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

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

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

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

* * * * *

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

* * * * *

§ 275.204–3 Delivery of brochures and brochure supplements.

(a) *General requirements.* If you are registered under the Act as an investment adviser, you must deliver a brochure and one or more brochure supplements to each client or prospective client that contains all information required by Part 2 of Form ADV [17 CFR 279.1].

(b) *Delivery requirements.* Subject to paragraph (g), you (or a supervised person acting on your behalf) must:

(1) Deliver to a client or prospective client your current brochure before or at the time you enter into an investment advisory contract with that client.

(2) Deliver to each client, annually within 120 days after the end of your fiscal year and without charge, if there are material changes in your brochure since your last annual updating amendment:

(i) A current brochure, or

(ii) The summary of material changes to the brochure as required by Item 2 of Form ADV, Part 2A that offers to provide your current brochure without charge, accompanied by the Web site address (if available) and an e-mail address (if available) and telephone number by which a client may obtain the current brochure from you, and the Web site address for obtaining information about you through the Investment Adviser Public Disclosure (IAPD) system.

(3) Deliver to each client or prospective client a current brochure supplement for a supervised person before or at the time that supervised person begins to provide advisory services to the client; provided, however, that if investment advice for a client is provided by a team comprised of more than five supervised persons, a current brochure supplement need only be delivered to that client for the five supervised persons with the most significant responsibility for the day-to-day advice provided to that client. For purposes of this section, a supervised person will provide advisory services to a client if that supervised person will:

(i) Formulate investment advice for the client and have direct client contact; or

(ii) Make discretionary investment decisions for the client, even if the supervised person will have no direct client contact.

(4) Deliver the following to each client promptly after you create an amended brochure or brochure supplement, as applicable, if the amendment

adds disclosure of an event, or materially revises information already disclosed about an event, in response to Item 9 of Part 2A of Form ADV or Item 3 of Part 2B of Form ADV (Disciplinary Information), respectively, (i) the amended brochure or brochure supplement, as applicable, along with a statement describing the material facts relating to the change in disciplinary information, or (ii) a statement describing the material facts relating to the change in disciplinary information.

(c) *Exceptions to delivery requirement.* (1) You are not required to deliver a brochure to a client:

(i) That is an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 to 80a–64] or a business development company as defined in that Act, provided that the advisory contract with that client meets the requirements of section 15(c) of that Act [15 U.S.C. 80a–15(c)]; or

(ii) Who receives only impersonal investment advice for which you charge less than $500 per year.

(2) You are not required to deliver a brochure supplement to a client:

(i) To whom you are not required to deliver a brochure under subparagraph (c)(1) of this section;

(ii) Who receives only impersonal investment advice; or

(iii) Who is an officer, employee, or other person related to the adviser that would be a ''qualified client'' of your firm under § 275.205–3(d)(1)(iii).

(d) *Wrap fee program brochures.* (1) If you are a sponsor of a wrap fee program, then the brochure that paragraph (b) of this section requires you to deliver to a client or prospective client of the wrap fee program must be a wrap fee program brochure containing all the information required by Part 2A, Appendix 1 of Form ADV. Any additional information in a wrap fee program brochure must be limited to information applicable to wrap fee programs that you sponsor.

(2) You do not have to deliver a wrap fee program brochure if another sponsor of the wrap fee program delivers, to the client or prospective client of the wrap fee program, a wrap fee program brochure containing all the information required by Part 2A, Appendix 1 of Form ADV.

NOTE TO PARAGRAPH (d): A wrap fee program brochure does not take the place of any brochure supplements that you are required to deliver under paragraph (b) of this section.

(e) *Multiple brochures.* If you provide substantially different advisory services to different clients, you may provide them with different brochures, so long as each client receives all information about the services and fees that are applicable to that client. The brochure you deliver to a client may omit any information required by Part 2A of Form ADV if the information does not apply to the advisory services or fees that you will provide or charge, or that you propose to provide or charge, to that client.

(f) *Other disclosure obligations.* Delivering a brochure or brochure supplement in compliance with this section does not relieve you of any other disclosure obligations you have to your advisory clients or prospective clients under any federal or state laws or regulations.

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

(1) *Impersonal investment advice* means investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts.

(2) *Current brochure* and *current brochure supplement* mean the most recent revision of the brochure or brochure supplement, including all amendments to date.

(3) *Sponsor* of a wrap fee program means an investment adviser 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.

(4) *Supervised person* means any of your officers, partners or directors (or other persons occupying a similar status or performing similar functions) or employees, or any other person who provides investment advice on your behalf.

(5) *Wrap fee program* means an advisory program under which a specified fee or fees not based directly upon transactions in a client's account is

charged for investment advisory services (which may include portfolio management or advice concerning the selection of other investment advisers) and the execution of client transactions.

[75 FR 49268, Aug. 12, 2010, as amended at 81 FR 60458, Oct. 31, 2016; 84 FR 33630, July 12, 2019]

§ 275.204–4 Reporting by exempt reporting advisers.

(a) *Exempt reporting advisers.* If you are an investment adviser relying on the exemption from registering with the Commission under section 203(l) or (m) of the Act (15 U.S.C. 80b–3(l) or 80b–3(m)), you must complete and file reports on Form ADV (17 CFR 279.1) by following the instructions in the Form, which specify the information that an exempt reporting adviser must provide.

(b) *Electronic filing.* You must file Form ADV electronically with the Investment Adviser Registration Depository (IARD) unless you have received a hardship exemption under paragraph (e) of this section.

NOTE TO PARAGRAPH (b): Information on how to file with the IARD is available on the Commission's Web site at *http://www.sec.gov/iard.*

(c) *When filed.* Each Form ADV is considered filed with the Commission upon acceptance by the IARD.

(d) *Filing fees.* You must pay FINRA (the operator of the IARD) a filing fee. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed Form ADV will not be accepted by FINRA, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(e) *Temporary hardship exemption*—(1) *Eligibility for exemption.* If you have unanticipated technical difficulties that prevent submission of a filing to the IARD, you may request a temporary hardship exemption from the requirements of this chapter to file electronically.

(2) *Application procedures.* To request a temporary hardship exemption, you must:

(i) File Form ADV–H (17 CFR 279.3) in paper format no later than one business day after the filing that is the subject of the ADV–H was due; and

(ii) Submit the filing that is the subject of the Form ADV–H in electronic format with the IARD no later than seven business days after the filing was due.

(3) *Effective date—upon filing.* The temporary hardship exemption will be granted when you file a completed Form ADV–H.

(f) *Final report.* You must file a final report in accordance with instructions in Form ADV when:

(1) You cease operation as an investment adviser;

(2) You no longer meet the definition of exempt reporting adviser under paragraph (a); or

(3) You apply for registration with the Commission.

NOTE TO PARAGRAPH (f): You do not have to pay a filing fee to file a final report on Form ADV through the IARD.

[76 FR 43013, July 19, 2011]

§ 275.204–5 Delivery of Form CRS.

(a) *General requirements.* If you are registered under the Act as an investment adviser, you must deliver Form CRS, required by Part 3 of Form ADV [17 CFR 279.1], to each retail investor.

(b) *Delivery requirements.* You (or a supervised person acting on your behalf) must:

(1) Deliver to each retail investor your current Form CRS before or at the time you enter into an investment advisory contract with that retail investor.

(2) Deliver to each retail investor who is an existing client your current Form CRS before or at the time you:

(i) Open a new account that is different from the retail investor's existing account(s);

(ii) Recommend that the retail investor roll over assets from a retirement account into a new or existing account or investment; or

(iii) Recommend or provide a new investment advisory service or investment that does not necessarily involve the opening of a new account and would not be held in an existing account.

(3) Post the current Form CRS prominently on your website, if you

have one, in a location and format that is easily accessible for retail investors.

(4) Communicate any changes made to Form CRS to each retail investor who is an existing client within 60 days after the amendments are required to be made and without charge. The communication can be made by delivering the amended Form CRS or by communicating the information through another disclosure that is delivered to the retail investor.

(5) Deliver a current Form CRS to each retail investor within 30 days upon request.

(c) *Other disclosure obligations.* Delivering Form CRS in compliance with this section does not relieve you of any other disclosure obligations you have to your retail investors under any Federal or State laws or regulations.

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

(1) *Current Form CRS* means the most recent version of the Form CRS.

(2) *Retail investor* means a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.

(3) *Supervised person* means any of your officers, partners or directors (or other persons occupying a similar status or performing similar functions) or employees, or any other person who provides investment advice on your behalf.

(e) *Transition rule.* (1) Within 30 days after the date by which you are first required by § 275.204–1(b)(3) to electronically file your Form CRS with the Commission, you must deliver to each of your existing clients who is a retail investor your current Form CRS as required by Part 3 of Form ADV.

(2) As of the date by which you are first required to electronically file your Form CRS with the Commission, you must begin using your Form CRS as required by Part 3 of Form ADV to comply with the requirements of paragraph (b) of this section.

[84 FR 33631, July 12, 2019]

§ 275.204(b)–1 Reporting by investment advisers to private funds.

(a) *Reporting by investment advisers to private funds on Form PF.* If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), you act as an investment adviser to one or more private funds and, as of the end of your most recently completed fiscal year, you managed private fund assets of at least $150 million, you must complete and file a report on Form PF (17 CFR 279.9) by following the instructions in the Form, which specify the information that an investment adviser must provide. Your initial report on Form PF is due no later than the last day on which your next update would be timely in accordance with paragraph (e) if you had previously filed the Form; provided that you are not required to file Form PF with respect to any fiscal quarter or fiscal year ending prior to the date on which your registration becomes effective.

(b) *Electronic filing.* You must file Form PF electronically with the Form PF filing system on the Investment Adviser Registration Depository (IARD).

NOTE TO PARAGRAPH (b): Information on how to file Form PF is available on the Commission's Web site at *http://www.sec.gov/iard.*

(c) *When filed.* Each Form PF is considered filed with the Commission upon acceptance by the Form PF filing system.

(d) *Filing fees.* You must pay the operator of the Form PF filing system a filing fee as required by the instructions to Form PF. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed Form PF will not be accepted by the operator of the Form PF filing system, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(e) *Updates to Form PF.* You must file an updated Form PF:

(1) At least annually, no later than the date specified in the instructions to Form PF; and

(2) More frequently, if required by the instructions to Form PF. You must file all updated reports electronically with the Form PF filing system.

(f) *Temporary hardship exemption.* (1) If you have unanticipated technical difficulties that prevent you from submitting Form PF on a timely basis through the Form PF filing system, you may request a temporary hardship

exemption from the requirements of this section to file electronically.

(2) To request a temporary hardship exemption, you must:

(i) Complete and file in paper format, in accordance with the instructions to Form PF, Item A of Section 1a and Section 5 of Form PF, checking the box in Section 1a indicating that you are requesting a temporary hardship exemption, no later than one business day after the electronic Form PF filing was due; and

(ii) Submit the filing that is the subject of the Form PF paper filing in electronic format with the Form PF filing system no later than seven business days after the filing was due.

(3) The temporary hardship exemption will be granted when you file Item A of Section 1a and Section 5 of Form PF, checking the box in Section 1a indicating that you are requesting a temporary hardship exemption.

(4) The hardship exemptions available under § 275.203–3 do not apply to Form PF.

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

(1) *Assets under management* means the regulatory assets under management as determined under Item 5.F of Form ADV (§ 279.1 of this chapter).

(2) *Private fund assets* means the investment adviser's assets under management attributable to private funds.

[76 FR 71174, Nov. 16, 2011]

§ 275.204A–1 Investment adviser codes of ethics.

(a) *Adoption of code of ethics.* If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), you must establish, maintain and enforce a written code of ethics that, at a minimum, includes:

(1) A standard (or standards) of business conduct that you require of your supervised persons, which standard must reflect your fiduciary obligations and those of your supervised persons;

(2) Provisions requiring your supervised persons to comply with applicable Federal securities laws;

(3) Provisions that require all of your access persons to report, and you to review, their personal securities transactions and holdings periodically as provided below;

(4) Provisions requiring supervised persons to report any violations of your code of ethics promptly to your chief compliance officer or, provided your chief compliance officer also receives reports of all violations, to other persons you designate in your code of ethics; and

(5) Provisions requiring you to provide each of your supervised persons with a copy of your code of ethics and any amendments, and requiring your supervised persons to provide you with a written acknowledgment of their receipt of the code and any amendments.

(b) *Reporting requirements*—(1) *Holdings reports.* The code of ethics must require your access persons to submit to your chief compliance officer or other persons you designate in your code of ethics a report of the access person's current securities holdings that meets the following requirements:

(i) *Content of holdings reports.* Each holdings report must contain, at a minimum:

(A) The title and type of security, and as applicable the exchange ticker symbol or CUSIP number, number of shares, and principal amount of each reportable security in which the access person has any direct or indirect beneficial ownership;

(B) The name of any broker, dealer or bank with which the access person maintains an account in which any securities are held for the access person's direct or indirect benefit; and

(C) The date the access person submits the report.

(ii) *Timing of holdings reports.* Your access persons must each submit a holdings report:

(A) No later than 10 days after the person becomes an access person, and the information must be current as of a date no more than 45 days prior to the date the person becomes an access person.

(B) At least once each 12-month period thereafter on a date you select, and the information must be current as of a date no more than 45 days prior to the date the report was submitted.

(2) *Transaction reports.* The code of ethics must require access persons to submit to your chief compliance officer

or other persons you designate in your code of ethics quarterly securities transactions reports that meet the following requirements:

(i) *Content of transaction reports.* Each transaction report must contain, at a minimum, the following information about each transaction involving a reportable security in which the access person had, or as a result of the transaction acquired, any direct or indirect beneficial ownership:

(A) The date of the transaction, the title, and as applicable the exchange ticker symbol or CUSIP number, interest rate and maturity date, number of shares, and principal amount of each reportable security involved;

(B) The nature of the transaction (i.e., purchase, sale or any other type of acquisition or disposition);

(C) The price of the security at which the transaction was effected;

(D) The name of the broker, dealer or bank with or through which the transaction was effected; and

(E) The date the access person submits the report.

(ii) *Timing of transaction reports.* Each access person must submit a transaction report no later than 30 days after the end of each calendar quarter, which report must cover, at a minimum, all transactions during the quarter.

(3) *Exceptions from reporting requirements.* Your code of ethics need not require an access person to submit:

(i) Any report with respect to securities held in accounts over which the access person had no direct or indirect influence or control;

(ii) A transaction report with respect to transactions effected pursuant to an automatic investment plan;

(iii) A transaction report if the report would duplicate information contained in broker trade confirmations or account statements that you hold in your records so long as you receive the confirmations or statements no later than 30 days after the end of the applicable calendar quarter.

(c) *Pre-approval of certain investments.* Your code of ethics must require your access persons to obtain your approval before they directly or indirectly acquire beneficial ownership in any security in an initial public offering or in a limited offering.

(d) *Small advisers.* If you have only one access person (i.e., yourself), you are not required to submit reports to yourself or to obtain your own approval for investments in any security in an initial public offering or in a limited offering, if you maintain records of all of your holdings and transactions that this section would otherwise require you to report.

(e) *Definitions.* For the purpose of this section:

(1) *Access person* means:

(i) Any of your supervised persons:

(A) Who has access to nonpublic information regarding any clients' purchase or sale of securities, or nonpublic information regarding the portfolio holdings of any reportable fund, or

(B) Who is involved in making securities recommendations to clients, or who has access to such recommendations that are nonpublic.

(ii) If providing investment advice is your primary business, all of your directors, officers and partners are presumed to be access persons.

(2) *Automatic investment plan* means a program in which regular periodic purchases (or withdrawals) are made automatically in (or from) investment accounts in accordance with a predetermined schedule and allocation. An automatic investment plan includes a dividend reinvestment plan.

(3) *Beneficial ownership* is interpreted in the same manner as it would be under § 240.16a–1(a)(2) of this chapter in determining whether a person has beneficial ownership of a security for purposes of section 16 of the Securities Exchange Act of 1934 (15 U.S.C. 78p) and the rules and regulations thereunder. Any report required by paragraph (b) of this section may contain a statement that the report will not be construed as an admission that the person making the report has any direct or indirect beneficial ownership in the security to which the report relates.

(4) *Federal securities laws* means the Securities Act of 1933 (15 U.S.C. 77a-aa), the Securities Exchange Act of 1934 (15 U.S.C. 78a-mm), the Sarbanes-Oxley Act of 2002 (Pub. L. 107–204, 116 Stat. 745 (2002)), the Investment Company Act of

1940 (15 U.S.C. 80a), the Investment Advisers Act of 1940 (15 U.S.C. 80b), title V of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338 (1999), any rules adopted by the Commission under any of these statutes, the Bank Secrecy Act (31 U.S.C. 5311–5314; 5316–5332) as it applies to funds and investment advisers, and any rules adopted thereunder by the Commission or the Department of the Treasury.

(5) *Fund* means an investment company registered under the Investment Company Act.

(6) *Initial public offering* means an offering of securities registered under the Securities Act of 1933 (15 U.S.C. 77a), the issuer of which, immediately before the registration, was not subject to the reporting requirements of sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)).

(7) *Limited offering* means an offering that is exempt from registration under the Securities Act of 1933 pursuant to section 4(a)(2) or section 4(a)(5) (15 U.S.C. 77d(a)(2) or 77d(a)(5)) or pursuant to §§ 230.504 or 230.506 of this chapter.

(8) *Purchase or sale of a security* includes, among other things, the writing of an option to purchase or sell a security.

(9) *Reportable fund* means:

(i) Any fund for which you serve as an investment adviser as defined in section 2(a)(20) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(20)) (i.e., in most cases you must be approved by the fund's board of directors before you can serve); or

(ii) Any fund whose investment adviser or principal underwriter controls you, is controlled by you, or is under common control with you. For purposes of this section, *control* has the same meaning as it does in section 2(a)(9) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(9)).

(10) *Reportable security* means a security as defined in section 202(a)(18) of the Act (15 U.S.C. 80b–2(a)(18)), except that it does not include:

(i) Direct obligations of the Government of the United States;

(ii) Bankers' acceptances, bank certificates of deposit, commercial paper and high quality short-term debt instruments, including repurchase agreements;

(iii) Shares issued by money market funds;

(iv) Shares issued by open-end funds other than reportable funds; and

(v) Shares issued by unit investment trusts that are invested exclusively in one or more open-end funds, none of which are reportable funds.

[69 FR 41708, July 9, 2004, as amended at 76 FR 81806, Dec. 29, 2011; 81 FR 83554, Nov. 21, 2016]

§ 275.205–1 Definition of "investment performance" of an investment company and "investment record" of an appropriate index of securities prices.

(a) *Investment performance* of an investment company for any period shall mean the sum of:

(1) The change in its net asset value per share during such period;

(2) The value of its cash distributions per share accumulated to the end of such period; and

(3) The value of capital gains taxes per share paid or payable on undistributed realized long-term capital gains accumulated to the end of such period; expressed as a percentage of its net asset value per share at the beginning of such period. For this purpose, the value of distributions per share of realized capital gains, of dividends per share paid from investment income and of capital gains taxes per share paid or payable on undistributed realized long-term capital gains shall be treated as reinvested in shares of the investment company at the net asset value per share in effect at the close of business on the record date for the payment of such distributions and dividends and the date on which provision is made for such taxes, after giving effect to such distributions, dividends and taxes.

(b) *Investment record* of an appropriate index of securities prices for any period shall mean the sum of:

(1) The change in the level of the index during such period; and

(2) The value, computed consistently with the index, of cash distributions made by companies whose securities comprise the index accumulated to the end of such period; expressed as a percentage of the index level at the beginning of such period. For this purpose cash distributions on the securities

which comprise the index shall be treated as reinvested in the index at least as frequently as the end of each calendar quarter following the payment of the dividend.

EXHIBIT I

[METHOD OF COMPUTING THE INVESTMENT RECORD OF THE STANDARD & POOR'S 500 STOCK COMPOSITE INDEX FOR CALENDAR 1971]

Quarterly ending—	Index value [1]	Quarterly dividend yield-composite index	
		Annual percent [2]	Quarterly percent [3] (¼ of annual)≤
Dec. 1970	92.15	.....	.....
Mar. 1971	100.31	3.10	0.78
June 1971	99.70	3.11	.78
Sept. 1971	98.34	3.14	.79
Dec. 1971	102.09	3.01	.75

[1] Source: Standard & Poor's Trade and Securities Statistics, Jan. 1972, p. 33.
[2] *Id.* See Standard & Poor's Trade and Securities Statistics Security and Price Index Record—1970 Edition, p. 133 for explanation of quarterly dividend yield.
[3] Quarterly percentages have been founded to two decimal places.

Change in index value for 1971: 102.09 − 92.15 = 9.94.

Accumulated value of dividends for 1971:

$$\frac{\text{Quarter ending:}}{\text{Percent yield}} = \frac{\text{March}}{1.0078} \times \frac{\text{June}}{1.0079} \times \frac{\text{Sept.}}{1.0079} \times \frac{\text{Dec.}}{1.0075} - 1.00 = .0314$$

Aggregate value of dividends paid, assuming quarterly reinvestment and computed consistently with the index:

(Percent yield as computed above) × (ending index value) = Aggregate value of dividends paid

For 1971:

$.0314 \times 102.09 = 3.21$

Investment record of Standard & Poor's 500 stock composite index assuming quarterly reinvestment dividends:

$$\frac{9.94 + 3.21}{92.15} = 14.27 \text{ percent}$$

The same method can be extended to cases where an investment company's fiscal quarters do not coincide with the fiscal quarters of the S & P dividend record or to instances where a "rolling period" is used for performance comparisons as indicated by the following example of the calculation of the investment record of the Standard & Poor's 500 Stock Composite Index for the 12 months ended November 1971:

Index value Nov. 30, 1971	93.99
Index value Nov. 30, 1970	87.20
Change in index value	6.79

Quarter ending—	Dividend yield		Rate for each month of quarter (1/12 of annual)≤
	Annual rate	¼ of annual	
Dec. 1970	3.41	0.85	0.28
Mar. 1971	3.10	.78	.26
June 1971	3.11	.78	.26
Sept. 1971	3.14	.79	.26
Dec. 1971	3.01	.75	.25

Accumulated value of dividends reinvested:

December = 1.0028
January-March = 1.0078
April-June = 1.0078
July-September = 1.0079
October-November = 1.0053 [4]

Dividend yield:

$(1.0028 \times 1.0078 \times 1.0078 \times 1.0079 \times 1.0053) - 1.00 = .0320$

Aggregate value of dividends paid computed consistently with the index:

$.0320 \times 93.99 = 3.01$

[4] The rate for October and November would be two-thirds of the yield for the quarter ended Sept. 30 (i.e. .667 × .79 = 5269) since the yield for the quarter ended Dec. 31 would not be available as of Nov. 30.

Investment record of the Standard & Poor's 500 Stock Composite Index for the 12 months ended November 30, 1971:

$$\frac{6.79+3.01}{87.20}=11.24 \text{ percent}$$

EXHIBIT II

[METHOD OF COMPUTING THE INVESTMENT RECORD OF THE NEW YORK STOCK EXCHANGE COMPOSITE INDEX FOR CALENDAR 1971]

(1)—Quarter ending	(2)—Index value [1]	(3)—Aggregate market value of shares listed on the NYSE as of end of quarter (billions of dollars) [2]	(4)—Quarterly value of estimated cash payments of shares listed on the NYSE (millions of dollars) [3]	(5)—Estimated yield [4] (quarterly percent)≤
Dec. 1970	50.23			
Mar. 1971	55.44	$709	$5,106	0.72
June 1971	55.09	710	4,961	.70
Sept. 1971	54.33	709	5,006	.71
Dec. 1971	56.43	742	5,183	.70

[1] Source: New York Stock Exchange Composite Index as reported daily by the New York Stock Exchange.
[2] Source: Monthly Review, New York Stock Exchange.
[3] Source: The Exchange, New York Stock Exchange magazine, May, Aug., Nov. 1971 and Feb. 1972 editions. Upon request the Statistics Division of the Research Department of the NYSE will make this figure available within 10 days of the end of each quarter.
[4] The ratio of column 4 to column 3.

Change in NYSE Composite Index value for 1971: 56.43 − 50.23 = 6.20.

Accumulated Value of Dividends of NYSE Composite Index for 1971:

$$\frac{\text{Quarter ending:}}{\text{Percent yield}}=\frac{\text{March}}{1.0072}\times\frac{\text{June}}{1.0070}\times\frac{\text{Sept.}}{1.0071}\times\frac{\text{Dec.}}{1.0070}-1.00=0.0286$$

Aggregate value of dividends paid on NYSE Composite Index assuming quarterly reinvestment:

For 1971:

$.0286 \times 56.43 = 1.61$

Investment record of the New York Stock Exchange Composite Index assuming quarterly reinvestment of dividends:

$$\frac{6.20+1.61}{50.23}=15.55 \text{ percent}$$

The same method can be extended to cases where an investment company's fiscal quarters do not coincide with the fiscal quarters of the NYSE dividend record or to instances where a "rolling period" is used for performance comparisons as indicated by the following example of the calculation of the investment record of the NYSE Composite Index for the 12 months ended November 1971:

Index value Nov. 30, 1971	51.84
Index value Nov. 30, 1970	47.41
Change in index value	4.43

Quarter ending	Dividend yield quarterly percent	Rate for each month of quarter (1/12 of annual)≤
Dec. 1970	0.79	0.26
Mar. 1971	.72	.24
June 1971	.70	.23
Sept. 1971	.71	.24
Dec. 1971	.70	.23

Accumulated value of dividends reinvested:

December = 1.0026
January-March = 1.0072
April-June = 1.0070
July-September = 1.0071
October-November = 1.0047 [4]

Dividend yield:

$(1.0026 \times 1.0072 \times 1.0070 \times 1.0071 \times 1.0047) - 1.00 = .0289$

Aggregate value of dividends paid computed consistently with the index:

[4] The rate for October and November would be two thirds of the yield for the quarter ended September 30 (i.e. .667 × .71 = 4736), since the yield for the quarter ended December 31 would not be available as of November 30.

$.0289 \times 51.84 = 1.50$

Investment record of the NYSE Composite Index for the 12 months ended November 30, 1971:

$$\frac{4.43 + 1.50}{47.41} = 12.51 \text{ percent}$$

(Secs. 205, 211, 54 Stat. 852, 74 Stat. 887, 15 U.S.C. 80b–205, 80b–211; sec. 25, 84 Stat. 1432, 1433, Pub. L. 91–547)

[37 FR 17468, Aug. 29, 1972]

§ 275.205–2 Definition of "specified period" over which the asset value of the company or fund under management is averaged.

(a) For purposes of this rule:

(1) *Fulcrum fee* shall mean the fee which is paid or earned when the investment company's performance is equivalent to that of the index or other measure of performance.

(2) *Rolling period* shall mean a period consisting of a specified number of subperiods of definite length in which the most recent subperiod is substituted for the earliest subperiod as time passes.

(b) The specified period over which the asset value of the company or fund under management is averaged shall mean the period over which the investment performance of the company or fund and the investment record of an appropriate index of securities prices or such other measure of investment performance are computed.

(c) Notwithstanding paragraph (b) of this section, the specified period over which the asset value of the company or fund is averaged for the purpose of computing the fulcrum fee may differ from the period over which the asset value is averaged for computing the performance related portion of the fee, only if:

(1) The performance related portion of the fee is computed over a rolling period and the total fee is payable at the end of each subperiod of the rolling period; and

(2) The fulcrum fee is computed on the basis of the asset value averaged over the most recent subperiod or subperiods of the rolling period.

(Secs. 205, 106A, 211; 54 Stat. 852, 855; 84 Stat. 1433, 15 U.S.C. 80b–5, 80b–6a, 80b–11)

[37 FR 24896, Nov. 22, 1972]

§ 275.205–3 Exemption from the compensation prohibition of section 205(a)(1) for investment advisers.

(a) *General.* The provisions of section 205(a)(1) of the Act (15 U.S.C. 80b–5(a)(1)) will not be deemed to prohibit an investment adviser from entering into, performing, renewing or extending an investment advisory contract that provides for compensation to the investment adviser on the basis of a share of the capital gains upon, or the capital appreciation of, the funds, or any portion of the funds, of a client, *Provided*, That the client entering into the contract subject to this section is a qualified client, as defined in paragraph (d)(1) of this section.

(b) *Identification of the client.* In the case of a private investment company, as defined in paragraph (d)(3) of this section, an investment company registered under the Investment Company Act of 1940, or a business development company, as defined in section 202(a)(22) of the Act (15 U.S.C. 80b–2(a)(22)), each equity owner of any such company (except for the investment adviser entering into the contract and any other equity owners not charged a fee on the basis of a share of capital gains or capital appreciation) will be considered a client for purposes of paragraph (a) of this section.

(c) *Transition rules*—(1) *Registered investment advisers.* If a registered investment adviser entered into a contract and satisfied the conditions of this section that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of this section; *Provided*, however, that if a natural person or company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser), the conditions of this section in effect at that time will apply with regard to that person or company.

(2) *Registered investment advisers that were previously not registered.* If an investment adviser was not required to register with the Commission pursuant to section 203 of the Act (15 U.S.C. 80b–3) and was not registered, section 205(a)(1) of the Act will not apply to an advisory contract entered into when the adviser was not required to register

and was not registered, or to an account of an equity owner of a private investment company advised by the adviser if the account was established when the adviser was not required to register and was not registered; *Provided*, however, that section 205(a)(1) of the Act will apply with regard to a natural person or company who was not a party to the contract and becomes a party (including an equity owner of a private investment company advised by the adviser) when the adviser is required to register.

(3) *Certain transfers of interests.* Solely for purposes of paragraphs (c)(1) and (c)(2) of this section, a transfer of an equity ownership interest in a private investment company by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, will not cause the transferee to ''become a party'' to the contract and will not cause section 205(a)(1) of the Act to apply to such transferee.

(d) *Definitions.* For the purposes of this section:

(1) The term *qualified client* means:

(i) A natural person who, or a company that, immediately after entering into the contract has at least $1,000,000 under the management of the investment adviser;

(ii) A natural person who, or a company that, the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either:

(A) Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $2,000,000. For purposes of calculating a natural person's net worth:

(*1*) The person's primary residence must not be included as an asset;

(*2*) Indebtedness secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time the investment advisory contract is entered into may not be included as a liability (except that if the amount of such indebtedness outstanding at the time of calculation exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess must be included as a liability); and

(*3*) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the residence must be included as a liability; or

(B) Is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(51)(A)) at the time the contract is entered into; or

(iii) A natural person who immediately prior to entering into the contract is:

(A) An executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or

(B) An employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company for at least 12 months.

(2) The term *company* has the same meaning as in section 202(a)(5) of the Act (15 U.S.C. 80b–2(a)(5)), but does not include a company that is required to be registered under the Investment Company Act of 1940 but is not registered.

(3) The term *private investment company* means a company that would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)) but for the exception provided from that definition by section 3(c)(1) of such Act (15 U.S.C. 80a–3(c)(1)).

(4) The term *executive officer* means the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions, for the investment adviser.

(e) *Inflation adjustments.* Pursuant to section 205(e) of the Act, the dollar amounts specified in paragraphs (d)(1)(i) and (d)(1)(ii)(A) of this section shall be adjusted by order of the Commission, on or about May 1, 2016 and issued approximately every five years thereafter. The adjusted dollar amounts established in such orders shall be computed by:

(1) Dividing the year-end value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), as published by the United States Department of Commerce, for the calendar year preceding the calendar year in which the order is being issued, by the year-end value of such index (or successor) for the calendar year 1997;

(2) For the dollar amount in paragraph (d)(1)(i) of this section, multiplying $750,000 times the quotient obtained in paragraph (e)(1) of this section and rounding the product to the nearest multiple of $100,000; and

(3) For the dollar amount in paragraph (d)(1)(ii)(A) of this section, multiplying $1,500,000 times the quotient obtained in paragraph (e)(1) of this section and rounding the product to the nearest multiple of $100,000.

[63 FR 39027, July 21, 1998, as amended at 69 FR 72088, Dec. 10, 2004; 77 FR 10368, Feb. 22, 2012]

§ 275.206(3)–1 Exemption of investment advisers registered as broker-dealers in connection with the provision of certain investment advisory services.

(a) An investment adviser which is a broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934 shall be exempt from section 206(3) in connection with any transaction in relation to which such broker or dealer is acting as an investment adviser solely (1) by means of publicly distributed written materials or publicly made oral statements; (2) by means of written materials or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts; (3) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or (4) any combination of the foregoing services: *Provided, however,* That such materials and oral statements include a statement that if the purchaser of the advisory communication uses the services of the adviser in connection with a sale or purchase of a security which is a subject of such communication, the adviser may act as principal for its own account or as agent for another person.

(b) For the purpose of this Rule, publicly distributed written materials are those which are distributed to 35 or more persons who pay for such materials, and publicly made oral statements are those made simultaneously to 35 or more persons who pay for access to such statements.

NOTE: The requirement that the investment adviser disclose that it may act as principal or agent for another person in the sale or purchase of a security that is the subject of investment advice does not relieve the investment adviser of any disclosure obligation which, depending upon the nature of the relationship between the investment adviser and the client, may be imposed by subparagraphs (1) or (2) of section 206 or the other provisions of the federal securities laws.

[40 FR 38159, Aug. 27, 1975]

§ 275.206(3)–2 Agency cross transactions for advisory clients.

(a) An investment adviser, or a person registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) and controlling, controlled by, or under common control with an investment adviser, shall be deemed in compliance with the provisions of sections 206(3) of the Act (15 U.S.C. 80b–6(3)) in effecting an agency cross transaction for an advisory client, if:

(1) The advisory client has executed a written consent prospectively authorizing the investment adviser, or any other person relying on this rule, to effect agency cross transactions for such advisory client, provided that such written consent is obtained after full written disclosure that with respect to agency cross transactions the investment adviser or such other person will act as broker for, receive commissions from, and have a potentially conflicting division of loyalties and responsibilities regarding, both parties to such transactions;

(2) The investment adviser, or any other person relying on this rule, sends to each such client a written confirmation at or before the completion of each such transaction, which confirmation includes (i) a statement of the nature of such transaction, (ii) the date such transaction took place, (iii) an offer to furnish upon request, the time when such transaction took place, and (iv) the source and amount of any other remuneration received or to be received by the investment adviser and any other person relying on this rule in connection with the transaction, *Provided, however*, That if, in the case of a purchase, neither the investment adviser nor any other person relying on this rule was participating in a distribution, or in the case of a sale, neither the investment adviser nor any other person relying on this rule was participating in a tender offer, the written confirmation may state whether any other remuneration has been or will be received and that the source and amount of such other remuneration will be furnished upon written request of such customer;

(3) The investment adviser, or any other person relying in this rule, sends to each such client, at least annually, and with or as part of any written statement or summary of such account from the investment adviser or such other person, a written disclosure statement identifying the total number of such transactions during the period since the date of the last such statement or summary, and the total amount of all commissions or other remuneration received or to be received by the investment adviser or any other person relying on this rule in connection with such transactions during such period;

(4) Each written disclosure statement and confirmation required by this rule includes a conspicuous statement that the written consent referred to in paragraph (a)(1) of this section may be revoked at any time by written notice to the investment adviser, or to any other person relying on this rule, from the advisory client; and

(5) No such transaction is effected in which the same investment adviser or an investment adviser and any person controlling, controlled by or under common control with such investment adviser recommended the transaction to both any seller and any purchaser.

(b) For purposes of this rule the term *agency cross transaction for an advisory client* shall mean a transaction in which a person acts as an investment adviser in relation to a transaction in which such investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, acts as broker for both such advisory client and for another person on the other side of the transaction.

(c) This rule shall not be construed as relieving in any way the investment adviser or another person relying on this rule from acting in the best interests of the advisory client, including fulfilling the duty with respect to the best price and execution for the particular transaction for the advisory client; nor shall it relieve such person or persons from any disclosure obligation which may be imposed by subparagraphs (1) or (2) of section 206 of the Act or by other applicable provisions of the federal securities laws.

[42 FR 29301 June 8, 1977, as amended at 48 FR 41379, Sept. 15, 1983; 62 FR 28135, May 22, 1997]

§ 275.206(4)–1 Advertisements by investment advisers.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), directly or indirectly, to publish, circulate, or distribute any advertisement:

(1) Which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, anaylsis, report or other service rendered by such investment adviser; or

(2) Which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would have been profitable to any person: *Provided, however,* That this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations

made by such investment adviser within the immediately preceding period of not less than one year if such advertisement, and such list if it is furnished separately: (i) State the name of each such security recommended, the date and nature of each such recommendation (e.g., whether to buy, sell or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each such security as of the most recent practicable date, and (ii) contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: ''it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list''; or

(3) Which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or

(4) Which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or

(5) Which contains any untrue statement of a material fact, or which is otherwise false or misleading.

(b) For the purposes of this section the term *advertisement* shall include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (2) any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, or (3) any other investment advisory service with regard to securities.

(Sec. 206, 54 Stat. 852, as amended; 15 U.S.C. 80b–6)

[26 FR 10549, Nov. 9, 1961, as amended at 62 FR 28135, May 22, 1997]

EFFECTIVE DATE NOTE: At 86 FR 13139, Mar. 5, 2021, § 275.206(4)–1 was revised, effective May 4, 2021. For the convenience of the user, the revised text is set forth as follows:

§ 275.206(4)–1 Investment Adviser Marketing.

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

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

(1) Include any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading;

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

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

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

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

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

(7) Otherwise be materially misleading.

(b) *Testimonials and endorsements.* An advertisement may not include any testimonial or endorsement, and an adviser may not provide compensation, directly or indirectly, for

a testimonial or endorsement, unless the investment adviser complies with the conditions in paragraphs (b)(1) through (3) of this section, subject to the exemptions in paragraph (b)(4) of this section.

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

(i) Clearly and prominently:

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

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

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

(ii) The material terms of any compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the person for the *testimonial* or *endorsement;* and

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

(2) *Adviser oversight and compliance.* The investment adviser must have:

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

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

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

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

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

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

(A) Paragraph (b)(1) of this section if the testimonial or endorsement is a recommendation subject to § 240.151–1 of this chapter (Regulation Best Interest) under that Act;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) Any hypothetical performance unless the investment adviser:

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

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

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

(7) Any predecessor performance unless:

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

(ii) The accounts managed at the predecessor investment adviser are sufficiently similar to the accounts managed at the advertising investment adviser that the performance results would provide relevant information to clients or investors;

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

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

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

(1) *Advertisement* means:

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

(A) Extemporaneous, live, oral communications;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) An order pursuant to section 9(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–9) with respect to such event; or

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

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

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

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

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

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

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

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

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

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

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

(A) Performance derived from model portfolios;

(B) Performance that is backtested by the application of a strategy to data from prior time periods when the strategy was not actually used during those time periods; and

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

(ii) Hypothetical performance does not include:

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

potential risks and returns of investment choices; provided that the investment adviser:

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

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

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

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

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

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

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

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

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

(10) *Net performance* means the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser. For purposes of this rule, net performance:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 275.206(4)–2 Custody of funds or securities of clients by investment advisers.

(a) *Safekeeping required.* If you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3), it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the *Act (15 U.S.C. 80b–6(4))* for you to have custody of client funds or securities unless:

(1) *Qualified custodian.* A qualified custodian maintains those funds and securities: