The Ohio Investment Adviser and Investment Adviser Representative Handbook

Ohio Department of Commerce, Division of Securities
Licensing Section
Updated as of March, 2017

The Ohio Department of Commerce

The mission of the Ohio Department of Commerce is to safeguard Ohio's citizens and visitors, their property and resources while ensuring reliable marketplaces conducive to business growth and prosperity.

The Ohio Division of Securities

The Division of Securities, within the Ohio Department of Commerce, administers and enforces the Ohio Securities Act. The Division licenses broker-dealers, securities salespersons, investment advisers, and investment adviser representatives. The Division also registers securities offered for sale to Ohioans. When Ohio Securities law is violated, the Division can pursue administrative actions, civil injunctive actions, and criminal referrals.

Mission: Promoting capital formation while protecting Ohio investors from fraudulent securities and investment schemes through the sale of properly registered securities by licensed professionals.

Disclaimer: This compilation of material and information was prepared by the Ohio Division of Securities to provide general information and assistance regarding the Division's oversight of investment advisers and investment adviser representatives in Ohio. This information is not legal advice and is not a substitute for a thorough review of the relevant statutory provisions set out in Chapter 1707 of the Ohio Revised Code and related administrative rules set out in Chapter 1301:6-3 of the Ohio Administrative Code.

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Introduction

The Ohio Securities Act (the "Act") provides for oversight of investment advisers and investment adviser representatives operating in Ohio. This oversight is administered and enforced by the Division of Securities (the "Division"). Subject to certain limited exceptions, all investment advisers operating in Ohio must be either licensed by the Division or in compliance with certain notice filing requirements. Further, subject to certain limited exceptions, all investment adviser representatives with a place of business in Ohio must be licensed by the Division. Filings and fees for investment adviser notice filings or licensure must be submitted electronically through the Investment Adviser Registration Depository (IARD), a nationwide database and filing system maintained by the Financial Industry Regulatory Authority (FINRA) that is available at www.iard.com. Filings and fees for investment adviser representative licensure must be submitted electronically through the Central Registration Depository (CRD), the companion FINRA database to IARD.

Pursuant to the federal National Securities Markets Improvement Act of 1996, as amended, and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, only certain investment advisers are eligible to be registered with the federal Securities and Exchange Commission (the "Commission"). Generally, there are eleven categories of investment advisers that are permitted to register with the Commission. The most commonly relied upon category is for investment advisers that have assets under management of one hundred million dollars ($100,000,000) or more. Subject to certain limited exceptions, investment advisers registered with the Commission that are operating in Ohio must comply with the Act's notice filing requirements.

Investment advisers operating in Ohio that are not registered with the Commission must be licensed by the Division, subject to four limited exceptions.

Similarly, all investment adviser representatives with a place of business in Ohio must be licensed by the Division, subject to five limited exceptions. The general rule requiring licensure for investment adviser representatives holds true regardless of whether the investment adviser representative is affiliated with a Commission-registered investment adviser or a state-licensed investment adviser.

The starting points for consideration of Ohio investment adviser and investment adviser representative requirements are the definitional sections. "Investment adviser" is defined in Revised Code 1707.01(X). "Investment adviser representative" is defined in Revised Code 1707.01(CC). These definitions track the definitions of these terms contained in federal law.

If a person meets the definition of investment adviser or investment adviser representative under Ohio law, the person then must look to the Act's licensing and

notice filing requirements. Revised Code 1707.141 and Revised Code 1707.151 set out the licensing and notice filing requirements for investment advisers, and Revised Code 1707.161 sets out the licensing requirements for investment adviser representatives.

Finally, investment advisers and investment adviser representatives are subject to certain anti-fraud and conduct standards. These standards are contained primarily in Revised Code 1707.44(M) and Ohio Administrative Code 1301:6-3-15.1 and 1301:6-3-44.

Violations of the Act can result in criminal penalties. Revised Code 1707.99 provides that the penalties for certain violations range from fifth degree to first degree felonies. Violations can also give rise to civil liability. Consequently, the Division urges investment advisers and investment adviser representatives to take their compliance responsibilities seriously.

All references to the Ohio Revised Code http://codes.ohio.gov/orc/1707 and Ohio Administrative Code http://codes.ohio.gov/oac/1301%3A6-3 can be reviewed on the Ohio Department of Commerce's website at www.com.ohio.gov (Resources tab).

Part 1 – Licensing – Applications, Renewals, Termination

I. Investment Adviser Licensing

i. Are you an Investment Adviser under Ohio law?

1. "Investment Adviser"

The Ohio definition of "investment adviser" is contained in Revised Code 1707.01(X), and parallels the federal definition (*see* § 202(a)(11) of the Investment Advisers Act of 1940).

In general, an investment adviser is a person who: (1) for compensation; (2) engages in the business of; (3) advising others as to the value of securities or the advisability of investing in securities.

The flow chart, provided at Appendix C, titled *"Are You an Investment Adviser Under Ohio Law?"* and accompanying notes provide a step-by-step guide through the elements of, and exclusions from, this definition.

2. Three Elements

The **three elements** are broadly construed. The **"compensation" element** is satisfied by the receipt of any economic benefit by the person providing advice. The **"engaged in the business" element** is satisfied if any one of the following occurs: (1) the person holds himself or herself out as an investment adviser or as one who provides investment advice; (2) the person receives compensation that represents a clearly definable charge for providing advice about securities; or (3) the person, on anything other than rare, isolated and non-periodic instances, provides specific investment advice. Finally, as to the **third element, the advice must pertain to "securities."** However, in order to satisfy the "securities" element, the advice need not be about specific securities, but rather only about securities as an investment alternative.

Keep in mind that it is not necessary that a person's activities consist solely of investment advisory services in order to qualify as an investment adviser. Rather the test is whether any part of the person's activities meet the three elements of "for compensation," "engaged in the business," and "regarding securities." For example, a recommendation to sell securities holdings in order to purchase a particular insurance product may satisfy the definition of an investment adviser where the insurance sale results in a commission payment.

3. Exclusions from the definition of "Investment Adviser"

Revised Code 1707.01(X)(2) excludes several classes of persons from the Ohio definition of investment adviser. These exclusions track the exclusions from the federal definition

of investment adviser. (*See* § 202(a)(11)(A)-(F) of the Investment Advisers Act of 1940). Whether an exclusion is available depends on all of the relevant facts and circumstances.

ii. How to Form an Investment Adviser Firm in Ohio

If you determine that you meet the definition of an Investment Adviser under Ohio law and that you are required to be licensed, you need to take steps to become licensed.

- Determine the legal status of your firm. The most common structures are Corporation, Sole Proprietorship (see "Establishing an Investment Adviser Firm as a Sole Proprietor"), Limited Partnerships, Partnership, and Limited Liability Company. To determine the best structure for your firm, you should consult with an attorney or accounting professional for guidance.

- Register your firm with the Ohio Secretary of State's office and obtain an EIN for your firm, if applicable. Helpful sites to visit are: www.sos.state.oh.us and www.irs.gov.

- Establish that your firm has a representative that meets minimum competency requirements and determine if the representative is required to submit fingerprints. Investment Adviser Representative licensing requirements are discussed in the Minimum Competency Requirements section of this guide.

- Establish an IARD account, through FINRA's Web IARD at: www.iard.com/accessIARD.asp. This is how a firm applies for licensure and funds the payments for licensing and future renewals. IARD Gateway Call center representatives can be reached at 240-386-4848.

- Applications for licensure must be submitted electronically using the IARD system. Create and file on the IARD System the Form ADV Parts 1A and 1B, Parts 2A and 2B, and wrap fee brochure (Appendix 1), if applicable. These documents make up your firm's application. The Form ADV in its entirety as well as the Instructions and Glossary are available at: www.sec.gov/about/forms/formadv.pdf.

- Pay the applicable licensing fees for your firm and all IARs as prescribed in Revised Code 1707.17(B).

- Create your firm's Compliance Manual, policies and procedures, business continuity plan and investment advisory agreement. These requirements are discussed in more detail in Compliance Manual section of this guide.

- Install your initial recordkeeping procedures, including your accounting records that you will use for creating the required financial statements. These requirements are discussed in Books and Records.

- Once you have filed your initial application material on the IARD, the Division requires a Pre-Licensing Examination. The exam will require that certain documents be provided. *See Appendix E*.

iii. Investment Adviser Branch Offices

If you operate a branch office(s) other than your primary office, you need to register the branch office with the Division. Each investment adviser must file a Form BR through IARD to report a "place of business" other than their principle place of business. "Place of business" is defined in OAC 1301:6-3-01(G) to include two categories of locations. First is an office at which an investment adviser or investment adviser representative regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients. Second is any other location that is held out to the general public as a location at which an investment adviser or investment adviser representative provides investment advisory services, solicits, meets with or otherwise communicates with clients. There is no filing fee for filing the Form BR.

iv. Establishing an Investment Adviser Firm as a Sole Proprietor

Revised Code 1707.151(B) provides that each natural person applicant for an investment adviser license (i.e., as a sole proprietor) must demonstrate their competence to engage in the advisory business. A sole proprietor investment adviser is a natural person who has not created a legal entity to engage in that business. Sole proprietor investment advisers should keep in mind that, as with firms, they are subject to anti-fraud and business conduct standards.

In addition, because sole proprietor investment advisers are distinguished from sole shareholders of corporate investment advisers, sole proprietor investment advisers need not file a Form U-4 with the Division and need not be licensed as an investment adviser representative (unless the person also acts as an investment adviser representative for another investment adviser). However, in addition to submitting the Form ADV and filing fee through the IARD/CRD system, a sole proprietor must also submit a standard impression sheet for fingerprints provided by the Division if one is not already on file with the Division. For more information about the fingerprinting requirements, see the section on Fingerprinting in this guide.

A sole proprietor investment adviser must also demonstrate "good business repute" (as discussed in The "Good Business Repute" Standard section of this guide) and minimum competency. Under Ohio Administrative Code 1301:6-3-15.1(C), the minimum competency standard for sole proprietors may be satisfied in one of three ways:

- By achieving a passing score *on or after* January 1, 2000, on the Uniform Investment Adviser Law Examination, Series 65; or

- By achieving a passing score *on or after* January 1, 2000, on the Uniform Combined State Law Examination; Series 66 and also, at any time, the General Securities Representative Examination, Series 7; or

- By earning and being in good standing with the organization that issued any of the following credentials:
  - Certified Financial Planner awarded by the Certified Financial Planner Board of Standards, Inc.;
  - Chartered Financial Analyst;
  - Chartered Financial Consultant;
  - Chartered Investment Counselor; or
  - Certified Public Accountant with a Personal Financial Specialist designation.

An applicant who is not affiliated with a FINRA-registered securities dealer may register for the Series 63, Series 65 or Series 66 by submitting to FINRA a completed Form U-10, Uniform Examination Request for Non-FINRA Candidates. These examinations are administered by NASAA (North American Securities Administrators Association). For information about registration, scheduling, and study guides, visit their website for more information: www.nasaa.org

v. The "Good Business Repute" Standard

In addition to the application requirements described above, Revised Code 1707.151(E) requires the Division to make an affirmative finding that an applicant is of "good business repute" before granting a license. To determine if you meet the "good business repute" standard, the Division is guided by the factors set forth in Ohio Administrative Code 1301:6-3-19(D), which generally includes whether the applicant has:

- Engaged in fraudulent conduct or been found liable for conduct constituting incompetence in financial activities;

- Been subject to administrative, civil or other disciplinary action by a regulatory agency, or failed to fully satisfy any judgment or award;

- Been found guilty of a felony, or of any misdemeanor involving theft, deception or moral turpitude; or

- Engaged in any conduct that would reflect on the applicant's reputation for honesty, integrity and competence in business and personal dealings.

vi. Application Review Process – Approval or Denial

Failure to answer all questions on the appropriate forms, and failure to provide all required information will delay the Division's review of an application. By rule, the Division may terminate an application with unresolved deficiencies that remains pending for more than 180 days. See OAC 1301:6-3-15.1(K).

Pursuant to Revised Code 1707.151(D), the Division may investigate any license applicant and may require any additional information as it deems necessary in consideration of the application.

If the Division determines that an applicant lacks good business repute, the Division will issue to the applicant a notice of intent to deny the application. The applicant must, within 30 days, either withdraw the application or, pursuant to Revised Code Chapter 119, request an administrative hearing. Failure to withdraw the application or request a hearing within 30 days will result in the issuance by the Division of a final order to deny the application.

II. Investment Adviser Representative Licensing

i. Are you an "Investment Adviser Representative" under Ohio law?

The Ohio definition of "investment adviser representative" ("IAR") is contained in Revised Code 1707.01(CC), and parallels the federal definition (*See* Commission Rule 203A-3(a)). The flow chart, available at Appendix C, entitled *"Are You an Investment Adviser Representative Under Ohio Law?"* and accompanying notes, provide a step-by-step guide through the elements of this definition.

In general, an investment adviser representative is an individual who gives advice on behalf of an investment adviser to a certain minimum number of natural person clients through regular meetings or communications.

- **Supervised Person:** Specifically, in order to be an investment adviser representative, the person **first must be a "supervised person"** as defined in Revised Code 1707.01(DD) and generally means officers, directors and employees of an investment adviser as well as others who provide advice on behalf of the investment adviser firm.

- **More than five Clients:** The supervised person must have more than five clients who are natural persons other than "excepted persons," and more than 10% of the clients must be natural persons other than "excepted persons." "Excepted person" is defined in Revised Code 1707.01(EE) and generally means certain wealthy and high net worth individuals.

- **Client meetings:** The supervised person must on a regular basis solicit, meet with, or otherwise communicate with clients of the investment adviser.

All three of these elements must be met in order for a person to qualify as an investment adviser representative. However, even if a person meets all three of these elements, Revised Code 1707.01(CC)(1)(b) provides that the person is excluded from the definition of investment adviser representative if the natural person provides advisory services only by means of written materials or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts.

ii. How do I apply to be an IAR in Ohio?

Ohio Revised Code 1707.161(D)(1) states that an application for an investment adviser representative license shall consist of the information, materials, and forms specified in rules adopted by the Division. Ohio Administrative Code 1301:6-3-16.1(A) specifies that an application shall consist of:

- A completed Form U-4 for each individual for whom the applicant seeks to act as an investment adviser representative;
- The license fee prescribed in ORC 1707.17(B); and
- The fingerprinting requirement.

iii. Fingerprinting Requirement

All investment adviser representatives are required to be fingerprinted when applying for a license. However, there are two exceptions to this rule:

- If the investment adviser representative is (or was) licensed as a securities salesperson with the Division and has filed fingerprints with FINRA, it is not necessary to be reprinted, or
- If the investment adviser representative has previously been licensed with the Division and previously filed fingerprints, it is not necessary to be reprinted.

For Ohio residents, the Division only accepts electronic fingerprints taken via WebCheck. Below is a website you can use to find a WebCheck location near you:

www.ohioattorneygeneral.gov/Services/business/webcheck

The Division cannot accept fingerprint results directly from the applicant or their employing firm. Please bring the Division's address to the facility for the results to be sent directly to the Division:

Ohio Department of Commerce
Division of Securities
77 S. High Street, 22nd Floor
Columbus, OH 43215

A WebCheck facility will request the "reason for printing." Please have the WebCheck personnel choose "other" and fill in "IAR Registration, pursuant to OAC 1301:6-3-16.1." The impressions will be forwarded directly to the Attorney Generals' Bureau of Criminal Investigation ("BCI") and then be sent to the Division. It may be necessary to notify the WebCheck personnel that the fingerprint results must be sent directly to the Division, not to the adviser/firm to then route them to the Division. The Division can only accept results if they come directly from BCI.

For non-Ohio residents, please contact the Division at (614) 644-6292, and a Division-specific fingerprint impression card will be forwarded to you.

iv. Minimum Competency – Series Examinations

Ohio Administrative Code 1301:6-3-16.1(B)(1)

An IAR applicant must achieve a passing score on **one** of the following tests administered by FINRA or NASAA to satisfy the minimum competency requirements for licensure:

- Investment company and variable contracts representative, series 6;
- General securities representative, series 7;
- Direct participation programs representative, series 22;
- General securities principal, series 24;
- Investment company and variable contracts principal, series 26;
- Direct participation programs principal, series 39;
- Corporate securities representative, series 62;
- Uniform securities agent state law examination, series 63;
- Uniform investment adviser law examination, series 65;
- Uniform combined state law examination, series 66

In Ohio, there is no lapse period for the validity of series the examinations. All passing scores on qualifying exams, taken at any time, are considered for meeting minimum competency. If you are a sole proprietor, there are additional requirements, please refer to page 8.

An applicant who is not affiliated with a FINRA-registered securities dealer may register for the Series 63, Series 65 or Series 66 by submitting to FINRA a completed Form U-10,

Uniform Examination Request for Non-FINRA Candidates. These examinations are administered by NASAA (North American Securities Administrators Association). For information about registration, scheduling, and study guides, visit their website for more information: www.nasaa.org

The Series 65 Examination

When a firm submits an IAR application by updating the individual's U4, there is a chance (if the applicant has not taken the Series 65, or has passed the exam more than 2 years ago) that FINRA will automatically open a Series 65 Exam Window for this applicant, and charge the employing firm for the examination.

Since Ohio does not require the 65, if the applicant already has a qualifying examination or meets other minimum competency, this exam can be WAIVED, and the exam fees can be REIMBURSED to the firm.

In order to have the fee for the Series 65 examination refunded, you must provide the Division with the firm's name and CRD number, the representative's name and CRD number, the transaction number, and posting date of the transaction. The above information should be e-mailed to: securitiesgeneral.questions@com.state.oh.us

v. Minimum Competency – Professional Designations

Ohio Administrative Code 1301:6-3-16.1(B)(2)

As an alternative to the Series Examinations, an applicant can qualify for licensure with the Division by providing verification that they are in good standing with the organization that issues credentials for one of the following designations:

- Certified Financial Planner- www.cfp.net;
- Chartered Financial Analyst - www.cfainstitute.org;
- Chartered Investment Counselor – www.invstmentadviser.org;
- Chartered Financial Consultant - www.chfhigheststandard.com; and
- Certified Public Accountant with a Personal Financial Specialist designation - www.nasba.org and www.aicpa.org.

For more in-depth information, please visit the websites provided.

vi. Unaffiliated IA Dual Registration

Revised Code 1707.161(B)(1) permits an investment adviser representative to act as an investment adviser representative for up to two unaffiliated investment advisers, provided that the investment adviser representative:

- Is properly licensed, or properly excepted from licensure, as an investment adviser representative for each of the two investment advisers; *and*

- Notifies both investment advisers of the dual affiliation via filing of the Form U-4 on the IARD/CRD system and retains evidence of that notification in his or her records.

vii. The "Good Business Repute" Standard

In addition to the application and minimum competency requirements described above, Revised Code 1707.161(E) requires the Division to make an affirmative finding that an applicant is of "good business repute" before granting a license.

Determining the existence of good business repute. The Division is guided by the factors set forth in Ohio Administrative Code 1301:6-3-19(D), which generally include whether the applicant has:

- Engaged in fraudulent conduct or been found liable for conduct constituting incompetence in financial activities;

- Been subject to administrative, civil or other disciplinary action by a regulatory agency, or failed to fully satisfy any judgment or award;

- Been found guilty of a felony, or of any misdemeanor involving theft, deception or moral turpitude; or

- Engaged in any conduct that would reflect on the applicant's reputation for honesty, integrity and competence in business and personal dealings.

If the Division determines that an applicant lacks good business repute, the Division will issue to the applicant a **notice of intent to deny the application**. The applicant must, within 30 days, either withdraw the application or, pursuant to Revised Code Chapter 119, request an administrative hearing. Failure to withdraw or request a hearing within 30 days will result in the issuance by the Division of a final order to deny the application.

viii. Application Review Process – Approval and Denial

Failure to answer all questions on the appropriate forms, and failure to provide all required information will delay the Division's review of an application. By rule, the Division may terminate an application with unresolved deficiencies that remains pending for more than 180 days. See OAC 1301:6-3-16.1(G).

Pursuant to Revised Code 1707.161(D), the Division may investigate any applicant and may require any additional information as it deems necessary in consideration of the application.

If the Division determines that an applicant lacks good business repute, the Division will issue to the applicant a notice of intent to deny the application. The applicant must, within 30 days, either withdraw the application or, pursuant to Revised Code Chapter 119, request an administrative hearing. Failure to withdraw the application or request a hearing within 30 days will result in the issuance by the Division of a final order to deny the application.

III. Renewal and Expiration of a License

All investment adviser and investment adviser representative licenses expire on December 31st each year unless they are renewed through the Web IARD/CRD. All investment advisers must renew the firm and their investment adviser representatives' licenses through the Web IARD/CRD.

A Preliminary renewal statement is made available to each firm online in Web IARD/CRD in mid-November each year. The firm's renewal account must be funded for the entire preliminary renewal statement amount, regardless of whether there are additions or deletions in the number of investment adviser representatives, in order for the firm and their investment adviser representatives to be renewed. Failure to fund the renewal account with the entire amount of the preliminary renewal account statement will result in the firm and its investment adviser representatives being terminated. The renewal account must be funded prior to Web IARD/CRD shutdown in mid to late December. There are no exceptions in Ohio. You must renew through Web IARD/CRD. Ohio cannot accept payment directly to the Division.

All licenses not renewed by the deadline will terminate as a matter of law – there are no grace periods. Investment advisers and investment adviser representatives that "fail to renew" must re-apply with the Division.

IV. How to Terminate a License – Discontinuing Business

Ohio Administrative Code 1301:6-3-15.1(I)

A notice of withdrawal from licensure shall be filed with the Division via the IARD on Form ADV-W in accordance with its instructions. The IA should include on the Form ADV-W the exact address where the books and records will be maintained during such period. Investment adviser representatives licensed with the terminating firm should have a Form U5 filed on their behalf.

The records of an investment adviser ceasing to conduct or discontinue business shall arrange for and be responsible for the preservation of the records in compliance with the Ohio Administrative Code for a period of five years after the firm ceases doing business.

PART 2 - Compliance Obligations

I. Books and Records

Ohio Administrative Code 1301:6-3-15.1(E).

The following books and records must be maintained in true and accurate form by investment advisers headquartered in Ohio and licensed with the Division.

i. Financial Records

Ohio Administrative Code 1301:6-3-15.1(E)(1)(a), (b), (d)–(f)

- Cash receipts and disbursement journals and other records of original entry forming the basis for entries in any ledger
- General and auxiliary ledgers reflecting assets, liabilities, reserves, capital, income and expense accounts
- All check books, bank statements, and bank reconciliations of the adviser
- All bills or statements (paid or unpaid) relating to the business of the investment adviser as such
- All trial balances, quarterly financial statements (which includes balance sheets and income or profit and loss statements), and internal audit working papers relating to the investment adviser's business

ii. Trading Records

Ohio Administrative Code 1301:6-3-15.1(E)(1)(c) and (h), (E)(2)-(3)

- A memorandum for each order given for the purchase or sale of securities, including terms, conditions and instructions received from the client, and any modification or cancellation of the order. The memorandum must identify the affiliated person who recommended the transaction, the person who placed the order, the account involved, the date of entry, and the bank, broker or dealer that executed the order. Orders entered pursuant to discretionary power are to be so designated
- A list or record of all accounts in which the adviser has discretionary power as to funds, securities or transactions
- For advisers that have custody or possession of client funds or securities, records must include (a) a journal of purchases, sales, receipts and deliveries of securities, showing certificate numbers and all other debits and credits to the accounts; (b) a separate ledger account for each client showing purchases, sales, receipts and deliveries, showing the date and price for each transaction and all debits and credits; (c) copies of confirmations of all transactions effected by or for clients' accounts; (d) a record for each security in which any client has a position, showing the name of each client having an interest in the security, the amount or interest of each client, and the location of each such security; and (e) the required accountant's certificate verifying client funds and securities in the adviser's possession

- For advisers who render investment advisory or management services to clients, records with respect to the portfolio being supervised or managed (to the extent reasonably available or obtainable) must include accurate and current records showing separately for each client the securities purchased and sold; the date, amount, and price of each transaction; and for each security in which any client has a current position, information from which the adviser can promptly furnish the name of each client and its current amount or interest in the security. Client records may be maintained using a code instead of the client's name so long as when requested the name and other identifying information is promptly provided to the Division

i. Correspondence

Ohio Administrative Code 1301:6-3-15.1(E)(1)(g)

Originals of all written communications received and copies of all written communications sent:

- relating to recommendations or advice given (or proposed to be given);
- relating to receipt, disbursement or delivery of funds or securities; or
- relating to the placing or execution of any order to purchase or sell securities.

The adviser does not need to keep the names and addresses of persons to whom a publication was sent when it was distributed to more than 10 persons, but must keep with the copy of the publication a memorandum describing any list to whom the publication was sent and the source of the list. The adviser does not need to keep unsolicited market letters or similar communications of general public distribution not prepared by or for the adviser.

ii. Advertising Records

Ohio Administrative Code 1301:6-3-15.1(E)(1)(k) and (p)

- A copy of any notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication, including electronic and internet communications or postings to internet sites, that are distributed to ten or more persons (other than people connected with the investment adviser). If the communication recommends the purchase or sale of a specific security without giving the reasons for the recommendation, the adviser must keep a memorandum indicating the reasons
- All accounts, books, internal working papers, and other records or documents that support the performance or rate of return calculations for managed accounts or securities recommendations that are advertised or circulated to ten or more persons (other than persons connected with the investment adviser). With respect to performance of managed accounts, it is sufficient to retain the account statements and related worksheets

iii. Client Records

Ohio Administrative Code 1301:6-3-15.1(E)(1)(h)-(j), (q)-(r)

- All client lists, including list of clients that have terminated with the IA
- All advisory contracts entered into by the adviser or its investment adviser representatives
- Originals or copies of all powers of attorney or similar documents from clients granting the adviser discretionary authority
- Originals or copies of all written agreements with clients or agreements otherwise relating to the adviser's business

iv. Miscellaneous Records

Ohio Administrative Code 1301:6-3-15.1(E)(1)(l)

A record of every securities transaction (other than in US government securities) over which the adviser or any of its advisory representative has, influence or control and in which the adviser or advisory representative has, or by reason of the transaction acquires, any direct or indirect beneficial ownership. The record must state the title and amount of securities involved, the date and nature of the transaction, the price, and the name of the broker, dealer or bank through whom the transaction was effected. The record may also contain a statement declaring that the recording of the transaction is not an admission that the adviser or representative has a beneficial ownership interest in the security. The transaction must be recorded not later than ten days after the end of the calendar quarter in which it was effected. "Advisory representative" is defined broadly to include affiliates, partners, officers, directors and those employees connected with the advisory activities. Where 50% or less of the adviser's business was from advising clients, a narrower group of management officials are covered. An adviser is protected if the adviser instituted adequate procedures and used reasonable diligence to promptly obtain reports of all transactions required to be recorded.

v. Disclosure Records

Ohio Administrative Code 1301:6-3-15.1(E)(1)(n)

- A copy of the written disclosure statement, Form ADV Part 2A, 2B, Appendix, (and each amendment or revision) made available and a record of the dates that they were given or offered to each client or prospective client who subsequently became a client
- All written disclosure documents delivered to clients by third-party solicitors and all written acknowledgments of receipt of such documents received back from clients

vi. Compliance Policies and Procedures

Ohio Administrative Code 1301:6-3-15.1(E)(1)(s)-(t); and 44(H)

Advisers are required to maintain compliance policies and procedures, and records of their annual review of those compliance policies and procedures. Please note that advisers should maintain copies of the various "versions" of their manual for five years from the end of the fiscal year that the "version" was used.

It is advisable to set up routine compliance procedures, including the update of your compliance manual to stay on top of your requirements. The Division will advise you of important requirements, including rule/requirement changes, when they occur

vii. Retention Period of Books and Records

Ohio Administrative Code 1301:6-3-15.1(E)(5)

All books and records required to be made 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 the record. The first two years must be maintained in an appropriate office of the investment adviser.

viii. Electronic Storage

Ohio Administrative Code 1301:6-3-15.1(E)(7)

The records required to be maintained and preserved may be maintained and preserved electronically, however the investment adviser must arrange and index the records in a way that permits easy location, access and retrieval of the record and must be able to promptly provide legible true and complete copies when requested by the Division. The Division permits advisers to maintain records exclusively with third parties (e.g. cloud storage); however, it is the ultimate responsibility of the investment adviser to comply with all aspects of the record retention rules.

ix. Book and Records Should be kept Current

Each Investment Adviser licensed with the Division shall make and keep, true, accurate and ***current*** books and records relating to its advisory business. Records must be created at the time of or in proximity to the entry, action, or occurrence.

II. Financial Records required to be kept quarterly

Ohio Administrative Code 1301:6-3-15.1(E)(1)

Investment advisers are required to make and keep accurate and current financial records. All financial records must be prepared on a quarterly basis. Please refer to the Books and Records section of this Guide for the specific types of records. **If an IA is a sole-proprietor, it is recommended that financial records for the investment adviser be kept separate from the sole proprietor's records. It is also recommended that financial software be used or that the investment adviser employ an accountant.**

III. The Brochure Rule - Form ADV (Parts 1 and 2)

Ohio Administrative Code 1301:6-3-15.1(G)

a. Form ADV Part 1

Part 1 of Form ADV is required to be updated within 90 days AFTER the end of your fiscal year. In addition to your *annual updating amendment*, you must amend your Form ADV Part 1, including corresponding sections of Schedules A, B, C, and D, by filing additional amendments promptly if:

- Information you provided in response to Items 1, 3, 9 (except 9.A.(2), 9.B.(2), 9.E., and 9.F.), or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of Part 1B becomes inaccurate in any way; or
- Information you provided in response to Items 4, 8, or 10 of Part 1A or Item 2.G. of Part 1B becomes materially inaccurate.

b. Form ADV Parts 2 A and B

(also known as: "brochure" or "disclosure document" and "brochure supplement")

Every investment adviser is required to deliver to each client and prospective client a written disclosure document, describing the investment adviser's business practices, education, and business background.

Unless otherwise provided in the Ohio Administrative Code, an investment adviser shall follow all current Instructions to the Form ADV issued by the Securities and Exchange Commission with regard to the completion, filing, delivery, and updating of the form ADV Part 2A (Brochure statement) and Form ADV Part 2B (Brochure Supplement). A general summary is as follows:

- **Give your Brochure:** You must give a Brochure to each client before or at the time you enter into an advisory agreement. Evidence of providing the Brochure is required. This evidence can be in the form of a signed receipt, or language can be made as part of the client contract.
- **Update your Brochure** each year at the time you file your annual updating amendment on the IARD system. The amount of client assets under management and fee schedule should be updated at this time. Item 2, Material Changes, should also be updated by clearly indicating that you are including only material changes since the last annual update of your brochure. You must then provide the date of the last annual update of your brochure. If there are no material changes since your last update, you should state that there are no material changes. Please note that you must maintain each update in your files.
- **File your Brochure** through the IARD annually within 90 days of the end of your fiscal year. However, if information in your brochure becomes materially inaccurate, you must update it promptly. According to Ohio Administrative Code 1301:6-3-01, the word "promptly" requires licensees to amend or update any

filings within 30 calendar days of learning of facts or circumstances giving rise to an amendment or update.

- **Annual Delivery:** Each year you must either deliver within 120 days of your fiscal year-end your Brochure to each client, that either includes or is accompanied by a summary of material changes (Item 2), OR you must provide a summary of material changes and offer your clients the Brochure if they are interested. **If you do not have any material changes:** You do not have to deliver or offer the Brochure to your clients annually.
- **Interim Delivery:** If any information in response to Item 9 of Part 2A (disciplinary information) changes, you are required to provide an interim update of your Wrap Fee Program Brochure to your wrap fee clients.

c. Material changes

Depending on the facts and circumstances, examples of material changes may include, but are not limited to:

- Change of address/location or contact information (e.g., phone number, email)
- New Owners of Investment Adviser entity
- Significant change in services offered
- New potential conflict of interest
- A new fee schedule
- Changes in disciplinary history
- Changes in the custodian or broker used
- Changes in licensing status with the SEC or state(s)

d. Wrap Fee Program Disclosures

For advisers offering a wrap fee program, they shall follow all current instructions to the Form ADV issued by the SEC with regards to the completion, filing, delivery, and updating of the Form ADV Part 2A, Appendix 1.

- **Preparing a Wrap Fee Program Brochure:** If you sponsor a wrap fee program, you must prepare a Wrap Fee Program Brochure. If you sponsor more than one wrap fee program, you may prepare a single Wrap Fee Program Brochure describing all of the programs or you may prepare separate brochures for each program. If you provide advisory services outside of a wrap fee program, you must prepare a separate brochure for those advisory services. If a wrap fee program that you sponsor has multiple sponsors, and another sponsor creates and delivers to your wrap fee program clients a brochure that includes all of the required information, you do not have to create or deliver a separate Wrap Fee Program Brochure.
- **Give your Wrap Fee Program Brochure:** You must give a Wrap Fee Program Brochure to each client of the wrap fee program before or at the

time the client enters into a wrap fee program contract. Evidence of providing such is required. This evidence can be in the form of a signed receipt, or language can be made as part of the client contract.

- **Update your Wrap Fee Program Brochure** each year at the time you file your annual updating amendment on the IARD system and otherwise promptly whenever any information in the Wrap Fee Program Brochure becomes materially inaccurate.
- **File your Wrap Fee Program Brochure** through the IARD annually within 90 days of the end of your fiscal year. However, if information in your Wrap Fee Program Brochure becomes materially inaccurate, you must update it promptly. According to Ohio Administrative Code 1301:6-3-01, the word "promptly" requires licensees to amend or update any filings within 30 calendar days of learning of facts or circumstances giving rise to an amendment or update.
- **Annual Delivery:** Each year you must either deliver within 120 days of your fiscal year-end your wrap-fee program brochure to each client, that either includes or is accompanied by a summary of material changes (Item 2), OR you must provide a summary of material changes and offer your Wrap Fee Program Brochure.
- **Interim Delivery:** If any information in response to Item 9 of Part 2A (disciplinary information) changes, you are required to provide an interim update of your Wrap Fee Program Brochure to your wrap fee clients.

IV. Advertising

Ohio Administrative Code 1301:6-3-44(A)

Investment advisers and their investment adviser representatives are prohibited from using any advertisement that contains any untrue statement of a material fact or that is otherwise misleading. The rule broadly defines "advertisement" to include any notice, circular, letter or other written communication addressed to more than one person, or any notice, circular, letter or other written communication or any communication by electronic means including but not limited to email, the Internet, any social media sites, CD-Rom or DVD which are disseminated to more than one person, or any notice or other announcement in any publication or by radio or television.

In addition, an advertisement may not:

- Use or refer to testimonials (which include any statement of a client's experience or endorsement)
- Refer to past, specific recommendations made by the adviser that were profitable, unless the advertisement sets out a list of all recommendations made by the adviser within the preceding period of not less than one year, and complies with other, specified conditions

- Represent that any graph, chart, formula, or other device can, in and of itself, be used to determine which securities to buy or sell, or when to buy or sell such securities, or can assist persons in making those decisions, unless the advertisement prominently discloses the limitations thereof and the difficulties regarding its use
- Represent that any report, analysis, or other service will be provided without charge unless the report, analysis or other service will be provided without any obligation whatsoever

V. Performance Advertising

Ohio Administrative Code 1301:6-3-44(A)(1)(b)

Consistent with the position taken by the Commission, the Division takes the position that an adviser may advertise its past performance (both actual performance and hypothetical or model results), only if the advertisement meets certain conditions and restrictions. An advertisement using performance data must disclose all material facts necessary to avoid any unwarranted inference.

Among other things, an adviser may not advertise its performance data if the adviser:

- Fails to disclose the effect of material market or economic conditions on the results portrayed (e.g., an advertisement stating that the accounts of the adviser's clients appreciated in value 25% without disclosing that the market generally appreciated 40% during the same period)
- Includes model or actual results that do not reflect the deduction of advisory fees, brokerage or other commissions, and any other expenses that a client paid or would have paid
- Fails to disclose whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings
- Suggests or makes claims about the potential for profit without also disclosing the possibility of loss
- Compares model or actual results to an index without disclosing all material facts relevant to the comparison (e.g. an advertisement that compares model results to an index without disclosing that the volatility of the index is materially different from that of the model portfolio)
- Fails to disclose any material conditions, objectives, or investment strategies used to obtain the results portrayed (e.g. the model portfolio contains equity stocks that are managed with a view towards capital appreciation)
- Fails to prominently disclose the limitations inherent in model results, particularly the fact that such results do not represent actual trading and that they may not reflect the impact that material economic and market factors might have had on the adviser's decision-making if the adviser were actually managing clients' money

- Fails to disclose, if applicable, that the conditions, objectives, or investment strategies of the model portfolio changed materially during the time period portrayed in the advertisement and, if so, the effect of any such change on the results portrayed
- Fails to disclose, if applicable, that any of the securities contained in, or the investment strategies followed with respect to, the model portfolio do not relate, or only partially relate, to the type of advisory services currently offered by the adviser (e.g., the model includes some types of securities that the adviser no longer recommends for its clients)
- Fails to disclose, if applicable, that the adviser's clients had investment results materially different from the results portrayed in the model
- Fails to prominently disclose, if applicable, that the results portrayed relate only to a select group of the adviser's clients, the basis on which the selection was made, and the effect of this practice on the results portrayed, if material

An adviser must create and retain all documents necessary to substantiate any performance information contained in advertisements or communications.

VI. Client Contracts

Ohio Administrative Code 1301:6-3-15.1(H)

All advisory contracts shall be in writing, and signed and dated by the client and the adviser.

The contract should clearly state that the contract may not be assigned without the client's consent. Ohio Administrative Code 1301:6-3-15.1(A)(2) defines "assignment" generally to include any direct or indirect transfer of an investment advisory contract by the investment adviser to another adviser, entity, or firm. A transaction that does not result in a change of actual control or management of the investment adviser (e.g. a reorganization for purposes of changing an adviser's state of incorporation), would not be deemed to be an assignment for these purposes. Ohio Administrative Code 1301:6-3-15.1(H)(1)(c) provides that if an investment adviser is organized as a partnership, the advisory contract must provide that the adviser will notify the client of a change in its partnership makeup.

If client fees are pre-paid, the contract should contain a provision for the pro rata refund of fees if the contract is terminated.

If the adviser has trading authority but does not have discretionary authority, it is recommended that the adviser contract include language that the adviser cannot trade without prior approval of the customer.

Ohio Administrative Code 1301:6-3-44(E)(1)(e) makes it unlawful for any investment adviser to use any condition, stipulation, or provision binding upon any person to waive compliance within any provision of Chapter 1707 of the Ohio Revised Code or any rule promulgated thereunder. This includes the use of hedge clauses, or disclaimers absolving the IA from responsibility or accuracy of the information obtained, which would lead a client to believe that any rights have been waived.

VII. Supervision and Compliance Manual

Ohio Administrative Code 1301:6-3-15.1 (D)

Every investment adviser licensed by the Division shall reasonably supervise its investment adviser representatives and other persons employed or associated with the investment adviser.

Part of the supervision obligation requires the investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violations by the adviser and its supervised person of the Ohio Securities Act and the administrative rules promulgated by the Division. These written policies and procedures are often referred to as the adviser's "compliance manual."

Compliance considerations must be relevant to the operations of the adviser, and not simply an "off the shelf" version adopted without modifications tailored to the activities of the adviser.

In connection with adopting and implementing the written compliance program, an adviser must designate a person, who is a supervised person, as the "Chief Compliance Officer" ("CCO") responsible for administering the program.

The CCO should establish procedures to:

- prevent violations from occurring;
- detect violations that have occurred; and
- promptly correct any violations that have occurred.

VIII. Compliance Manual

Advisers licensed with the Division have an obligation to establish, maintain, and enforce written policies and procedures reasonably designed to prevent and detect any violation by its investment adviser representatives or other persons, employed by or associated with, the investment adviser. The Division cannot provide a standard template for a compliance manual. The following is a sample list of the most common fiduciary and regulatory obligations of an adviser that should be addressed in the firm's written compliance program, where applicable:

- Conflicts of interest
  - Identify potential risks
  - Establish policies addressing how the adviser will address these risks

- Registration and Licensing
  - Keep the Form ADV Current – should be reviewed and updated no less than annually
  - IARD Entitlement and personnel responsible for all IARD duties
  - IA Licensing – Maintain compliance with licensing requirements in Ohio and others states, when necessary
  - IAR Licensing – Who is required to be licensed as an Investment Adviser Representative

- Books and Records
  - What are the firm's required records?
  - Who maintains the records, how, and where – including off-site storage
  - Manner in which records are secured from unauthorized alteration or use
  - Retention and destruction of records
  - Maintaining and preserving electronic records and safeguarding them from loss

- Disclosure
  - Brochure Rule, Form ADV – how it's offered originally and annually
  - Form U4 Disclosures
  - Client Referral Arrangements
  - The accuracy of disclosures made to investors, clients, and regulators, including account statements and advertisements

- Trading Practices
  - Best Execution
  - Policies on when the adviser can trade in stocks recommended to clients
  - Guidelines on whether IARs need to trade with a certain broker-dealer
  - Soft Dollar Arrangements
  - Batch Trading (Aggregation of Orders)
  - Proprietary trading of the adviser and personal trading activities of supervised persons
  - Trade Errors

- Privacy Policy
  - The sharing of client information with others
  - Office personnel having access to files/computer

- Portfolio management processes
  - The allocation of investment opportunities among clients

    - The consistency of portfolios with clients' investment objectives
    - Disclosures by the adviser, and applicable regulatory restrictions

- Marketing/Advertising
    - Required internal approval prior to use
    - Use of social media, website, blogs, posts (etc.)
    - The use of solicitors
    - Record retention

- Fees
    - Processes to value client holdings
    - Disclosure
    - Refunds

- Business Continuity and Disaster Recovery Plans
    - Recovery of Books and Records
    - Alternate means of communications with customers, employees, service providers (including third-party custodians), and regulators
    - Office relocation due to unavailability of office
    - Death or incapacity of principal(s)

- Custody
    - Prior authorization before deducting fees
    - Safekeeping requirements
    - Account statements to clients
    - Audit requirement

- Proxy voting policy

- Complaints
    - How they are handled (procedures for reporting and addressing)?
    - How are related records maintained?

- Computer (Cybersecurity)
    - Anti-virus – installation, updates
    - Preservation of the records from loss, alteration, destruction (use of back-ups)
    - Encryption
    - Secure Emails
    - Dissemination of client information
    - Inventory of hardware
    - Passwords
    - Procedures for lost or stolen data/information
    - Customer Access via web portals

- Insider Trading
  Prevention of the misuse of material, nonpublic information

The IA is required to review, no less frequently than **annually**, the adequacy of the policies and procedures and their effectiveness. In addition, you are required to document, in writing, evidence of the annual review.

IX. Custody

Ohio Administrative Code 1301:6-3-44(B)

Unless an investment adviser licensed or required to be licensed by the Division, and its investment adviser representatives, follow the Division's rule regarding custody of client funds and securities, such custody will be deemed a fraudulent, deceptive or manipulative practice in violation of the statutory anti-fraud provision.

An adviser has custody if it holds client funds or securities directly or indirectly, or has authority to obtain possession of such assets.

For example, an adviser has custody any time it physically holds client stock certificates, bonds or cash – even if temporarily. It should be noted that inadvertent receipt will not result in custody as long as the check or securities are returned to the client within three business days. In addition, checks written to third parties and forwarded on to that third party will not result in custody.

A second example of custody is when an adviser is authorized to sign checks on a client's behalf to withdraw funds or securities from a client's account or to dispose of client funds or securities for any purpose other than authorized trading. To illustrate this more clearly, custody occurs where advisers are authorized to deduct advisory fees or other expenses directly from a client's account, or, where the adviser has a general power of attorney.

Custody is triggered any time an adviser acts in a capacity that gives the adviser legal ownership of, or access to, client funds or securities. Illustrations of this include a general partner of a limited partnership; a managing member of a limited liability company; a comparable position for another type of pooled investment vehicle; or, a trustee of a trust.

The custody rule requires that all advisers maintain client funds and securities with only four types of qualified custodians, including:

- United States banks
- broker-dealers registered with, and regulated by the Commission
- futures commission merchants registered under the Commodity Exchange Act
- foreign financial institutions that customarily hold financial assets for their customers provide they hold them in segregated accounts

The client's funds and securities must be either placed in a separate account for each client under the client's name or placed in an account that contains only the adviser's clients' funds and securities under the adviser's name as agent or trustee for the clients.

An adviser that opens an account with a qualified custodian on the client's behalf, whether in the name of the client or in the name of the adviser, as agent, must notify the client in writing and provide the name and address of the qualified custodian; the manner in which the client funds or securities are being held; and **must promptly notify** the client upon the change of this information.

Clients must also receive quarterly account statements directly from the qualified custodian that identify the amount of funds and each security held in the adviser's custody at the end of the period; and, all transactions in the account occurring during the period. The adviser must have a reasonable basis for believing that the qualified custodian is delivering proper quarterly account statements to its clients. To form this reasonable basis for believing, the adviser is required to receive duplicate copies of the account statements from the qualified custodian of what was delivered to the adviser's clients. The adviser cannot receive the quarterly account statements and then forward copies on to its clients. **Failure to comply with these quarterly account statement delivery requirements will result in the adviser being required to have annual surprise audits conducted by an independent public accountant, at the adviser's cost.**

Limited partnerships, limited liability companies, other pooled investment vehicles, and trusts must have clients' funds and securities maintained with a qualified custodian. The qualified custodian must deliver quarterly account statements regarding transactions and holdings in the limited partnerships, limited liability companies, other pooled investment vehicles, and trusts, not just transactions or holdings relating to the individual investors/limited partners.

The qualified custodian must deliver the quarterly account statements directly to the limited partners, members, or beneficial owners. Account statement delivery is not required if the limited partnership, limited liability company, or pooled investment vehicle is audited annually by an independent public accountant; the audited financials are prepared in accordance with GAAP accounting; and the audited financials are distributed to each limited partner or pooled investment vehicle member within 120 days of the limited partnership's or pooled investment vehicle's fiscal year end.

X. Fees

The Division takes the position that investment advisers and investment adviser representatives must disclose to clients all material information regarding compensation. This includes accurate fee schedules, when fees will be charged, and whether fees will be automatically deducted from clients' accounts or paid directly. The investment adviser

should also disclose if its fee is 3% of assets under management or higher, which is higher than the fee typically charged by other advisers for similar services.

- Minimum Fees

If minimum fees are charged, the adviser has a fiduciary obligation to ensure that fees for small accounts are not abusive. Fixing a minimum fee for a small account may be unreasonable.

- Refunding Fees for Terminated Accounts

If fees are paid in advance the investment adviser should also disclose its refund policy. A non-refundable feature goes against an investment adviser's fiduciary responsibility. Any advisory contract which does not provide in substance for a pro rata refund of a prepaid advisory fee would violate the antifraud provisions of Section 206 of the Advisory Act.

- Performance Fees
  Ohio Administrative Code 1301:6-3-15.1(H)

Investment advisers licensed or required to be licensed under the Act, are prohibited from receiving any type of advisory fee calculated as a percentage of capital gains or appreciation in the client's account. This prohibition extends to contingent fee arrangements, including contracts that provide for the fee to be waived or reduced if certain performance levels are not met. However, this prohibition does not apply to contracts with clients who have at least $1 million under the management of the adviser, or if the client has a net worth of more than $2.1 million. Either of these tests must be met at the time of entering into the advisory contract.

XI. Wrap Fee Program

Definition

In a wrap fee program, a client pays a single fee (usually measured as a percentage of assets under management) for a group of services that are bundled, or "wrapped" together. Typically, the services include investment advice, brokerage, custody and other administrative functions. Ohio law defines a wrap fee program as an arrangement in which a client is charged a specified fee or fees, not based directly on transactions in the client's account, for investment advisory services and execution of transactions.

Sponsor

A wrap fee program is offered by a program "sponsor," which may be broker-dealer, an investment adviser, bank, or other financial institution. A wrap fee sponsor typically is subject to regulation as an investment adviser. Normally a client enters into a contract directly with the sponsor, and a sponsor has specific disclosure obligations.

Portfolio Manager

After contracting with the sponsor, the typical wrap fee program permits the client to choose a portfolio manager from a list provided by the sponsor. This permits a client with a smaller account that might not warrant separate management by an investment adviser to obtain individualized treatment. Typically, the portfolio manager will have investment discretion in accordance with pre-determined investment objectives. As a result, clients with the same investment objectives receive the same investment advice and may hold the same, or substantially the same, securities in their accounts. In light of this similarity of management, a wrap fee program can effectively function like a mutual fund.

An investment adviser, licensed or required to be licensed by the Division, that is compensated under a wrap fee program for sponsoring, organizing, or administering the program, or for selecting, or providing advice to clients regarding the selection of other investment advisers in the program, must furnish each client and prospective client of the wrap fee program with a written disclosure statement ADV Part 2A, Appendix 1.

Wrap Fee Statement

An investment adviser that is required to furnish a wrap fee statement must furnish the wrap fee statement to each client at the time they enter into the agreement with the investment adviser. An investment adviser's fiduciary duty extends to wrap fee program recommendations. In particular, an investment adviser sponsor of a wrap fee program should consider at least the following issues:

- Whether the portfolio manager is suitable for the client
- Whether the program is suitable for the client
- Whether the chosen strategy is suitable for the client

XII. Fiduciary Standard

Ohio Administrative Code 1301:6-3-44(E)(1)(f)

Investment advisers and IARs stand in a fiduciary relationship with their clients. This duty is a long-standing doctrine of both federal and state common law, and is reiterated in the Ohio Administrative Code. As fiduciaries, advisers have "an affirmative duty of utmost good faith and full and fair disclosure of all material facts." (See *Transamerica Mortg. Adv. Inc. v. Lewis*, 444 U.S. 11, 17 (1979)). In addition, an adviser has the duty to act in the best interest of their clients and to disclose all material information about actual or potential conflicts of interest. Specifically, an adviser or IAR has a duty to:

- employ reasonable care to avoid misleading clients
- have a reasonable independent basis for investment advice
- ensure that investment advice is suitable
- obtain "best execution" of client transactions

With regard to suitability in particular, the Division will expect to see current documentation demonstrating how the investment advice is suitable for the client, taking into consideration the client's financial situation, investment experience, and investment objectives.

XIII. Solicitors and Referral Fees

Ohio Administrative Code 1301:6-3-44(C)

A solicitor is any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser or investment adviser representative. Solicitors are not required to be licensed by the Division – there is no "solicitor's license". Rather, solicitors need to be licensed by the Division only if their activities meet the definition of investment adviser or investment adviser representative. (See Appendix C and Appendix D).

The Ohio Administrative Code establishes a "safe harbor" for solicitors, providing that a person who acts solely as a solicitor and is in compliance with the rule regarding cash payments for client solicitations is not deemed to be an investment adviser.

Ohio law generally prohibits investment advisers and their investment adviser representatives from paying a cash fee to a solicitor unless all three of the following exist:

- There is a written agreement between the investment adviser or investment adviser representative and the solicitor (a copy of which the investment adviser must retain), detailing the referral arrangement.
- At the time of any solicitation activities, the solicitor provides the prospective client with a copy of the investment adviser's brochure, Form ADV Part 2. The prospective client must also receive a separate, written disclosure document that discloses, among other things, that the solicitor is being compensated for referring or recommending the investment adviser or investment adviser representative, and the terms of the compensation (including any additional amounts the client will be charged by the adviser as a result of the referral arrangement).
- The investment adviser or investment adviser representative receives from the client, prior to or at the time of entering into any written or oral investment advisory agreement with the client, a signed and dated acknowledgment that the client received the investment adviser's brochure and the solicitor's written disclosure document.

Certain persons are **prohibited** from serving as a solicitor under the Ohio Securities Act. Specifically, prior to engaging a solicitor, an investment adviser is required to verify that the individual does not have a history of any securities or commodities violations and has not committed various other kinds of illegal conduct. The specific types of past administrative, civil, and criminal findings that disqualify a person from serving as a solicitor are listed in Ohio Administrative Code 1301:6-3-44(C)(1)(c).

XIV. Best Execution and Soft Dollars

As a fiduciary, an adviser has an obligation to obtain "best execution" of clients' transactions. In meeting this obligation, an adviser must execute securities transactions for clients in such a manner that the client's total cost or proceeds in each transaction are the most favorable under the circumstances.

In assessing whether this standard is met, an adviser should consider the full range and quality of a broker's services when placing brokerage orders, including, among other things, execution capability, commission rate, financial responsibility, responsiveness to the adviser, and the value of any research services provided. An investment adviser must keep in mind the fiduciary obligation of best price and best execution when considering these factors.

When an investment adviser causes an account to pay more than the lowest available commission to a broker-dealer in return for research products and services, these payments are commonly referred to as "soft dollars." Federal law contains a "safe harbor" for certain soft dollar payments in section 28(e) of the Securities Exchange Act of 1934 and is available for all investment advisers operating in Ohio. This safe harbor protects an adviser from claims for breach of fiduciary duty based solely on the fact that the adviser paid more than the lowest available commission rate if the adviser, in good faith, determined that the higher commission was reasonable in relation to the value of the brokerage and research services provided. Section 28(e)(3) provides that brokerage and research services within the safe harbor include:

- Furnishing advice, either directly or through publications or writings, as to the value of the securities, the advisability of investing in, purchasing, or selling securities and the availability of securities or purchasers or sellers of securities;
- Furnishing analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or
- Effecting securities transactions and performing functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

The Commission has issued extensive guidance under section 28(e). *See* Securities Exchange Act Release No. 34-23170 (April 23, 1986). The Division takes the position that this guidance, along with section 28(e), sets out the appropriate standards to follow regarding soft dollar arrangements for all investment advisers operating in Ohio.

XV. Aggregation of Client Orders ("Batch Orders")

In directing orders for the purchase or sale of securities to a broker-dealer for execution, an adviser may aggregate or "bunch" those orders on behalf of two or more of its accounts, so long as the bunching is done for purposes of achieving best execution, and no client is systematically advantaged or disadvantaged by the bunching. An investment adviser may include accounts in which it or its officers or employees have an interest in a bunched order. Investment advisers must have procedures in place that are designed to ensure that the trades are allocated in such a manner that all clients are treated fairly and equitably.

XVI. Principal Transactions; Agency Cross Transactions; Cross Trades

Ohio Revised Code 1707.44(M)(1)(c); Ohio Administrative Code 1301:6-3-44(G)

Ohio law prohibits an investment adviser or an investment adviser representative, acting as principal for their own account, from knowingly selling any security to or purchasing any security from a client ("principal transaction"), without notifying the client in writing, and obtaining the client's consent before the completion of the transaction. The Division shares the view of the Commission that a transaction is "completed" upon its settlement. Thus, consent must be obtained prior to execution or prior to settlement.

Notification and consent for principal transactions must be obtained separately for each transaction. However, this requirement does not apply to any investment adviser registered with the Commission, or to any transaction with a customer of a licensed dealer or salesperson who is not acting as an investment adviser or investment adviser representative in relation to the transaction.

For investment advisers licensed or required to be licensed by the Division and their investment adviser representatives, Ohio Administrative Code 1301:6-3-44(G) permits an adviser to act as broker for both its advisory client and the party on the other side of the brokerage transaction ("agency cross transaction"), without obtaining the client's prior consent to each transaction, provided that the adviser obtains a prior consent for these types of transactions from the client, and complies with other, enumerated conditions.

The rule does not relieve advisers of their duties to obtain best execution and best price for any transaction. A principal or agency cross transaction executed by an affiliate of an adviser is deemed to have been executed by the adviser for purposes of Revised Code 1707.44(M)(1) and Ohio Administrative Code 1301:6-3-44(G).

While an agency cross transaction involves an advisory client and a non-advisory client, a "cross trade" describes the circumstance where an adviser executes a transaction between advisory clients. The Division shares the view of the Commission that, in executing a cross trade, if an adviser receives no compensation (other than its advisory

fee), directly or indirectly, for effecting a particular cross trade between advisory clients, the adviser will not be "acting as a salesperson" within the meaning of Revised Code 1707.44(M)(1)(c). However, full disclosure of such cross trade is required, and the adviser must ensure that the cross trade achieves best execution and does not disfavor any client.

XVII. Other Disclosure Requirements

Ohio Administrative Code 1301:6-3-44(D)

Ohio law requires investment advisers and investment adviser representatives that: (1) have custody or discretionary authority over client funds or securities; or (2) require prepayment six months or more in advance of more than $500 of advisory fees, to disclose promptly to clients <u>any financial condition</u> of the investment adviser or investment adviser representative(s) that is reasonably likely to impair the ability of the investment adviser and investment adviser representative to meet contractual commitments to clients. This disclosure requirement can be satisfied by giving disclosure at the time of entering into a contract with a prospective client, if the contract permits the client to terminate the contract without penalty within five business days after entering into it.

All investment advisers and investment adviser representatives are required to disclose promptly to clients legal or disciplinary events that are material to an evaluation of the adviser's integrity or ability to meet their commitments to clients. The rule lists a number of legal and disciplinary events for which there is a rebuttable presumption of materiality for these purposes. Keep in mind that although an event may not be on the list in the rule, it may still be material, particularly in light of an adviser's fiduciary duty to its clients.

XVIII. Overview of Anti-Fraud and Conduct Standards

Investment advisers and investment adviser representatives are fiduciaries who have an affirmative obligation of utmost good faith and full and fair disclosure, and who owe their clients undivided loyalty. Further, advisers have a duty to avoid misleading their clients, and may not engage in activity that may conflict with a client's interest without the client's consent.

Consequently, advisers are subject to a set of conduct and anti-fraud standards. The conduct standards include a series of business responsibilities, set out in Ohio Administrative Code 1301:6-3-15.1, that are based on analogous federal responsibilities. Statutory anti-fraud standards are set out in Revised Code 1707.44(M) and generally prohibit misstatements or misleading omissions of material facts and other fraudulent acts and practices in connection with the conduct of an advisory business. Revised Code 1707.44(M) applies to all investment advisers and investment adviser representatives operating in Ohio.

The statutory anti-fraud standards are amplified by a series of administrative rules set out in Ohio Administrative Code 1301:6-3-44 and based on analogous federal regulations. The administrative rules are prophylactic in nature and are generally aimed at prohibiting activities that are fraudulent, deceptive, or manipulative.

The following are some examples of conduct that may be deemed dishonest or unethical practices or are otherwise contrary to an adviser's fiduciary duty:

- Failing to disclose to their client in writing that a material conflict of interest exists
- Misrepresenting the qualifications of the adviser or IAR
- Borrowing or lending money or securities from or to a client
- Making guarantees
- Placing an order without authority to do so
- Making a recommendation without reasonable grounds to believe the recommendation is suitable
- Providing a report or recommendation to a client prepared by someone else without disclosing that fact
- Charging an excessive fee
- Failing to disclose a legal or disciplinary event that is material
- Disclosing the identity, affairs, or investments of any client to a third party unless required by law or consented to by the client

PART 3 – The Division's Onsite Exam Program

I. The Division's Onsite Examination Program

Ohio Revised Code 1707.23(B)

The Division may conduct periodic, special, or for-cause examinations of any investment adviser or investment adviser representative, and their books, records, documents, accounts, and work papers as it deems material or relevant to the protection of investors or in the public interest. While most examinations are routine in nature, and as such, scheduled in advance, the Division has authority to conduct unannounced for-cause examinations of its licensees at any time it is necessary for the protection of investors or in the public interest.

Before the Exam

As an investment adviser licensed in Ohio, you can expect an examination of your firm's books and records routinely once you are licensed. Generally, prior to the examination date you will receive a call from the office notifying you that an examination is to be scheduled. That conversation will be followed with a letter confirming the date and time and providing you with a list of your records that should be readily available. Additional records may be requested by the examiner during or after the exam. It is important that

you promptly notify the Division if the address is incorrect or if you cannot adhere to the scheduled date.

The Exam

During the examination, the examiner will spend time interviewing key personnel. The examiner will then review all or some of the documents and information you were asked to make available. Copies of some documents may be requested by the examiner in order for further reading or review. If records are maintained in electronic form, electronic copies may be provided to the examiner in lieu of hard copies. However, it may be necessary and will be requested for you to print or provide access for the examiner to view such records. The examiner will also be available to answer questions but cannot provide legal advice. The length of the examination varies depending on the focus of the examiner. **Key personnel must be available for the duration of the examination.**

After the Exam

Once the examination is complete, the examiner will explain what you can expect, including a deficiency letter if deficiencies were noted. A deficiency letter will be sent from the Division requiring you to correct deficiencies and otherwise may make recommendations that the Division believes are good business practices. You will be given adequate time to reply and submit corrected documents if required. Once you have addressed all items in the deficiency letter, you will then receive a closing letter.

Non-compliance

Failure to be prepared for or co-operate with the Division's on-site examination program, as well as a failure to timely and satisfactorily respond to Division deficiency letters (see common deficiencies below) may result in administrative action against the investment adviser and investment adviser representative's licenses, including license suspension or revocation.

II. Common Deficiencies

The Division suggests getting ahead of some of the most common deficiencies found during routine examinations:

a. **ADV Consistency.** The description of your advisory business and services in Part 1 should match the description of your advisory business and services in Part 2.
b. **Annual ADV Updates.** The most recent rule requires annual updating of the adviser's Form ADV within 90 days of the firm's fiscal year end. You are required to make this annual filing on the IARD system, even if nothing about your business has changed. Remember, the ADV should reflect you actual, not anticipated, business.
c. **Make sure you SUBMIT your IARD changes.** Many advisers make amendments to their ADV on the IARD system, save the changes, but then fail to SUBMIT the filing changes. Be sure to select the SUBMIT button once you have completed making all of your amendments – or the changes will never post to the Division or the investing public.

d. **Form ADV, Part I, Item 9F.** This item is commonly answered incorrectly or is misunderstood. It is important that IA's understand that if fees are directly deducted from client accounts, for the purposes of this question, they are considered to have custody limited to the direct deduction of fees from client accounts. Please refer to the ADV Instructions found at: www.sec.gov/about/forms/formadv.pdf.

e. **Quarterly Financial Statements**. A Balance Sheet and Income Statement – prepared quarterly - are required. The Balance Sheet is a statement showing the assets, liabilities, and equity of the firm (Assets = Liabilities + Equity). The Income Statement is a statement showing the revenues, expenses, and net income of the firm.

f. **Bank Reconciliation**. This is a reconciliation between the cash balance shown on the Balance Sheet with the balance shown on the bank statement. The reconciliation will account for outstanding checks, deposits in transit, and other items that cause the bank balance to differ from the amounts shown on your records.

g. **Compliance Manual**. The Division has no template for a compliance manual, but does expect the compliance manual to reflect all the policies and procedures that apply to **your firm's business**. The purchase of "off the shelf" compliance manuals is acceptable so long as the manual is reviewed and amended to reflect only the items that apply to your firm.

h. **Cybersecurity.** The Division expects compliance manuals to address your firm's policy with respect to cybersecurity. How is client information safeguarded? How do you keep your systems secure? How is the identity of your clients verified? How are records retained and then destroyed after the retention period?

i. **Suitability.** IA's are generally good about obtaining customer suitability information. They need to keep this information current, and updated regularly so that they are preserving their fiduciary duty to their clients.

j. **Refunds.** IA's may not retain unearned fees. Any fees paid in advance must be refunded. If you collect fees in advance, your contract must contain a provision to refund unearned fees if the client terminates.

k. **Discretion**. If your firm is not granted discretion in the written contract, you are required to obtain client approval for **all trades prior** to the trade being made. Your firm must establish a means of documenting this client contact and approval of securities actions.

l. **Brochure Rule.** The ADV Part 2 requires that the IA give a Brochure Statement to each client or potential client before or at the time they enter into an advisory agreement. Evidence of providing such is required, and may be accomplished by including this obligation in the advisory contract.

m. **Deficiency letters.** The importance of responding to Division communications cannot be over-stressed. The Division is very receptive to reasonable requests for extensions of time to respond. We will work with you. Failure to respond to our requests serves only to require additional follow-up on our part and additional effort on your part to comply. Non-compliance will lead to a Notice of Intent to suspend or revoke of your license.

Appendix A - Frequently Asked Questions

Q. Do I register as an investment adviser with the U.S. Securities and Exchange Commission or with the state of Ohio?

A. Investment advisers that have Regulatory Assets Under Management of less than $100 million register with the state, unless the adviser is required to be registered in 15 or more states (then it registers with the U.S. Securities and Exchange Commission). Investment advisers that have Regulatory Assets Under Management of more than $110 million are required to register with the U.S. Securities and Exchange Commission.

Q. How long does it take to get approved as an investment adviser in Ohio?

A. The Division reviews all applications and pre-licensing examination materials as quickly as possible. Given that the process is back-and-forth between the applicant and the Division, the amount of time an application remains pending largely depends on how quickly the applicant is able to submit the required documents to the Division and otherwise meet all of the licensing requirements. Applicants who are diligent in providing the required information to the Division, and are not subject to a denial action, will find that their application may be approved a just a few weeks.

Q: How long is an investment adviser or investment adviser representative license valid?

A. The licenses of investment advisers and investment adviser representatives expire on December 31st of each year unless the renewal fees for the next calendar year have been paid in advance. If the renewal fees are not paid in time and the licenses lapse, there is no grace period and no method for reinstating the licenses. Firms and individuals must re-apply. Further, if the investment adviser firm fails to renew its license, all of the licenses of affiliated investment adviser representatives are automatically terminated.

Q: How do I renew my investment adviser and investment adviser representative licenses?

A. Renewal fees are paid through the IARD system, and must be paid in accordance with the IARD system deadlines. The Division undertakes many steps to remind

advisers of their renewal filing obligations. There are no renewal documents required to be filed with the Division.

Q: How do I update information concerning the investment adviser?

A: The best way to keep the Division informed of any changes to the investment adviser (e.g., phone number, mailing address, e-mail address) is to amend the firm's Form ADV through the IARD system. It is the first place the Division will look for the most current information.

Q: My firm has started obtaining potential clients outside of Ohio. When do I need to become licensed with other state(s)?

A: Each state has different rules regarding when licensing is required. Some states have a "de minimus rule" which allows you to have up to 5 clients in their state and not become licensed, so long as you do not maintain a place of business there. However, this is not the case in all states so you must contact the appropriate state securities regulator to verify their licensing requirements before working with out-of-state clients.

Q: Is there a net capital requirement for investment advisers in Ohio?

A: There are no net capital or surety bond requirements for investment advisers in Ohio.

Q: Are investment adviser representatives required to file fingerprints with the Division?

A: Yes, please see the IAR Fingerprinting section of this Guide.

Q: Is there a de-minimis exclusion from registering as an investment adviser in Ohio?

A: Yes, the investment adviser must in the proceeding twelve months, have had no place of business in Ohio and had five or fewer clients.

Q: Does the Division allow advisers to send documents to their clients electronically?

A: Yes, so long as the adviser has previously obtained consent from the client to send documents to them electronically, the adviser takes reasonable steps to ensure

the e-mail address on file for the client is still valid, and the adviser takes precautions to protect the transmission of any confidential personal information contained in the documents.

Q: How do I withdraw my license as an investment adviser or investment adviser representative?

A: The investment adviser is required to file a Form ADV-W through the IARD system. The investment adviser representative is required to file a Form U5 with the CRD system.

Appendix B - Common Definitions

All definitions in the Ohio Securities Act can be found in either the Ohio Revised Code http://codes.ohio.gov/orc/ or the Ohio Administrative Code http://codes.ohio.gov/oac/. The Division has added a few definitions below, as these are commonly asked questions.

"Clients" – Ohio Administrative Code 1301:6-3-01(H) and (I)

For the purpose of determining the number of clients for meeting the *de-minimis* exception from licensing as an investment adviser, the following are deemed a "single client":

- A natural person, and
- Any minor child of the natural persons;
- Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence; and
- All accounts and trusts, the only primary beneficiaries of which are the natural person and/or the children, spouses and relatives described above.
- Legal organizations, including
- A corporation, general partnership, limited partnership, limited liability company, trust (other than a family trust described above), or other legal organization that receives investment advice based on its investment objectives rather than the individual investment objectives of its owners; and
- Two or more legal organizations described above that have identical owners.

"Held Out" to the Public - SEC Release IA-1633m [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,940 (May 15, 1997)

A location is considered "held out" to the public by, for example, publishing information in a professional directory or a telephone listing, or distributing advertisements, business cards, stationery, or similar communications that identify the location as one at which the investment adviser or investment adviser representative is or will be able to meet or communicate with clients. However, an investment adviser representative who sends a letter to certain existing clients indicating, for example, that he or she will be in their area and available for a meeting would not have held out the location of the proposed meeting to the general public for purposes of the definition. Similarly, an investment adviser representative that communicates to a defined group under the terms of an advisory contract the location at which he or she will be available would not be holding himself or herself out to the general public. Further, in the case of a national organization that engages an adviser to provide advisory services to its members, an adviser representative who communicates its availability at a certain location to the members (even though those individuals may not be clients) would not be holding himself or herself out to the

general public. The definition encompasses permanent and temporary offices as well as other locations at which advisory services are provided, such as a hotel or auditorium. Whether an investment adviser representative will be subject to the qualification requirements of a state in which the hotel or auditorium is located will turn on whether, for example, an investment adviser representative conducts advisory business there.

"Place of Business" – Ohio Administrative Code 1301:6-3-01(G)

Ohio law defines "place of business" to include two categories of locations. First is an office at which an investment adviser or investment adviser representative regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients. Second is any other location that is held out to the general public as a location at which an investment adviser or investment adviser representative provides investment advisory services, solicits, meets with, or otherwise communicates with clients.

"Promptly" – Ohio Administrative Code 1301:6-3-01(N)

Promptly is defined to mean not later than 30 calendar days after learning of the facts or circumstances giving rise to the amendment or update.

"Regulatory Assets Under Management" – Form ADV, Part 1A, Instruction 5.b

For purposes of completing the Form ADV, the amount of your firm's Regulatory Assets Under Management is determined by including the securities portfolios for which you provide **continuous and regular supervisory or management services** as of the date you are filing or amending your Form ADV. As to the types of securities portfolios you must include in your calculation, in addition to traditional advisory accounts, you must include family or proprietary accounts, pro bono accounts, accounts of non-U.S. persons, and assets of a private fund. For additional explanation on how to calculate your Regulatory Assets Under Management, see Form ADV, Part 1A, Instruction 5.b.

"Solicitor" – Ohio Administrative Code 1301:6-3-44(C)

A solicitor is any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser or investment adviser representative. Solicitors *per se* are not required to be licensed by the Division—there is no "solicitor's license." Rather, solicitors need to be licensed by the Division only if their activities meet the definition of investment adviser or investment adviser representative. As under federal law, Ohio law requires a solicitor who receives cash payments to provide a written solicitation disclosure document to clients.

Ohio Administrative Code 1301:6-3-01(K)(2) establishes a "safe harbor" for solicitors, providing that a person who acts solely as a solicitor and is in compliance with the rule regarding cash payments for client solicitations is not deemed to be an investment

adviser. However, certain persons are legally prohibited from acting as solicitors, namely those who have been the subject of certain federal and state securities actions.

"Supervised Person" – Ohio Revised Code 1707.01(DD)

In order to be an investment adviser representative, a natural person first must be a "supervised person." A supervised person is a natural person who is any of the following:

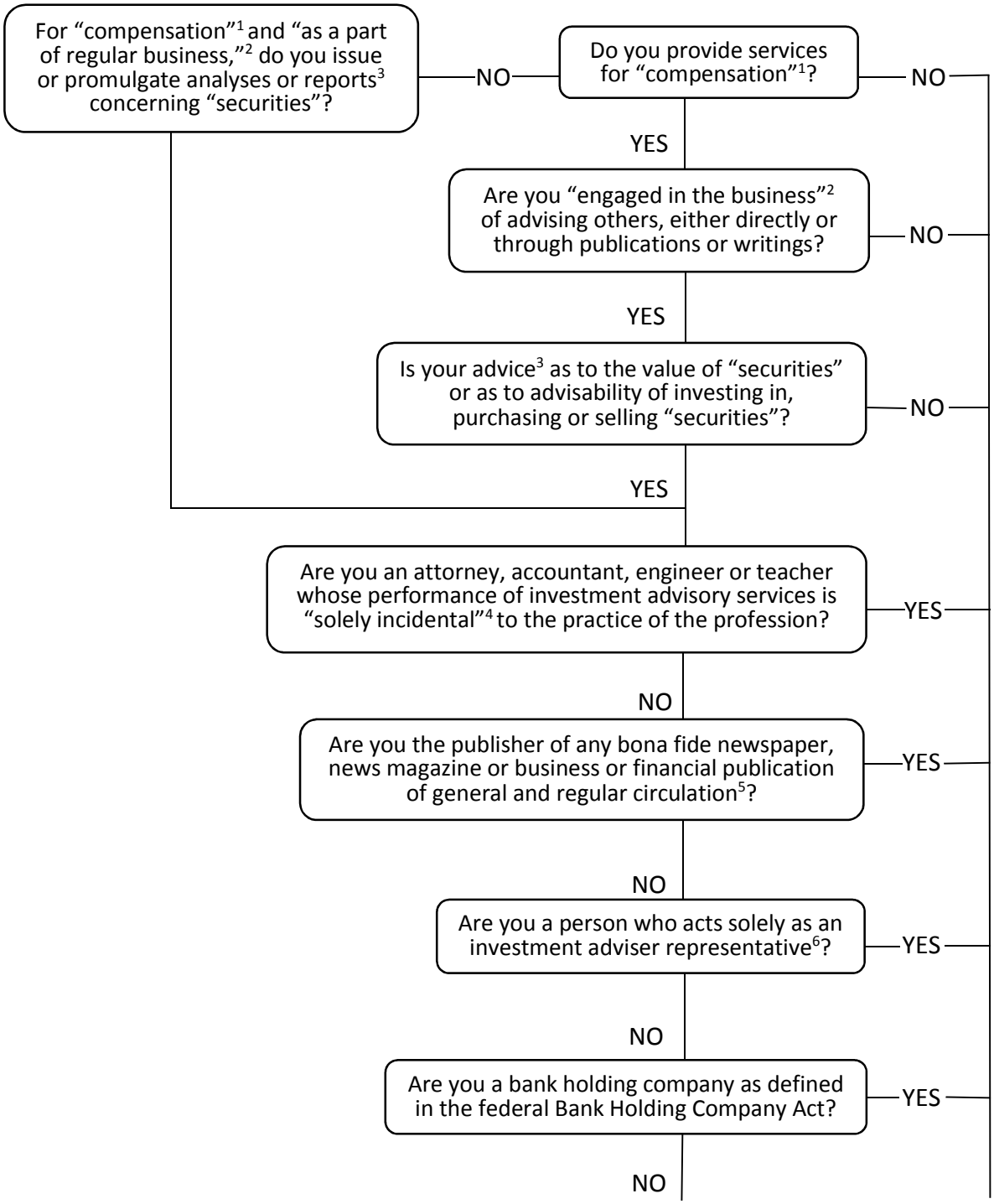
- A partner, officer, or director of an investment adviser, or other person occupying a similar status or performing similar functions with respect to an investment adviser;
- An employee of an investment adviser; or
- A person who provides investment advisory services on behalf of the investment adviser and is subject to the supervision and control of the investment adviser.

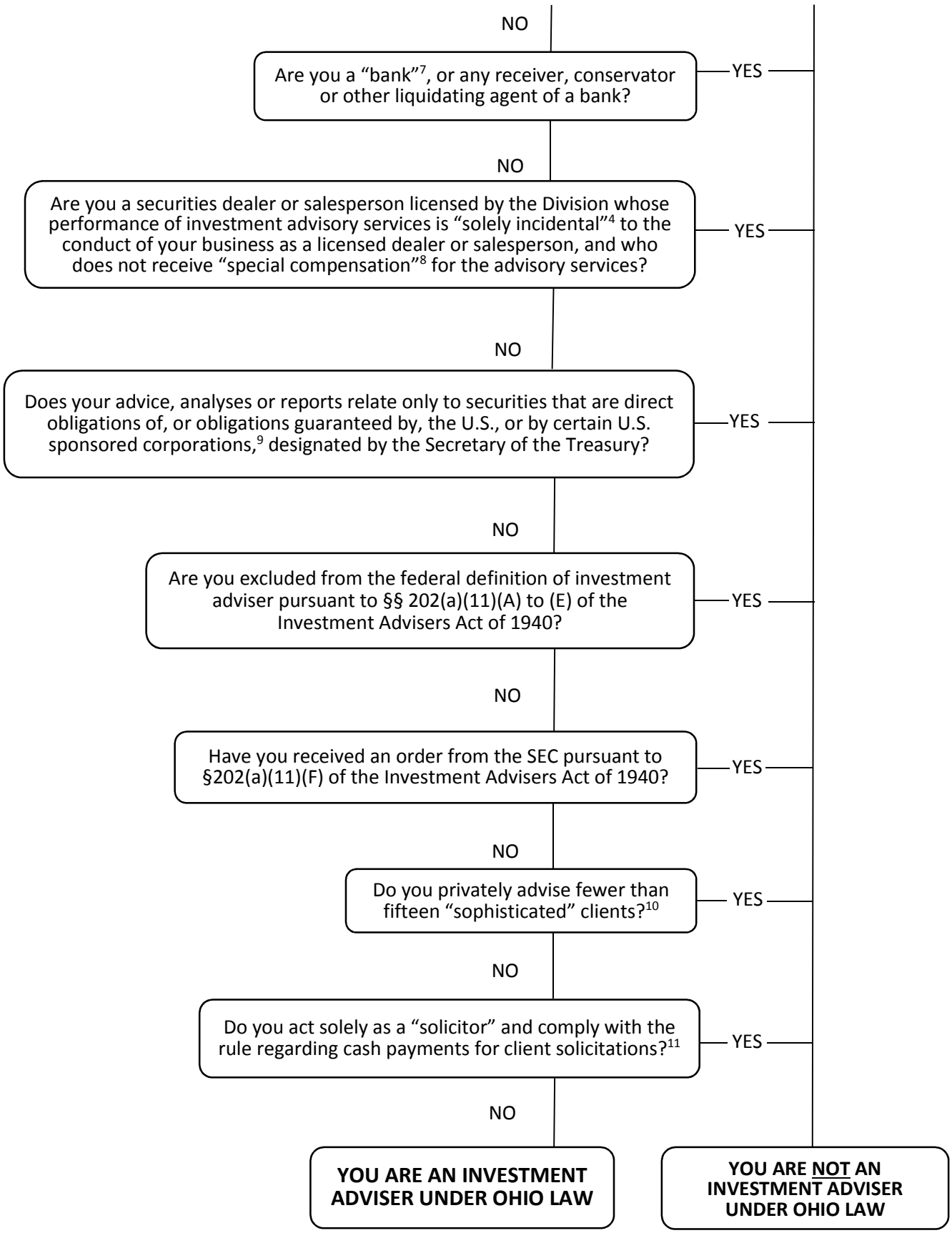
Appendix C - Investment Adviser Flowchart

ARE YOU AN INVESTMENT ADVISER UNDER OHIO LAW?

(R.C. 1707.01(X))

(The accompanying notes are an integral part of this flowchart.)




NO
Are you a "bank"[7], or any receiver, conservator or other liquidating agent of a bank?
YES
NO
Are you a securities dealer or salesperson licensed by the Division whose performance of investment advisory services is "solely incidental"[4] to the conduct of your business as a licensed dealer or salesperson, and who does not receive "special compensation"[8] for the advisory services?
YES
NO
Does your advice, analyses or reports relate only to securities that are direct obligations of, or obligations guaranteed by, the U.S., or by certain U.S. sponsored corporations,[9] designated by the Secretary of the Treasury?
YES
NO
Are you excluded from the federal definition of investment adviser pursuant to §§ 202(a)(11)(A) to (E) of the Investment Advisers Act of 1940?
YES
NO
Have you received an order from the SEC pursuant to §202(a)(11)(F) of the Investment Advisers Act of 1940?
YES
NO
Do you privately advise fewer than fifteen "sophisticated" clients?[10]
YES
NO
Do you act solely as a "solicitor" and comply with the rule regarding cash payments for client solicitations?[11]
YES
NO
YOU ARE AN INVESTMENT ADVISER UNDER OHIO LAW
YOU ARE NOT AN INVESTMENT ADVISER UNDER OHIO LAW

NOTES TO "ARE YOU AN INVESTMENT ADVISER UNDER OHIO LAW?"

1. "Compensation" is construed broadly and means the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some combination of the foregoing. It is not necessary that an adviser's compensation be paid directly by the person receiving investment advisory services, but only that the investment adviser receive compensation from some source for the services. See SEC Release No. IA-1092, § II.A.3. (October 8, 1987).

2. "As a part of regular business" and "engages in the business" both require a "business" element and are to be construed in the same manner. The determination to be made is whether the degree of the person's advisory activities constitutes being "in the business." Whether a person giving advice about securities for compensation would be "in the business" depends upon all relevant facts and circumstances. In general, a person is considered to be "in the business" if the person (i) holds himself or herself out as an investment adviser or as one who provided investment advice; or (ii) receives any separate or additional compensation that represents a clearly definable charge for providing advice about securities; or (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice. See SEC Release No. IA-1092, § II.A.2. (October 8, 1987).

3. The advice, report or analyses need not be with respect to particular securities. Rather, for example, advice concerning the relative advantages and disadvantages of investing in securities in general as compared to other investments would be "advice" for purposes of this prong of the definition. See SEC Release No. 1A-1092, § II.A.1. (October 8, 1987)

4. Whether an exclusion from the definition of investment adviser is applicable depends on the relevant facts and circumstances. For example, an attorney or accountant who holds himself or herself out to the public as providing financial planning or advisory services would not appear to fall within this "solely incidental" exclusion. See SEC Release No. IA-1092, § II.B. (October 8, 1987). In general, three factors are relevant to the determination of whether the "solely incidental" exclusion is available: (i) whether the person holds himself or herself out to the public as an investment adviser, financial planner or other provider of advisory services; (ii) whether the advisory services are rendered in connection with and reasonably related to the professional services; (iii) whether the fee charged for advisory services is based on the same factors as those used to determine the fee for the professional services. See, e.g., Hauk, Soule & Fasani, P.C., SEC No-Action Letter (April 2, 1986); Milton O. Brown, P.C., SEC No-Action Letter (August 28, 1983).

5. This exclusion does not include bulletins that are issued from time to time in response to episodic market activity, advertisements that "tout" particular issues, advertised lists of stocks "that are sure to go up" that are sold to individual

purchasers or publications distributed as an incident to personalized investment services. Lowe v. SEC, 472 U.S. 181 (1985). The Lowe court did hold that this exclusion was applicable to a newsletter that was "completely disinterested" and "offered to the general public on a regular schedule." Id. at 206. The definition of "investment adviser" encompasses publishers as well as authors. See SEC Release No. IA-563 (January 10, 1997). This exclusion, if it is available, would extend to authors.

6. A person may act as both an investment adviser and an investment adviser representative. See R.C. 1707.161(B)(2). However, a person who acts solely as an investment adviser representative is excluded from the definition of investment adviser. "Investment adviser representative" is defined in R.C. 1707.01(CC).

7. "Bank" is defined in R.C. 1707.01(O). This exclusion extends to an employee of a bank to the extent that the employee is acting in his or her capacity as an employee. See, e.g., Harbor Springs State Bank, SEC No-Action Letter (March 3, 1986). This exclusion does not extend to a bank employee acting in his or her individual capacity. Id.

8. "Special compensation" for investment advice is compensation to the dealer or salesperson in excess of that which he or she would be paid for providing a brokerage or dealer service alone. Consequently, "special compensation" exists where there is a clearly definable charge for investment advice. See SEC Release No. IA-626, § V. (April 27, 1978).

9. For example, the Government National Mortgage Association ("GNMA).

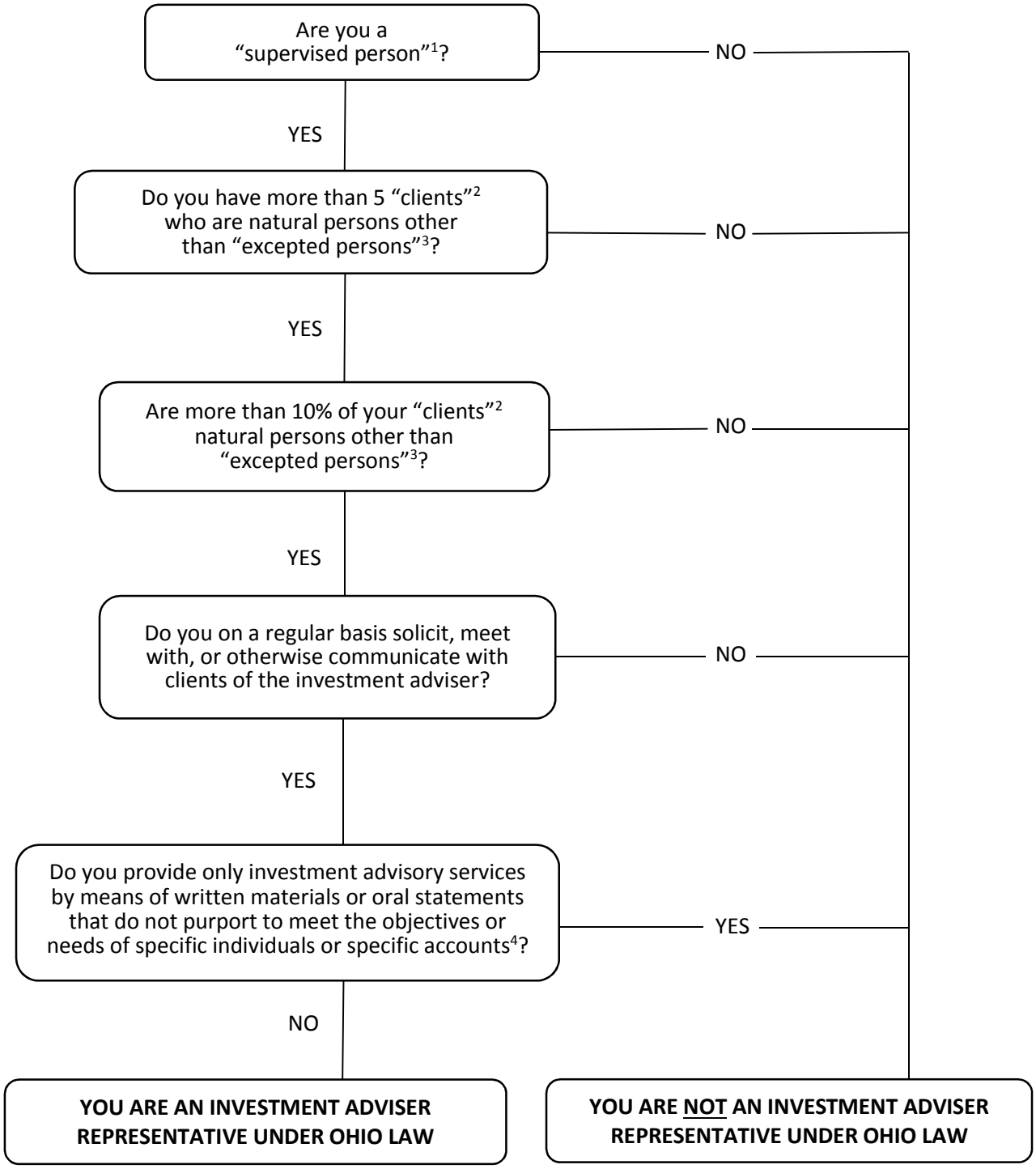
10. See O.A.C. 1301:6-3-01(L)(1). To qualify for this limited exclusion, you must, during a twelve-month period, (i) have fewer than fifteen clients; (ii) not hold yourself out generally to the public as an investment adviser; and (iii) have as clients only the sophisticated, trust or family entities specified in the rule.

11. See O.A.C. 1301:6-3-01(L)(2). A solicitor is any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser or investment adviser representative. The rule regarding cash payments for client solicitations is contained in O.A.C. 1301:6-3-44(C)(1) and requires, among other things, a solicitor who received cash payments to provide a written solicitation disclosure document to clients.

Appendix D - Investment Adviser Representative Flowchart

ARE YOU AN INVESTMENT ADVISER REPRESENTATIVE UNDER OHIO LAW?
(R.C. 1707.01(CC))

(The accompanying notes are an integral part of this flowchart.)



NOTES TO "ARE YOU AN INVESTMENT ADVISER REPRESENTATIVE UNDER OHIO LAW"?

1. "Supervised person" is defined in R.C. 1707.01(DD) to mean a natural person who is any of the following:

   (1) a partner, officer, or director of an investment adviser, or other person occupying a similar status or performing similar functions with respect to an investment adviser; or

   (2) an employee of an investment adviser; or

   (3) a person who provides investment advisory services on behalf of the investment adviser and is subject to the supervision and control of the investment adviser.

   This definition of "supervised person" matches the federal definition of "supervised person" contained in section 202(a)(25) of the Investment Adviser Act of 1940. The definition of "investment adviser representative" contained in R.C. 1707.01(CC) tracks the definition of that term set out in SEC Rule 203A-3(a) promulgated under the Investment Advisers Act of 1940.

2. R.C. 1707.01(CC)(2) lists certain persons who are deemed to be a single client for purposes of this definition. R.C. 1707.01(CC)(2) tracks SEC Rule 203(b)(3)-1 promulgated under the Investment Advisers Act of 1940.

3. "Excepted person" is defined in R.C. 1707.01(EE), and generally means a person who has: (i) at least $750,000 under the management of the adviser; or (ii) has a net worth (jointly with spouse) of more than $1,500,000; or (iii) is a "qualified purchaser" as defined in R.C. 1707.01(FF); or (iv) is an executive officer, director, trustee, general partner, or person serving in a similar capacity of the investment adviser; or (v) is a non-clerical employee of the investment adviser who participates in the investment activities of the adviser, and has so participated for at least 12 months. This definition of "excepted person" tracks the SEC's definition of "excepted person" contained in SEC Rule 203A-3(a)(3)(i) promulgated under the Investment Advisers Act of 1940, which in turn is based on SEC Rule 205-3(d)(1) promulgated under the Investment Advisers Act of 1940.

   "Qualified purchaser" is defined in R.C. 1707.01(FF), and generally means a natural person who owns not less than $5,000,000 in "investments" or who owns and invests on a discretionary basis not less than $25,000,000 in "investments." This definition of "qualified purchaser" is based on the SEC's definition of "qualified purchaser" set out in SEC Rule 205-3(d)(1)(ii)(B) promulgated under the Investment Advisers Act of 1940. For purposes of this definition of "qualified

purchaser," the Division defines "investments" to mean "investments" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940.

4. This is defined as "impersonal investment advice" by the SEC. See SEC Rule 203A-3(a)(3)(ii) promulgated under the Investment Advisers Act of 1940.

Appendix E - Pre-Licensing Examination

APPLICATION FILED THROUGH THE IARD:

Once the Ohio Division of Securities receives your application for an Investment Adviser License in Ohio, by way of the Form ADV submitted through the IARD system, applicants will receive notification of the Pre-Licensing Examination.

Please familiarize yourself with Ohio's investment adviser rules, found in the Ohio Administrative Code 1301:6-3-15.1, 1301:6-3-16.1, and 1301:6-3-44. The Ohio Administrative Code can be accessed using our website at www.com.ohio.gov/secu. In addition to the Ohio Administrative Code, information for investment advisers can be found in the Licensing section of our web site.

Please be advised that the Ohio Division of Securities is requiring all applicants to file ADV Part 2 electronically via IARD prior to being licensed.

COMPLETION OF THE LICENSING PROCESS:

Once we have reviewed your application through the IARD and determined it to be complete, the licensing process can be completed. The following tasks must be completed prior to approval.

In accordance with the provisions of the Ohio Revised Code 1707-15.1(B)(1), all IA Applicants are required to provide to the Division with the documents on the attached list. Due to how your business is formed, some of the requested documents may not be applicable, if this occurs, the Division requires a written explanation.

These documents should be submitted to the Division electronically to the e-mail address provided upon application.

DOCUMENTS REQUIRED TO BE SUBMITTED BEFORE INVESTMENT ADVISER LICENSING CAN BE COMPLETED

1. Copies of all investment advisory contracts your firm intends to use. All contracts must comply with the requirements of the Ohio Administrative code 1301:6-3-15.1(H)

2. A list of all branch offices your firm intends to have upon starting business. The list should include the address, telephone number, the number of investment adviser representatives, and the name of the manager of the branch office.

3. A list of all employees and their duties.

4. A copy of your firm's compliance manual, including a business continuity plan, disaster recovery plan and the designation of a chief compliance officer. Please indicate how you intend to document the required annual review of your compliance manual.

5. Copies of business cards for each investment adviser representative of your firm.

6. Copies of any solicitor agreements.

7. A statement of how your firm will comply with the requirements to maintain financial records and produce financial statements. The financial statement requirements are found in the Ohio Administrative Code 1301:6-3-15.1(E) (1).

8. A statement of how your firm intends to comply with the five-year record retention requirements