must pay FINRA (the operator of the IARD) an initial filing fee when you first electronically file Part 1A of Form ADV. After you

pay the initial filing fee, you must pay an annual filing fee each time you file your annual updating amendment. No portion of either fee is refundable. The Commission has approved the filing fees. Your amended Form ADV will not be accepted by FINRA, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(d) *Amendments to Form ADV are reports.* Each amendment required to be filed under this section is a “report” within the meaning of sections 204 and 207 of the Act (15 U.S.C. 80b-4 and 80b-7).

(e) *Transition to Filing Form CRS.* If you are registered with the Commission or have an application for registration pending with the Commission prior to June 30, 2020, you must amend your Form ADV by electronically filing with IARD your initial Form CRS that satisfies the requirements of Part 3 of Form ADV (as amended effective September 30, 2019) beginning on May 1, 2020 and by no later than June 30, 2020.

NOTE 1 TO PARAGRAPHS (e): This note applies to paragraphs (a), (b), and (e) of this section. Information on how to file with the IARD is available on our website at <http://www.sec.gov/iard>. For the annual updating amendment: Summaries of material changes that are not included in the adviser’s brochure must be filed with the Commission as an exhibit to Part 2A in the same electronic file; and if you are not required to prepare a brochure, a summary of material changes, an annual updating amendment to your brochure, or Form CRS you are not required to file them with the Commission. See the instructions for Part 2A and Part 3 of Form ADV.

[65 FR 57450, Sept. 22, 2000; 65 FR 81738, Dec. 27, 2000, as amended at 68 FR 42248, July 17, 2003; 73 FR 4694, Jan. 28, 2008; 75 FR 49267, Aug. 12, 2010; 76 FR 43013, July 19, 2011; 81 FR 60458, Sept. 1, 2016; 84 FR 33630, July 12, 2019]

§ 275.204-2 Books and records to be maintained by investment advisers.

(a) Every investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) shall make and keep true, accurate and current the following books and records relating to its investment advisory business:

(1) A journal or journals, including cash receipts and disbursements, records, and any other records of origi-

nal entry forming the basis of entries in any ledger.

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

(3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. Such memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed such order; and shall show the account for which entered, the date of entry, and the bank, broker or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.

(4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser.

(5) All bills or statements (or copies thereof), paid or unpaid, relating to the business of the investment adviser as such.

(6) All trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser.

(7) Originals of all written communications received and copies of all written communications sent by such investment adviser relating to:

(i) Any recommendation made or proposed to be made and any advice given or proposed to be given;

(ii) Any receipt, disbursement or delivery of funds or securities;

(iii) The placing or execution of any order to purchase or sell any security;

(iv) The performance or rate of return of any or all managed accounts or securities recommendations: *Provided, however:*

(A) That the investment adviser shall not be required to keep any unsolicited

Securities and Exchange Commission

§ 275.204-2

market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and

(B) That if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if such notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular or advertisement a memorandum describing the list and the source thereof

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

(9) All powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser, or copies thereof.

(10) All written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such.

(11) A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons (other than persons connected with such investment adviser), and if such notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication recommends the purchase or sale of a specific security and does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor.

(12)(i) A copy of the investment adviser's code of ethics adopted and implemented pursuant to §275.204A-1 that is in effect, or at any time within the past five years was in effect;

(ii) A record of any violation of the code of ethics, and of any action taken as a result of the violation; and

(iii) A record of all written acknowledgments as required by §275.204A-1(a)(5) for each person who is currently, or within the past five years was, a supervised person of the investment adviser.

(13)(i) A record of each report made by an access person as required by §275.204A-1(b), including any information provided under paragraph (b)(3)(iii) of that section in lieu of such reports;

(ii) A record of the names of persons who are currently, or within the past five years were, access persons of the investment adviser; and

(iii) A record of any decision, and the reasons supporting the decision, to approve the acquisition of securities by access persons under §275.204A-1(c), for at least five years after the end of the fiscal year in which the approval is granted.

(14)(i) A copy of each brochure, brochure supplement and Form CRS, and each amendment or revision to the brochure, brochure supplement and Form CRS, that satisfies the requirements of Part 2 or Part 3 of Form ADV, as applicable [17 CFR 279.1]; any summary of material changes that satisfies the requirements of Part 2 of Form ADV but is not contained in the brochure; and a record of the dates that each brochure, brochure supplement and Form CRS, each amendment or revision thereto, and each summary of material changes not contained in a brochure given to any client or to any prospective client who subsequently becomes a client.

(ii) Documentation describing the method used to compute managed assets for purposes of Item 4.E of Part 2A of Form ADV, if the method differs from the method used to compute regulatory assets under management in Item 5.F of Part 1A of Form ADV.

(iii) A memorandum describing any legal or disciplinary event listed in Item 9 of Part 2A or Item 3 of Part 2B (Disciplinary Information) and presumed to be material, if the event involved the investment adviser or any of its supervised persons and is not disclosed in the brochure or brochure supplement described in paragraph (a)(14)(i) of this section. The memorandum must explain the investment

§ 275.204-2

17 CFR Ch. II (4-1-21 Edition)

adviser's determination that the presumption of materiality is overcome, and must discuss the factors described in Item 9 of Part 2A of Form ADV or Item 3 of Part 2B of Form ADV.

(15) All written acknowledgments of receipt obtained from clients pursuant to § 275.206(4)-3(a)(2)(iii)(B) and copies of the disclosure documents delivered to clients by solicitors pursuant to § 275.206(4)-3.

(16) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication that the investment adviser circulates or distributes, directly or indirectly, to any person (other than persons connected with such investment adviser); *provided, however*, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph.

(17)(i) A copy of the investment adviser's policies and procedures formulated pursuant to § 275.206(4)-7(a) of this chapter that are in effect, or at any time within the past five years were in effect;

(ii) Any records documenting the investment adviser's annual review of those policies and procedures conducted pursuant to § 275.206(4)-7(b) of this chapter;

(iii) A copy of any internal control report obtained or received pursuant to § 275.206(4)-2(a)(6)(ii).

(18)(i) Books and records that pertain to § 275.206(4)-5 containing a list or other record of:

(A) The names, titles and business and residence addresses of all covered associates of the investment adviser;

(B) All government entities to which the investment adviser provides or has

provided investment advisory services, or which are or were investors in any covered investment pool to which the investment adviser provides or has provided investment advisory services, as applicable, in the past five years, but not prior to September 13, 2010;

(C) All direct or indirect contributions made by the investment adviser or any of its covered associates to an official of a government entity, or direct or indirect payments to a political party of a State or political subdivision thereof, or to a political action committee; and

(D) The name and business address of each regulated person to whom the investment adviser provides or agrees to provide, directly or indirectly, payment to solicit a government entity for investment advisory services on its behalf, in accordance with § 275.206(4)-5(a)(2).

(ii) Records relating to the contributions and payments referred to in paragraph (a)(18)(i)(C) of this section must be listed in chronological order and indicate:

(A) The name and title of each contributor;

(B) The name and title (including any city/county/State or other political subdivision) of each recipient of a contribution or payment;

(C) The amount and date of each contribution or payment; and

(D) Whether any such contribution was the subject of the exception for certain returned contributions pursuant to § 275.206(4)-5(b)(2).

(iii) An investment adviser is only required to make and keep current the records referred to in paragraphs (a)(18)(i)(A) and (C) of this section if it provides investment advisory services to a government entity or a government entity is an investor in any covered investment pool to which the investment adviser provides investment advisory services.

(iv) For purposes of this section, the terms "contribution," "covered associate," "covered investment pool," "government entity," "official," "payment," "regulated person," and "solicit" have the same meanings as set forth in § 275.206(4)-5.

(b) If an investment adviser subject to paragraph (a) of this section has custody or possession of securities or funds of any client, the records required to be made and kept under paragraph (a) of this section shall include:

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

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

(3) Copies of confirmations of all transactions effected by or for the account of any such client.

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

(5) A memorandum describing the basis upon which you have determined that the presumption that any related person is not operationally independent under § 275.206(4)-2(d)(5) has been overcome.

(c)(1) Every investment adviser subject to paragraph (a) of this section who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

(i) Records showing separately for each such client the securities purchased and sold, and the date, amount and price of each such purchase and sale.

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

(2) Every investment adviser subject to paragraph (a) of this section that exercises voting authority with respect to client securities shall, with respect

to those clients, make and retain the following:

(i) Copies of all policies and procedures required by § 275.206(4)-6.

(ii) A copy of each proxy statement that the investment adviser receives regarding client securities. An investment adviser may satisfy this requirement by relying on a third party to make and retain, on the investment adviser's behalf, a copy of a proxy statement (provided that the adviser has obtained an undertaking from the third party to provide a copy of the proxy statement promptly upon request) or may rely on obtaining a copy of a proxy statement from the Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system.

(iii) A record of each vote cast by the investment adviser on behalf of a client. An investment adviser may satisfy this requirement by relying on a third party to make and retain, on the investment adviser's behalf, a record of the vote cast (provided that the adviser has obtained an undertaking from the third party to provide a copy of the record promptly upon request).

(iv) A copy of any document created by the adviser that was material to making a decision how to vote proxies on behalf of a client or that memorializes the basis for that decision.

(v) A copy of each written client request for information on how the adviser voted proxies on behalf of the client, and a copy of any written response by the investment adviser to any (written or oral) client request for information on how the adviser voted proxies on behalf of the requesting client.

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

(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1)(i), inclusive, and (c)(2) of this section (except for books and records required to be made under the provisions of paragraphs (a)(11), (a)(12)(i), (a)(12)(iii), (a)(13)(i), (a)(13)(iii), (a)(16), and (a)(17)(i) of this

section), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.

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

(3)(i) Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of this rule shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication.

(ii) *Transition rule.* If you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)), as in effect on July 20, 2011, paragraph (e)(3)(i) of this section does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under the provisions of paragraph (a)(16) of this section to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b-2(a)(29)), or other account you advise for any period ended prior to your registration, provided that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.

(f) An investment adviser subject to paragraph (a) of this section, before ceasing to conduct or discontinuing business as an investment adviser shall arrange for and be responsible for the

preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the Commission in writing, at its principal office, Washington, D.C. 20549, of the exact address where such books and records will be maintained during such period.

(g) *Micrographic and electronic storage permitted—(1) General.* The records required to be maintained and preserved pursuant to this part may be maintained and preserved for the required time by an investment adviser on:

(i) Micrographic media, including microfilm, microfiche, or any similar medium; or

(ii) Electronic storage media, including any digital storage medium or system that meets the terms of this section.

(2) *General requirements.* The investment adviser must:

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

(ii) Provide promptly any of the following that the Commission (by its examiners or other representatives) may request:

(A) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(B) A legible, true, and complete printout of the record; and

(C) Means to access, view, and print the records; and

(iii) Separately store, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this section.

(3) *Special requirements for electronic storage media.* In the case of records on electronic storage media, the investment adviser must establish and maintain procedures:

(i) To maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction;

(ii) To limit access to the records to properly authorized personnel and the Commission (including its examiners and other representatives); and

(iii) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media

is complete, true, and legible when retrieved.

(h)(1) Any book or other record made, kept, maintained and preserved in compliance with §§240.17a-3 and 240.17a-4 of this chapter under the Securities Exchange Act of 1934, or with rules adopted by the Municipal Securities Rulemaking Board, which is substantially the same as the book or other record required to be made, kept, maintained and preserved under this section, shall be deemed to be made, kept, maintained and preserved in compliance with this section.

(2) A record made and kept pursuant to any provision of paragraph (a) of this section, which contains all the information required under any other provision of paragraph (a) of this section, need not be maintained in duplicate in order to meet the requirements of the other provision of paragraph (a) of this section.

(i) As used in this section the term "discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

(j)(1) Except as provided in paragraph (j)(3) of this section, each non-resident investment adviser registered or applying for registration pursuant to section 203 of the Act shall keep, maintain and preserve, at a place within the United States designated in a notice from him as provided in paragraph (j)(2) of this section true, correct, complete and current copies of books and records which he is required to make, keep current, maintain or preserve pursuant to any provisions of any rule or regulation of the Commission adopted under the Act.

(2) Except as provided in paragraph (j)(3) of this section, each nonresident investment adviser subject to this paragraph (j) shall furnish to the Commission a written notice specifying the address of the place within the United States where the copies of the books and records required to be kept and preserved by him pursuant to paragraph (j)(1) of this section are located. Each non-resident investment adviser registered or applying for registration

when this paragraph becomes effective shall file such notice within 30 days after such rule becomes effective. Each non-resident investment adviser who files an application for registration after this paragraph becomes effective shall file such notice with such application for registration.

(3) Notwithstanding the provisions of paragraphs (j)(1) and (2) of this section, a non-resident investment adviser need not keep or preserve within the United States copies of the books and records referred to in said paragraphs (j)(1) and (2), if:

(i) Such non-resident investment adviser files with the Commission, at the time or within the period provided by paragraph (j)(2) of this section, a written undertaking, in form acceptable to the Commission and signed by a duly authorized person, to furnish to the Commission, upon demand, at its principal office in Washington, DC, or at any Regional Office of the Commission designated in such demand, true, correct, complete and current copies of any or all of the books and records which he is required to make, keep current, maintain or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records which may be specified in such demand. Such undertaking shall be in substantially the following form:

The undersigned hereby undertakes to furnish at its own expense to the Securities and Exchange Commission at its principal office in Washington, DC or at any Regional Office of said Commission specified in a demand for copies of books and records made by or on behalf of said Commission, true, correct, complete and current copies of any or all, or any part, of the books and records which the undersigned is required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Securities and Exchange Commission under the Investment Advisers Act of 1940. This undertaking shall be suspended during any period when the undersigned is making, keeping current, and preserving copies of all of said books and records at a place within the United States in compliance with Rule 204-2(j) under the Investment Advisers Act of 1940. This undertaking shall be binding upon the undersigned and the heirs, successors and assigns of the undersigned, and the written irrevocable consents and powers of attorney of the undersigned, its general partners and managing

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agents filed with the Securities and Exchange Commission shall extend to and cover any action to enforce same.

and

(ii) Such non-resident investment adviser furnishes to the Commission, at his own expense 14 days after written demand therefor forwarded to him by registered mail at his last address of record filed with the Commission and signed by the Secretary of the Commission or such person as the Commission may authorize to act in its behalf, true, correct, complete and current copies of any or all books and records which such investment adviser is required to make, keep current or preserve pursuant to any provision of any rule or regulation of the Commission adopted under the Act, or any part of such books and records which may be specified in said written demand. Such copies shall be furnished to the Commission at its principal office in Washington, DC, or at any Regional Office of the Commission which may be specified in said written demand.

(4) For purposes of this rule the term *non-resident investment adviser* shall have the meaning set out in §275.0-2(d)(3) under the Act.

(k) Every investment adviser that registers under section 203 of the Act (15 U.S.C. 80b-3) after July 8, 1997 shall be required to preserve in accordance with this section the books and records the investment adviser had been required to maintain by the State in which the investment adviser had its principal office and place of business prior to registering with the Commission.

[26 FR 5002, June 6, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §275.204-2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

EFFECTIVE DATE NOTE: At 86 FR 13138, Mar. 5, 2021, §275.204-2 was amended by revising paragraphs (a)(7)(iv), (11), (15), and (16); and adding paragraph (a)(19), effective May 4, 2021. For the convenience of the user, the revised and added text is set forth as follows:

§ 275.204-2 Books and records to be maintained by investment advisers.

- (a) * * *
(7) * * *

(iv) Predecessor performance (as defined in §275.206(4)-1(e)(12) of this chapter) and the performance or rate of return of any or all managed accounts, portfolios (as defined in §275.206(4)-1(e)(11) of this chapter), or securities recommendations; Provided, however:

(A) That the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser; and

(B) That if the investment adviser sends any notice, circular, or other advertisement (as defined in §275.206(4)-1(e)(1) of this chapter) offering any report, analysis, publication or other investment advisory service to more than ten persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if such notice, circular, or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular, or advertisement a memorandum describing the list and the source thereof.

* * * * *

(11)(i) A copy of each

(A) Advertisement (as defined in §275.206(4)-1(e)(1) of this chapter) that the investment adviser disseminates, directly or indirectly, except:

(1) For oral advertisements, the adviser may instead retain a copy of any written or recorded materials used by the adviser in connection with the oral advertisement; and

(2) For compensated oral testimonials and endorsements (as defined in §275.206(4)-1(e)(17) and (5) of this chapter), the adviser may instead make and keep a record of the disclosures provided to clients or investors pursuant to §275.206(4)-1(b)(1) of this chapter; and

(B) Notice, circular, newspaper article, investment letter, bulletin, or other communication that the investment adviser disseminates, directly or indirectly, to ten or more persons (other than persons associated with such investment adviser); and

(C) If such notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication recommends the purchase or sale of a specific security and does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor; and

(ii) A copy of any questionnaire or survey used in the preparation of a third-party rating included or appearing in any advertisement in the event the adviser obtains a copy of the questionnaire or survey.

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