

THE REVISED NEW YORK INVESTMENT ADVISORY ACT

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THE REVISED NEW YORK INVESTMENT ADVISORY ACT EXECUTIVE SUMMARY

The State of New York recently revised Section 359-eee of Chapter 20, Article 23-A of the General Business Law of New York and issued related regulations¹ (collectively, the “New York Act” or the “Act”) which must be complied with by March 31, 2003. The implementation of the Act represents a significant shift in how Investment Advisers are regulated in the state of New York.

The Act:

- reduces the *de minimus* exemption from 40 clients to less than six (6), excluding certain financial institutions and institutional buyers²;
- imposes “Notice Filing” requirements on certain Federal Covered Investment Advisers³;
- provides an exemption from registration for advisers which would otherwise be required or permitted to register with the Securities and Exchange Commission (the “SEC”) under Section 203 of the Investment Advisors Act of 1940 (the

¹ Official Codes, Rules and Regulations of the State of New York, as amended, Title 13, Chapter II, Subchapter A, Part 11.

² See Annex A for the list of financial institutions and institutional buyers.

³ Federally Covered Investment Advisor means a person which is registered under Section 203 of the Investment Advisors Act of 1940, 15, U.S.C. §80 et seq.

“Advisers Act”) but for an exemption from registration under Section 203(b)(3) of the Advisers Act (“Exempt Federal Advisers”)⁴;

- requires the registration of all advisers located in New York who are not Federal Covered Investment Advisers or Exempt Federal Advisers or do not qualify for the *de minimus* exemption;
- requires the testing of certain registered investment advisers and their representatives or solicitors; and
- mandates the use of the web-based Investment Adviser Registration Depository (“IARD”)⁵.

DEFINITION

The Act defines an “Investment Adviser” to be “any person who, for compensation, engages in the business of advising members of the public, either directly or through publications or writings within or from the state of New York, as to the value of securities or as to the advisability of investing in, purchasing, or selling or holding securities, or who, for compensation and as a part of a regular business issues or promulgates analyses or reports concerning securities to members of the public within or from the state of New York.”

In addition to excluding from the definition those person or entities set forth in Section 202(a)(11)(A)-(D) of the Advisers Act⁶, the New York Act also excludes:

- a person who sells investment advisory services to less than six (6) persons in New York exclusive of financial institutions and institutional buyers (see Annex A);

⁴ An adviser which has fewer than 15 clients and does not hold itself out generally to the public as an investment adviser nor act as an investment adviser to a registered investment company or a business development company and meets the threshold for SEC registration in Rule 203A-1 of the Advisers Act.

⁵ The IARD website can be found at www.iard.com.

⁶ Section 202(a)(11)(A)-(D) exempts from investment advisory registration: (a) a bank or trust company, unless it is otherwise considered an investment adviser under the Advisers Act; (b) a lawyer, accountant, engineer or teacher whose performance of these services is solely incidental to the practice of this profession; (c) a broker or dealer whose performance of these services is solely incidental to the conduct of its business as broker or dealer and who receives no special compensation for them; and (d) a publisher of a bona fide newspaper or news magazine.

- a Federally Covered Investment Adviser; and
- a person who would otherwise be required or permitted to register with the SEC were it not for the exemption from registration under Section 203(b)(3) of the Advisers Act.⁷

These exclusions are significant in that advisers who are registered with the SEC, exempt from registration pursuant to Section 203(b)(3) of the Advisers Act but manage more than 25 million dollars or who have a limited member of clients, or purely institutional clients, will not be subject to the registration provision of the Act.

REGISTRATION REQUIREMENTS

TIMING

An application for registration as an investment adviser should be filed with the IARD no less than ten (10) days before engaging in investment advisory activities in New York. Each registration is for a calendar year.

REGISTRATION INFORMATION

An application for initial registration shall consist of Form ADV (Uniform Application for Investment Adviser Registration) which is filed, together with a fee of \$200, through the IARD. Until such time as the IARD accepts Part 2 of Form ADV, Part 2 must be filed in paper form with the Department of Law⁸.

A document is considered filed with the Department of Law when all fees are received and the filing is accepted by IARD on behalf of the state. Any documents or fees required to be filed with the Department of Law that are not permitted to be filed with or cannot be accepted via IARD, are required to be filed directly with the Department of Law.

FINANCIAL STATEMENTS

As part of an initial registration filing, each adviser must submit a balance sheet and an income statement as of the close of its last fiscal or calendar year. All financial statements must be prepared in accordance with generally accepted accounting principle. When financial statements are unaudited, management is required to certify the accuracy of those statements.

⁷ For the purpose of this exemption, the provisions of Rule 203(B)(3)-a under the Advisers Act shall apply.

⁸ Department of Law, Investment Protection Bureau, 120 Broadway, New York, New York 10271.

When financial statements submitted are more than ninety (90) days old, an interim balance sheet no older than ninety (90) days must also be submitted.

In addition, each registered adviser must annually submit a balance sheet and an income statement as of the close of its fiscal or calendar year within ninety(90) days after completion of its fiscal or calendar year.

UPDATES AND AMENDMENTS

An adviser must file any amendment to its Form ADV, in accordance with the instructions to Form ADV, via IARD. An amendment will be considered filed promptly if it is filed within thirty (30) days of the event which causes the filing.

All registered advisers are also required to file an updated Form ADV, through the IARD, within ninety (90) days of its fiscal year end.

EXAMINATION REQUIREMENTS

Every investment adviser who is required to register and who is an individual and every individual who represents an adviser in New York in conducting an advisory business or who solicits business for such adviser must take and receive a passing grade within two (2) years on:

1. the Uniform Investment Advisers Law Examination (Series 65 examination); or
2. the General Securities Representatives Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination).It should be noted that the examination requirement can be waived for certain qualified persons upon the filing of Form NY-IAQ (New York Investment Adviser Qualification).

Waivers are available for an individual who:

- has engaged in the business of advising members of the public and has been continuously registered in New York for a period of five (5) years without any regulatory action or arbitrations;
- represents an adviser in doing any of the acts that prompt registration as an adviser or solicits business for an adviser and who has been continuously registered in any jurisdiction for a period of two (2) years without any regulatory action or arbitrations; or

- is an individual who currently holds certain professional designations and remains in good standing⁹.

An individual who is required to meet the examination requirement under the Act must do so by June 20, 2003. It should be noted that the Act does not currently require the registration and payment of a fee for “representatives” or “solicitors” of an adviser.

MISCELLANEOUS REQUIREMENTS

The New York Act imposes various record keeping requirements which are beyond the scope of this memorandum. In addition, the Act requires the following:

- The filing of a copy within the Department of Law of all investment advisory literature which is sold to clients or prospective clients in New York by a registered adviser on the date of its first general distribution to the public;
- The filing of a copy with the Department of Law of any notice, circular advertisement, form letter or other advertising meant for general distribution and for the purpose of soliciting accounts or clients no later than five (5) days after said material have been distributed;
- Each New York client of a registered adviser must be sent a statement indicating that such client may obtain from the adviser either a copy of the adviser’s Form ADV or a publication containing all of the information set forth therein annually. The statement must be provided to clients within seven (7) days of a written request. The client may be charged for these materials.

WITHDRAWAL OF REGISTRATION

An application to withdraw a registration as an adviser is accomplished by filing a completed Form ADV-W (Notice of Withdrawal from registration as Investment Adviser) with the IARD.

⁹ Currently, the approved professional designations include: (i) Certified Financial Planner (CFP), (ii) Chartered Financial Consultant (CHFC), (iii) Personal Financial Specialist (PFS), (iv) Charter Financial Analyst (CFA) and/or (v) Chartered Investment Counselor (CIC).

FEDERAL COVERED INVESTMENT ADVISERS

NOTICE FILING

Each Federal Covered Investment Adviser, unless they are within the *de minimus* exemption, must file a duly executed Form ADV through the IARD and pay a \$200 fee. The filing is deemed filed when the fee and the Form ADV are filed and accepted by IARD on behalf of the state. In that the IARD does not yet provide for the filing of Part 2 to Form ADV, Part 2 must be filed in paper form with the Department of Law.

UPDATES AND AMENDMENTS

Federal Covered Investment Advisers must file updates and amendments in accordance with the instructions to Form ADV through the IARD. Although the rules covering notice filings do not specify, it appears that amendments for Federal Covered Investment Advisers should also be filed within thirty (30) days of the event which requires the filing of an amendment.

RENEWAL

Each Notice Filing by a Federal Covered Investment Adviser must be renewed annually by filing with the IARD, the renewal fee of \$200. The renewal will be deemed filed when the fee is filed and accepted by IARD on behalf of the state.

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If you have any questions regarding the New York Investment Advisers Act and its application, please contact Sarah E. Cogan (scogan@stblaw.com), Cynthia G. Cobden (ccobden@stblaw.com), Mark T. Lab (mlab@stblaw.com), Brynn E. Peltz (bpeltz@stblaw.com) or Martin A. Hewitt (mhewitt@stblaw.com) of our firm at (212) 455-2000.

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SCHEDULE OF FINANCIAL INSTITUTIONS
AND INSTITUTIONAL BUYERS

Financial institution shall mean:

(1) a bank as defined under General Business Law §359-e; or

(2) credit union, or similar institution that is organized or chartered under the laws of a State or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a State or the United States if its deposits or share accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law. The terms does not include:

(A) an insurance company or other organization primarily engaged in the business of insurance;

(B) a Morris Plan bank; or

(C) an industrial loan company

Institutional buyer shall mean any of the following, whether acting for itself or for others in a fiduciary capacity:

(1) a depository institution or international banking institution;

(2) an insurance company;

(3) a separate account of an insurance company

(4) an investment company as defined in the Investment Company Act of 1940;

(5) a broker-dealer registered under the Securities Exchange Act of 1934;

(6) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974 (ERISA), that is a broker-dealer registered under the Securities Exchange Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under the Act, a depository institution, or an insurance company;

(7) a plan established and maintained by a State, a political subdivision of a State, or an agency or instrumentality of a State or a political subdivision of a State for the benefit of its employees, if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in ERISA, that is a broker-dealer registered under the Securities Act of 1934, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, an investment adviser registered under this Act, a depository institution, or an insurance company;

(8) a trust, if it has total assets in excess of \$10,000,000, its trustee is a depository institution, and its participants are exclusively plans of the types identified in subparagraph (6) or (7), regardless of size of assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans;

(9) an organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Section 501(c)(3)), a corporation, Massachusetts or similar business trust, limited liability company, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$10,000,000;

(10) a small business investment company licensed by the Small Business administration under Section 301(c) of the Small Business Investment Act of 1958 (15 U.S.C. Section 681(c) with total assets in excess of \$10,000,000;

(11) a private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940 (15 U.S.C. Section 80b-2(a)(22)) with total assets in excess of \$10,000,000;

(12) a federal covered investment adviser acting for its own account;

(13) a “qualified institutional buyer” as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(H), adopted under the Securities Act of 1933;

(14) a “major United States institutional investor” as defined in Rule 15a-6(b)(4)(i) adopted under the Securities exchange Act of 1934.