CHAPTER 2876
DEPARTMENT OF COMMERCE
REGULATING SECURITIES

2876.1020 DEPOSITORY INSTITUTIONS.

The term "broker-dealer" does not include a depository institution that engages in the conditioned activities described in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, United States Code, title 15, section 78c(a)(4)(B)-(C).

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.1021 REGULATION D.

"Regulation D" as used in the Minnesota Securities Act, Minnesota Statutes, chapter 80A, and the rules adopted under the act means Regulation D as promulgated by the Securities and Exchange Commission, Code of Federal Regulations, title 17, sections 230.501 to 230.508, as amended.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.1030 EFFECTIVE DATE OF INCORPORATIONS BY REFERENCE.

Unless otherwise indicated, whenever a reference is made in this chapter to a federal, state, or self-regulatory organization's statute, rule, decision, or opinion, the reference is deemed to refer to the version of the statute, rule, decision, or opinion as of August 1, 2007, or as later amended.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.2020 RECOGNIZED MANUALS APPROVED BY COMMISSIONER.

"Nationally recognized securities manuals," as that term is used in Minnesota Statutes, section 80A.46 (2)(D), are limited to the following:

A. Standard & Poor's Corporation Records;

B. Mergent Industrial Manual and News Reports;

C. Mergent Bank and Finance Manual and News Reports;

D. Mergent Transportation Manual and News Reports;

E. Mergent Public Utility Manual and News Reports;

F. Mergent OTC Industrial Manual and News Reports; and

G. Mergent International Manual and News Reports.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.2021 SINGLE ISSUE; INTEGRATION.

The following factors should be considered in determining whether offers and sales are part of a "single issue" for purposes of the exemption contained in Minnesota Statutes, section 80A.46 (14):

A. whether the offers and sales are part of a single plan of financing;

B. whether the offers and sales involve issuance of the same class of securities;

C. whether the offers and sales have been made at or about the same time;

D. whether the same type of consideration is being received; and

E. whether the offers and sales are made for the same general purpose.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.3020 FEDERAL COVERED SECURITIES; NOTICE FILINGS.

Subpart 1. **Section 18(b)(2) securities.** With respect to a federal covered security, as defined in section 18(b)(2) of the Securities Act of 1933, United States Code, title 15, section 77r(b)(2), that is not otherwise exempt under Minnesota Statutes, sections 80A.45 to 80A.47:

A. An initial notice filing by or on behalf of an issuer must be filed with the administrator, and the notice filing must contain:

(1) Form NF (Uniform Investment Company Notice Filing), completed in accordance with the Form NF Instructions;

(2) a consent to service of process complying with Minnesota Statutes, section 80A.88; and

(3) a filing fee to be determined in accordance with Minnesota Statutes, section 80A.65, subdivision 1, paragraph (c).

B. On or before expiration of a notice filing, the issuer may amend or renew a notice filing by filing Form NF and a fee, if applicable.

C. All notice filings expire at midnight on June 30.

Subp. 2. **Section 18(b)(4)(D) securities.** With respect to a security that is a federal covered security under section 18(b)(4)(D) of the Securities Act of 1933, United States Code, title 15, section 77r(b)(4)(D), a notice filing by or on behalf of an issuer must be filed with the administrator, and the notice filing must contain:

A. a copy of Form D as promulgated by the Securities and Exchange Commission;

B. a report of the aggregate value of securities included in this offering already sold or offered to be sold to persons located in this state;

C. a consent to service of process complying with Minnesota Statutes, section 80A.88, signed by the issuer not later than 15 days after the first sale of the federal covered security in Minnesota; and

D. a filing fee to be determined in accordance with Minnesota Statutes, section 80A.65, subdivision 1, paragraph (a).

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.3021 SMALL CORPORATE OFFERING REGISTRATION STATEMENT.

Subpart 1. **Alternative to Form U-7.** Applicants may file a small corporate offering registration statement in a format other than Form U-7 so long as the alternative registration statement contains all of the information required by all items of Form U-7 as adopted by the North American Securities Administrators Association and all of the attachments required by the instructions for Form U-7, or specifically states that any omitted information or attachments are not applicable. All information contained in an alternative registration statement must be set forth under appropriate captions or headings reasonably indicative of the principal subject matter set forth. Each small corporate offering registration statement submitted under this section must include:

A. in its forepart a reasonably detailed table of contents showing the subject matter of the various sections or subdivisions and the page number on which each section or subdivision begins; and

B. an index indicating where the information required by each item of Form U-7 is located in the small corporate offering registration statement.

Subp. 2. **Unaudited financial statements.** Interim financial statements may be unaudited. All other financial statements may be unaudited if reviewed by independent certified public accountants in accordance with the Accounting and Review Service Standards promulgated by the American Institute of Certified Public Accountants and:

A. the applicant has not previously sold securities through an offering involving the general solicitation of prospective investors by means of advertising, mass mailings, public meetings, cold call telephone solicitation, or any other method directed toward the public;

B. the applicant has not been previously required under federal or state securities laws to provide audited financial statements in connection with any sale of its securities; and

C. the aggregate amount of all previous sales of securities by the applicant, exclusive of debt financing with banks and similar commercial lenders, does not exceed $1,000,000.

Subp. 3. **Posteffective amendments.** After the small corporate offering registration statement has been declared effective, and while the offering is still in progress, the registrant shall amend or supplement the small corporate offering registration statement to contain such further material information, if any, as may be necessary to make the information in the small corporate offering registration statement not misleading. A copy of the registration statement as changed, revised, or supplemented and clearly marked to show changes from the previously filed version shall be filed with the administrator and distributed to all offerees.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.3040 REGISTRATION STATEMENT; REQUIRED RECORDS.

Subpart 1. **Information required in registration statement.** A registration statement under Minnesota Statutes, section 80A.52, must contain the information and records specified in Minnesota Statutes, section 80A.52, paragraph (b), clauses (1) to (18).

Subp. 2. **Additional information required.** A registration statement under Minnesota Statutes, section 80A.52, must also contain:

A. such further material information, if any, as may be necessary to make the required information and records, in the light of the circumstances under which they are made, not misleading; and

B. a statement by the issuer that it has complied with the requirements in Minnesota Statutes, chapter 345, relating to unclaimed property.

Subp. 3. **Periodic reports.** While a registration statement is effective, the person that filed the registration statement must update it to keep it reasonably current by filing with the administrator a report explaining any material changes to the information contained in the registration statement.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.3041 SECURITIES NOT APPROVED.

Every registration statement and prospectus for a security that is registered as required under Minnesota Statutes, chapter 80A, and is exempt from registration by section 3(a)(11) of the Securities Act of 1933, as amended, or any rule promulgated thereunder shall bear on the front page of the registration statement or prospectus the following language in capital letters and boldface type:

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE MINNESOTA DEPARTMENT OF COMMERCE NOR HAS THE DIVISION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.3042 PROSPECTUS DISTRIBUTION MAY BE REQUIRED.

As a condition of registration under Minnesota Statutes, section 80A.52, a prospectus containing the information specified in part 2876.3040 must be sent or given to each person to which an offer is made, before or concurrently, with the earliest of:

A. the first offer made in a record to the person otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

B. the confirmation of a sale made by or for the account of the person;

C. payment pursuant to such a sale; or

D. delivery of the security pursuant to such a sale.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4020 AGENTS REPRESENTING ISSUERS AS FINDERS.

Subpart 1. **Definitions.** An individual's "immediate family" means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, and sister-in-law of the individual and any other person, other than a tenant or employee, sharing the household of the individual.

Subp. 2. **Limitations of activities.** An individual exempt from registration as an agent under Minnesota Statutes, section 80A.57 (b)(11), may perform only the following acts:

A. introduce prospective investors to issuers and issuers to prospective investors for compensation, if any, from the issuer only;

B. furnish to an issuer services that do not involve dealings with prospective investors if compensation for the services is not contingent, by agreement or in fact, upon investment by prospective investors; and

C. engage in communications and dealings with prospective investors that are unrelated to the investors' possible investment in the issuer.

An individual relying upon this exemption is not required to conduct any independent investigation or review of the issuer's offering materials.

Subp. 3. **Disclosure to investors.** An individual exempt from registration as an agent under Minnesota Statutes, section 80A.57 (b)(11), must disclose, or ensure that the issuer discloses, clearly and conspicuously in writing, to each investor prior to the time the investor enters into a binding agreement to purchase the issuer's securities to be sold in connection with the individual's services as an agent the following information:

A. the individual is acting as an agent for the issuer;

B. the amount of or method of calculation for any proposed payment by the issuer to the agent for the individual's services as an agent or in any other capacity for the issuer; and

C. any beneficial interest, direct or indirect, held by or to be acquired as part of the proposed payment to the individual acting as an agent, or held by or to be acquired as part of the proposed payment to a member of the individual's immediate family, in the issuer's securities.

Subp. 4. **Unlawful activities.** It is unlawful for an individual exempt from registration as an agent under Minnesota Statutes, section 80A.57 (b)(11), to act as an agent in connection with an offer or sale of a security that violates Minnesota Statutes, section 80A.49, unless the individual:

A. made a reasonable effort to ascertain before performing the acts described in subpart 2, items A and B, whether the offer or sale was exempted from registration under Minnesota Statutes, section 80A.46 (11) or (14); and

B. reasonably believed that the offer or sale was so exempted.

Subp. 5. **Notice.**

[NOTICE REQUIRED BY MINNESOTA STATUTES, SECTION 80A.57 (b)(11)(D)]

STATE OF MINNESOTA

DEPARTMENT OF COMMERCE
85 SEVENTH PLACE EAST, SUITE 500
ST. PAUL, MINNESOTA 55101-2198

In accordance with the requirements of Minnesota Statutes, section 80A.57 (b)(11)(D), the undersigned, intending to represent one or more issuers with respect to an offer or sale of the issuer's securities in offerings that are exempted by Minnesota Statutes, section 80A.46 (11) or 80A.46 (14) provides the following information to the Minnesota Department of Commerce:

_____

Full Legal Name of Individual

_____

Current Principal Business Address

_____

Current Principal Business Telephone Number

_____

Current Principal Business Email Address

_____

Any Other Name(s) Used by Undersigned in Prior Five Years

____ Yes ____ No The undersigned is, or within the prior five years has been, licensed by or registered with a state or federal government, government agency, or a self-regulatory organization, commodities exchange, or securities exchange as a broker-dealer, registered representative, investment adviser, or investment adviser representative. If yes, please provide IARD/CRD number(s):

_____

The undersigned undertakes to notify the Commissioner of Commerce in writing of any change in the foregoing information within five business days of the change.

_____

Signature of Individual

_____

Date

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4021 DIRECT COMMON CONTROL.

Broker-dealers are affiliated by direct common control, for the purpose of Minnesota Statutes, section 80A.57 (e), when 80 percent or more of the equity of each broker-dealer is beneficially owned by the same person or group of persons.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4050 NOTICE FILING REQUIREMENTS FOR FEDERAL COVERED INVESTMENT ADVISERS.

Subpart 1. **Notice filing.** The notice filing for a federal covered investment adviser pursuant to Minnesota Statutes, section 80A.60 (a), shall be filed electronically with IARD on an executed Form ADV (Uniform Application for Investment Adviser Registration). A notice filing of a federal covered investment adviser shall be deemed filed when the fee required by Minnesota Statutes, section 80A.65, subdivision 2a, and the Form ADV are filed electronically with and accepted by IARD on behalf of the state.

Subp. 2. **Form ADV Part II.** The administrator shall either:

A. accept a copy of Part II of Form ADV as filed electronically with IARD; or

B. deem Part II of Form ADV filed. When the administrator deems Part II of Form ADV to be filed, a federal covered investment adviser is not required to submit Part II of Form ADV to the administrator unless requested. If requested, a federal covered investment adviser must provide, within five days of the request, Part II of Form ADV to the administrator.

Subp. 3. **Renewal.** The annual renewal of the notice filing for a federal covered investment adviser pursuant to Minnesota Statutes, section 80A.60 (c), shall be filed electronically with IARD. The renewal of the notice filing for a federal covered investment adviser shall

be deemed filed when the fee required by Minnesota Statutes, section 80A.65, subdivision 2a, is filed with and accepted by IARD on behalf of the state.

Subp. 4. **Updates and amendments.** A federal covered investment adviser must file electronically with IARD, in accordance with the instructions in the Form ADV, any amendments to the federal covered investment adviser's Form ADV.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4060 ELECTRONIC FILING WITH DESIGNATED ENTITY.

Subpart 1. **Designations.** The administrator designates:

A. the Web-based Central Registration Depository ("CRD") to receive and store filings and collect related fees from broker-dealers and agents representing broker-dealers on behalf of the administrator; and

B. the Web-based Investment Adviser Registration Depository ("IARD") to receive and store filings and collect related fees from investment advisers and federal covered investment advisers on behalf of the administrator.

Subp. 2. **Use of CRD/IARD.**

A. Unless otherwise provided, all applications, amendments, reports, notices, related filings, and fees required to be filed with the administrator pursuant to the Minnesota Securities Act or the rules adopted thereunder, shall be filed electronically with and transmitted to:

(1) CRD, when the filing is required for the registration of a broker-dealer or agent representing a broker-dealer; and

(2) IARD, when the filing is required for the registration of an investment adviser.

B. The following additional conditions relate to such electronic filings:

(1) When a signature or signatures are required by the particular instructions of any filing to be made electronically through CRD/IARD, a duly authorized officer of the applicant or the applicant himself or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing electronically to CRD/IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individuals whose names are typed on the filing.

(2) Solely for purposes of a filing made electronically through CRD/IARD, a document is considered filed with the administrator when all fees are received and the filing is accepted by CRD/IARD on behalf of the state.

Subp. 3. **Electronic filing.** Notwithstanding subpart 2, the electronic filing of any particular document and the collection of related processing fees shall not be required until such time as CRD/IARD provides for receipt of such filings and fees and reasonable notice is provided by the administrator. Any documents or fees required to be filed with the administrator that are not permitted to be filed with or cannot be accepted electronically by CRD/IARD shall be filed directly with the administrator.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4061 APPLICATION FOR INVESTMENT ADVISER REGISTRATION.

Subpart 1. **Initial application.** The application for initial registration as an investment adviser pursuant to Minnesota Statutes, section 80A.58 (a), shall be made by completing Form ADV (Uniform Application for Investment Adviser Registration) in accordance with

the form instructions and by filing the form electronically with IARD. The application for initial registration must also include the following:

A. proof of compliance by the investment adviser with the examination requirements of part 2876.4120;

B. any financial statements required in part 2876.4113, if applicable;

C. a copy of the surety bond required by part 2876.4115, if applicable;

D. the fee required by Minnesota Statutes, section 80A.65, subdivision 2; and

E. any other information the administrator may reasonably require.

Subp. 2. **Form ADV Part II.** The administrator shall either:

A. accept a copy of Part II of Form ADV as filed electronically with IARD; or

B. require a paper copy of Part II of Form ADV be filed directly with the administrator.

Subp. 3. **Annual renewal.** The application for annual renewal registration as an investment adviser shall be filed electronically with IARD. The application for annual renewal registration must include the following:

A. the fee required by Minnesota Statutes, section 80A.65, subdivision 2; and

B. a copy of the surety bond required by part 2876.4115, if applicable.

Subp. 4. **Updates and amendments.**

A. An investment adviser must file electronically with IARD, in accordance with the instructions in the Form ADV, any amendments to the investment adviser's Form ADV.

B. An amendment will be considered to be filed promptly if the amendment is filed within 30 days of the event that requires the filing of the amendment.

C. Within 90 days of the end of the investment adviser's fiscal year, an investment adviser must file electronically with IARD an Annual Updating Amendment to the Form ADV.

Subp. 5. **Completion of filing.** An application for initial or renewal registration is not considered filed for purposes of Minnesota Statutes, section 80A.58 (a), until the required fee and all required submissions have been filed with the administrator.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4062 APPLICATION FOR REGISTRATION BY BROKER-DEALERS AND AGENTS REPRESENTING BROKER-DEALERS.

Subpart 1. **Initial application.** The application for initial registration:

A. As a broker-dealer pursuant to Minnesota Statutes, section 80A.56 (a), shall be made by completing Form BD (Uniform Application for Broker-Dealer Registration) in accordance with the form instructions and by filing the form electronically with Central Registration Depository (CRD). The application for initial registration must also include the following:

(1) proof of compliance by the broker-dealer with the examination requirements of part 2876.4120;

(2) the fee required by Minnesota Statutes, section 80A.65, subdivision 2; and

(3) any other information the administrator may reasonably require.

B. As an agent representing a broker-dealer pursuant to Minnesota Statutes, section 80A.57 (a), shall be made by completing Form U-4 (Uniform Application for Securities Industry Registration or Transfer) in accordance with the form instructions and by filing the

form electronically with CRD. The application for initial registration must also include the following:

(1) proof of compliance by the agent representing a broker-dealer with the examination requirements of part 2876.4120;

(2) the fee required by Minnesota Statutes, section 80A.65, subdivision 2; and

(3) any other information the administrator may reasonably require.

Subp. 2. **Annual renewal.** To renew a registration as a broker-dealer or an agent representing a broker-dealer, the registrant must submit to CRD the fee required by Minnesota Statutes, section 80A.65, subdivision 2.

Subp. 3. **Updates and amendments.**

A. A broker-dealer must file electronically with CRD any amendments to the broker-dealer's Form BD in accordance with the form instructions.

B. An agent representing a broker-dealer must file electronically with CRD any amendments to the agent's Form U-4 in accordance with the form instructions.

C. An amendment will be considered to be filed promptly if the amendment is filed within 30 days of the event that requires the filing of the amendment.

Subp. 4. **Completion of filing.** An application for initial or renewal registration is not considered filed for purposes of Minnesota Statutes, sections 80A.56 (a) and 80A.57 (a), until the required fee and all required submissions have been filed with the administrator.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4100 AMENDMENTS REQUIRING AN ORDER OF THE ADMINISTRATOR.

Amendments "requiring an order of the administrator," pursuant to Minnesota Statutes, section 80A.65, subdivision 3, shall mean any change in the language of a currently existing registration, unless a provision in Minnesota Statutes, chapter 80A, expressly allows an amendment to become effective without requiring an order of the administrator.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4101 PROMPTLY REMEDIED.

For purposes of Minnesota Statutes, section 80A.65, subdivisions 2 and 2a, an investment adviser and a federal covered investment adviser, respectively, will have "promptly remedied" a delay in payment or underpayment of fees if the adviser remits the fee payment to the administrator within ten business days of receipt of notification from the administrator of the delay or underpayment. If the payment is not received within the ten-business-day period, an investment adviser and a federal covered investment adviser will be found to have refused to pay the fee.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4110 RECEIPT OF MONEY FROM SALES.

No broker-dealer or agent participating in any distribution of securities, other than a firm commitment distribution of securities, shall accept any part of the sale price of any security being distributed unless:

A. the money or other consideration received is promptly transmitted to the persons entitled thereto; or

B. if the distribution is being made on an all-or-none basis, or on any other basis that contemplates that payment is not to be made to the person on whose behalf the distribution is being made until some further event or contingency occurs:

(1) the money or other consideration received is promptly deposited in a separate bank account, with the broker-dealer or agent as agent or trustee for the persons who have the beneficial interest therein, and remains in the bank account until the appropriate event or contingency has occurred, at which time the funds are promptly transmitted or returned to the persons entitled thereto; or

(2) all such funds are promptly transmitted to a bank that has agreed in writing to hold all such funds in escrow for the persons who have the beneficial interests therein, and all such funds are transmitted or returned directly to the persons entitled thereto when the appropriate event or contingency has occurred.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4112 MINIMUM FINANCIAL REQUIREMENTS FOR INVESTMENT ADVISERS; NET CAPITAL REQUIREMENTS FOR BROKER-DEALERS.

Subpart 1. **Custody.** An investment adviser registered or required to be registered under the Minnesota Securities Act who has custody of client funds or securities shall maintain at all times a minimum net worth of $35,000 except:

A. An investment adviser having custody solely due to direct fee deduction and complying with the terms described under part 2876.4116, subpart 1, item F, and the related books and records requirements, as described in part 2876.4114, shall not be required to comply with the net worth or bonding requirements of this part.

B. An investment adviser having custody solely due to advising pooled investment vehicles and complying with the terms described under part 2876.4116, subpart 1, item F, or subpart 2, item C, and the related books and records requirements, as described in part 2876.4114, shall not be required to comply with the net worth or bonding requirements of this part.

Subp. 2. **Discretionary authority.** An investment adviser registered or required to be registered under the Minnesota Securities Act who has discretionary authority over client funds or securities but does not have custody of client funds or securities shall maintain at all times a minimum net worth of $10,000.

Subp. 3. **Prepayments.** An investment adviser registered or required to be registered under the Minnesota Securities Act who accepts prepayment of more than $500 per client and six or more months in advance shall maintain at all times a positive net worth.

Subp. 4. **Notice of deficiency.** Unless otherwise exempted, as a condition of the right to transact business in this state, every investment adviser registered or required to be registered under the Minnesota Securities Act shall by the close of business on the next business day notify the administrator if such investment adviser's net worth is less than the minimum required. After transmitting such notice, each investment adviser shall file by the close of business on the next business day a report with the administrator of its financial condition, including the following:

A. a trial balance of all ledger accounts;

B. a statement of all client funds or securities which are not segregated;

C. a computation of the aggregate amount of client ledger debit balances; and

D. a statement as to the number of client accounts.

Subp. 5. **Net worth defined.** For purposes of subparts 1 to 9, the term "net worth" means an excess of assets over liabilities, as determined by generally accepted accounting principles, but shall not include as assets: prepaid expenses (except as to items properly classified as assets under generally accepted accounting principles), deferred charges,

goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, all other assets of intangible nature, home, home furnishings, automobiles, and any other personal items not readily marketable in the case of an individual; advances or loans to stockholders and officers in the case of a corporation; and advances or loans to partners in the case of a partnership.

Subp. 6. **Custody defined.** For purposes of this part, "custody" is defined in part 2876.4116, subpart 3, item A.

Subp. 7. **Exercising discretion.** For purposes of this part, an investment adviser shall not be deemed to be exercising discretion when it places trade orders with a broker-dealer pursuant to a third-party trading agreement if:

A. the investment adviser has executed a separate investment adviser contract exclusively with its client which acknowledges that a third-party trading agreement will be executed to allow the investment adviser to effect securities transactions for the client in the client's broker-dealer account;

B. the investment adviser contract specifically states that the client does not grant discretionary authority to the investment adviser and the investment adviser in fact does not exercise discretion with respect to the account; and

C. a third-party trading agreement is executed between the client and a broker-dealer which specifically limits the investment adviser's authority in the client's broker-dealer account to the placement of trade orders and deduction of investment adviser fees.

Subp. 8. **Appraisals.** The administrator may require that a current appraisal be submitted in order to establish the worth of any asset.

Subp. 9. **Out-of-state investment advisers.** Every investment adviser that has its principal place of business in a state other than this state shall maintain only such minimum net worth as required by the state in which the investment adviser maintains its principal place of business, provided the investment adviser is registered in such state and is in compliance with such state's minimum capital requirements.

Subp. 10. **Net capital requirement.** Every broker-dealer registered or required to register under the Minnesota Securities Act shall at all times have and maintain net capital in compliance with Code of Federal Regulations, title 17, section 240.15c 3-1.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4113 FINANCIAL REPORTING REQUIREMENTS FOR INVESTMENT ADVISERS.

Subpart 1. **Custody.** Every investment adviser, registered or required to be registered, who has custody of client funds or securities or requires payment of advisory fees six months or more in advance and in excess of $500 per client shall first have filed with the administrator an audited balance sheet as of the end of the investment adviser's most recent fiscal year if the filing is submitted more than 135 days after the last day of the investment adviser's most recent fiscal year. If the filing is submitted within 135 days after the last day of the investment adviser's most recent fiscal year, then the investment adviser shall file with the administrator an audited balance sheet as of the end of the investment adviser's second most recent fiscal year. Each balance sheet filed pursuant to this part must be:

A. examined in accordance with generally accepted auditing standards and prepared in conformity with generally accepted accounting principles;

B. audited by an independent certified public accountant; and

C. accompanied by an opinion of the accountant as to the report of financial position, and by a note stating the principles used to prepare it, the basis of included securities, and any other explanations required for clarity.

Subp. 2. **Discretionary authority.** Every registered investment adviser who has discretionary authority over client funds or securities, but not custody, shall first have filed

with the administrator a balance sheet, which need not be audited, but which must be prepared in accordance with generally accepted accounting principles or such other basis of accounting acceptable to the administrator and represented by the investment adviser or the person who prepared the statement as true and accurate, as of the end of the investment adviser's most recent fiscal year for which a balance sheet has been prepared.

Subp. 3. **Filing deadline.** If the balance sheet required to be filed under subpart 1 or 2 is as of a date more than 135 days from the date of filing of the application, then an audited or unaudited balance sheet that is as of a date within 135 days from the date of filing of the application must also be filed with the administrator.

Subp. 4. **Out-of-state investment advisers.** Every investment adviser that has its principal place of business in a state other than this state shall file only such reports as required by the state in which the investment adviser maintains its principal place of business, provided the investment adviser is registered or licensed in such state and is in compliance with such state's financial reporting requirements.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4114 RECORDKEEPING REQUIREMENTS.

Subpart 1. **Books and records; investment advisers.** Every investment adviser registered or required to be registered under the Minnesota Securities Act, Minnesota Statutes, chapter 80A, shall make and keep true, accurate, and current the following books, ledgers, and records.

A. Those books and records required to be maintained and preserved in compliance with Rule 204-2 of the Investment Advisers Act of 1940, Code of Federal Regulations, title 17, section 275.204 -2, notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940.

B. A file containing a copy of all written communications received or sent regarding any litigation involving the investment adviser, and regarding any written customer or client complaint.

C. Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client.

D. Written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

E. A file containing a copy of each document (other than any notices of general dissemination) that was filed with or received from any state or federal agency or self-regulatory organization and that pertains to the registrant or its investment adviser representatives, including all applications, amendments, renewal filings, and correspondence.

F. For investment advisers who have custody, as that term is defined in part 2876.4116, subpart 3, item A, of client funds or securities, all records and evidence of compliance required by Rule 206(4)-2 under the Investment Advisers Act of 1940.

Subp. 2. **Out-of-state investment advisers.** Every investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of this part, provided the investment adviser is registered in such state and is in compliance with the state's recordkeeping requirements.

Subp. 3. **Manner of preservation; investment advisers.** Every investment adviser subject to subpart 1 shall preserve the following records in the manner prescribed.

A. All books and records required to be made under the provisions of subpart 1, items A to F, inclusive (except for books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of SEC Rule 204-2), 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 record, the first two years in the principal office of the investment adviser.

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

C. Books and records required to be made under the provisions of paragraphs (a)(11) and (a)(16) of SEC Rule 204-2 shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in the principal office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media.

D. Notwithstanding other record preservation requirements of this part, the following records or copies shall be required to be maintained at the business location of the investment adviser from which the customer or client is being provided or has been provided with investment advisory services:

(1) records required to be preserved under paragraphs (a)(3), (a)(7) to (10), (a)(14) and (15), (a)(17), (b) and (c) inclusive, of SEC Rule 204-2; and

(2) the records or copies required under the provision of paragraphs (a)(11) and (a)(16) of SEC Rule 204-2 which records or related records identify the name of the investment adviser representative providing investment advice from that business location, or which identify the business locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in this subpart.

Subp. 4. **Books and records; broker-dealers.** Every broker-dealer registered or required to be registered under the Minnesota Securities Act, Minnesota Statutes, chapter 80A, shall make and keep current its books and records in compliance with Code of Federal Regulations, title 17, sections 240.17a-3 and 240.17a-4.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4115 BONDING REQUIREMENTS FOR CERTAIN INVESTMENT ADVISERS.

Subpart 1. **Bond requirement.** Every investment adviser registered or required to be registered under the Minnesota Securities Act, Minnesota Statutes, chapter 80A, having custody of or discretionary authority over client funds or securities shall have first posted with the administrator a surety bond or an irrevocable letter of credit in the maximum amount authorized by Minnesota Statutes, section 80A.66, subsection (e). Any bond required by this subpart shall be issued by a company qualified to do business in this state. The bond must be in the form determined by the administrator and shall be subject to the claims of all clients of such investment adviser regardless of the client's state of residence.

Subp. 2. **Custody.** For purposes of this part, "custody" is defined in part 2876.4116, subpart 3, item A.

Subp. 3. **Exemptions.**

A. An investment adviser that has its principal place of business in a state other than this state shall be exempt from the requirements of subpart 1, provided that the investment adviser is registered as an investment adviser in the state where it has its principal place of business and is in compliance with such state's requirements relating to bonding.

B. An investment adviser that continuously maintains net capital of not less than $100,000 shall be exempt from the requirements of subpart 1.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4116 CUSTODY REQUIREMENTS FOR INVESTMENT ADVISERS.

Subpart 1. **Safekeeping required.** It is unlawful and deemed to be a fraudulent, deceptive, or manipulative act, practice, or course of business for an investment adviser to have custody of client funds or securities unless:

A. The investment adviser notifies the administrator promptly in writing that the investment adviser has or is authorized to have custody of client funds or securities. The notification is required to be given on Form ADV.

B. A qualified custodian maintains those funds and securities:

(1) in a separate account for each client under that client's name; or

(2) in accounts that contain only the investment adviser's clients' funds and securities, under the investment adviser's name as agent or trustee for the clients.

C. If an investment adviser opens an account with a qualified custodian on its client's behalf, either under the client's name or under the name of the investment adviser as agent, the investment adviser must notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information.

D. Account statements must be sent to clients, either:

(1) by a qualified custodian. The investment adviser must have a reasonable basis for believing that the qualified custodian sends an account statement, at least quarterly, to each client for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period;

(2) by the investment adviser.

(a) The investment adviser must send an account statement, at least quarterly, to each client for whom the investment adviser has custody of funds or securities, identifying the amount of funds and of each security of which the investment adviser has custody at the end of the period and setting forth all transactions during that period.

(b) An independent certified public accountant retained by the investment adviser must verify all client funds and securities by actual examination at least once during each calendar year at a time chosen by the accountant without prior notice or announcement to the investment adviser and that is irregular from year to year, and file a copy of the special examination report with the administrator within 30 days after the completion of the examination, along with a letter stating that it has examined the funds and securities and describing the nature and extent of the examination.

(c) The independent certified public accountant, upon finding any material discrepancies during the course of the examination, must notify the administrator within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the administrator; or

(3) if the investment adviser is a general partner of a limited partnership, or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle, the account statements required under this item must be sent to each limited partner, or member or other beneficial owner or their independent representative.

E. A client may designate an independent representative to receive, on the client's behalf, notices and account statements as required under items C and D.

F. An investment adviser who has custody as defined in subpart 3, item A, subitem (1), unit (b), by having fees directly deducted from client accounts must also provide the following safeguards:

(1) the investment adviser must have written authorization from the client to deduct advisory fees from the account held with the qualified custodian;

(2) each time a fee is directly deducted from a client account, the investment adviser must concurrently:

(a) send the qualified custodian an invoice of the amount of the fee to be deducted from the client's account; and

(b) send the client an invoice itemizing the fee. Itemization includes the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee;

(3) the investment adviser must notify the administrator in writing that the investment adviser intends to use the safeguards provided above. Notification is required to be given on Form ADV; and

(4) an investment adviser having custody solely because it meets the definition of custody as defined in subpart 3, item A, subitem (1), unit (b), and who complies with the safekeeping requirements in items A to F, will not be required to meet the financial requirements for custodial advisers in parts 2876.4112 and 2876.4113, subpart 1, or the bonding requirement in part 2876.4115.

G. An investment adviser who has custody as defined in subpart 3, item A, subitem (1), unit (c), and who does not meet the exception provided under subpart 2, item C, must, in addition to the safeguards in items A to E, also comply with the following:

(1) hire an independent party to review all fees, expenses, and capital withdrawals from the pooled accounts;

(2) send all invoices or receipts to the independent party, detailing the amount of the fee, expenses, or capital withdrawal and the method of calculation such that the independent party can:

(a) determine that the payment is in accordance with the pooled investment vehicle standards (generally the partnership agreement or membership agreement); and

(b) forward, to the qualified custodian, approval for payment of the invoice with a copy to the investment adviser;

(3) for purposes of this item, "independent party" means a person that:

(a) is engaged by the investment adviser to act as a gatekeeper for the payment of fees, expenses, and capital withdrawals from the pooled investment;

(b) does not control and is not controlled by and is not under common control with the investment adviser; and

(c) does not have, and has not had within the past two years, a material business relationship with the investment adviser;

(4) the investment adviser notifies the administrator in writing on Form ADV that the investment adviser intends to use the safeguards provided in subitems (1) and (2); and

(5) an investment adviser having custody solely because it meets the definition of custody as defined in subpart 3, item A, subitem (1), unit (c), and who complies with the safekeeping requirements in items A to E and G will not be required to meet the financial requirements for custodial investment advisers in parts 2876.4112 and 2876.4113, subpart 1, or the bonding requirement in part 2876.4115.

H. When a trust retains an investment adviser or employee, director, or owner of an investment adviser as trustee and the investment adviser acts as the investment adviser to that trust, the investment adviser will:

(1) notify the administrator in writing on Form ADV that the investment adviser intends to use the safeguards provided in subitems (2) and (3);

(2) send to the grantor of the trust, the attorney for the trust if it is a testamentary trust, the cotrustee (other than the investment adviser or employee, director, or owner of the investment adviser) or a defined beneficiary of the trust, at the same time that it sends any invoice to the qualified custodian, an invoice showing the amount of the trustees' fee or investment management or advisory fee, the value of the assets on which the fees were based, and the specific manner in which the fees were calculated;

(3) enter into a written agreement with a qualified custodian that specifies:

(a) that the qualified custodian will not deliver trust securities to the investment adviser or employee, director, or owner of the investment adviser, nor will transmit any funds to the investment adviser or employee, director, or owner of the investment adviser, except that the qualified custodian may pay trustees' fees to the trustee and investment management or advisory fees to the investment adviser, provided that:

i. the grantor of the trust or attorneys for the trust, if it is a testamentary trust, the cotrustee (other than the investment adviser or employee, director, or owner of the investment adviser), or a defined beneficiary of the trust has authorized the qualified custodian in writing to pay those fees;

ii. the statements for those fees show the amount of the fees for the trustee and, in the case of statements for investment management or advisory fees, show the value of the trust assets on which the fee is based and the manner in which the fee was calculated; and

iii. the qualified custodian agrees to send to the grantor of the trust, the attorneys for a testamentary trust, the cotrustee (other than the investment adviser or employee, director, or owner of the investment adviser), or a defined beneficiary of the trust, at least quarterly, a statement of all disbursements from the account of the trust, including the amount of investment management fees paid to the investment adviser and the amount of trustees' fees paid to the trustee; and

(b) except as otherwise set forth in subunit i, that the qualified custodian may transfer funds or securities, or both, of the trust only upon the direction of the trustee, who may be the investment adviser or employee, director, or owner of the investment adviser, who the investment adviser has duly accepted as an authorized signatory. The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the cotrustee (other than the investment adviser or employee, director, or owner of the investment adviser), or a defined beneficiary of the trust must designate the authorized signatory for management of the trust. The direction to transfer funds or securities, or both, can only be made to the following:

i. a trust company, bank trust department, or brokerage firm independent of the investment adviser for the account of the trust to which the assets relate;

ii. the named grantors or to the named beneficiaries of the trust;

iii. a third party independent of the investment adviser in payment of the fees or charges of the third party including, but not limited to, attorney, accountant's, or qualified custodian's fees for the trust, and taxes, interest, maintenance, or other expenses, if there is property other than securities or cash owned by the trust;

iv. third parties independent of the investment adviser for any other purpose legitimately associated with the management of the trust; or

v. a broker-dealer in the normal course of portfolio purchases and sales, provided that the transfer is made on payment against delivery basis or payment against trust receipt; and

(4) not be required to meet the financial requirements for custodial investment advisers in part 2876.4112 and 2876.4113, subpart 1, or the bonding requirement in part 2876.4115 if the investment adviser has custody solely because it meets the definition of custody as defined in subpart 3, item A, subitem (1), unit (c), and complies with the safekeeping requirements in items A to E and this item.

Subp. 2. **Exceptions.**

A. With respect to shares of an open-end company as defined in Section 5(a)(1) of the Investment Company Act of 1940 ("mutual fund"), the investment adviser may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with subpart 1.

B. Certain privately offered securities.

(1) The investment adviser is not required to comply with subpart 1 with respect to securities that are:

(a) acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(b) uncertificated and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(c) transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(2) Notwithstanding subitem (1), the provisions of this item are available with respect to securities held for the account of a limited partnership (or limited liability company, or other type of pooled investment vehicle) only if the limited partnership is audited, the audited financial statements are distributed, as described in item C and the investment adviser notifies the administrator in writing on Form ADV that the investment adviser intends to provide audited financial statements, as described in this subitem.

C. An investment adviser is not required to comply with subpart 1, item D, with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) that is subject to an audit at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year. The investment adviser must also notify the administrator in writing on Form ADV that the investment adviser intends to employ the use of the audit safeguards described in this item.

D. The investment adviser is not required to comply with this part with respect to the account of an investment company registered under the Investment Company Act of 1940.

E. An investment adviser is not required to comply with safekeeping requirements of Minnesota Statutes, section 80A.66, subsection (f), or the net worth and bonding requirements of parts 2876.4112, 2876.4113, subpart 1, and 2876.4115, if the investment adviser has custody solely because the investment adviser or employee, director, or owner of the investment adviser is a trustee for a beneficial trust, if all of the following conditions are met for each trust.

(1) The beneficial owner of the trust is a parent, a grandparent, a spouse, a sibling, a child, or a grandchild of the trustee. These relationships shall include "step" relationships.

(2) For each account under subitem (1), the investment adviser complies with the following:

(a) the investment adviser provides a written statement to each beneficial owner of the account setting forth a description of the requirements of subpart 1 and the reasons why the investment adviser will not be complying with those requirements;

(b) the investment adviser obtains from each beneficial owner a signed and dated statement acknowledging the receipt of the written statement required in unit (a); and

(c) the investment adviser maintains a copy of both documents described in units (a) and (b) until the account is closed or the investment adviser is no longer trustee.

F. Any investment adviser who intends to have custody of client funds or securities but is not able to utilize a qualified custodian as defined in subpart 3, item C, must first obtain approval from the administrator and must comply with all of the applicable safekeeping provisions under subpart 1, including taking responsibility for those provisions that are designated to be performed by a qualified custodian.

Subp. 3. **Definitions.** For purposes of this part, the following terms have the meanings given them.

A. "Custody" means holding directly or indirectly, client funds or securities, or having any authority to obtain possession of them, or having the ability to appropriate them.

(1) Custody includes:

(a) possession of client funds or securities unless received inadvertently and returned to the sender promptly, but in any case within three business days of receiving them;

(b) any arrangement, including a general power of attorney, under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the investment adviser's instruction to the custodian; and

(c) any capacity, such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust, that gives the investment adviser or its supervised person legal ownership of or access to client funds or securities.

(2) Receipt of checks drawn by clients and made payable to unrelated third parties will not meet the definition of custody if forwarded to the third party within 24 hours of receipt.

B. "Independent representative" means a person who:

(1) acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle and by law or contract is obliged to act in the best interest of the advisory client or the limited partners, members, or other beneficial owners;

(2) does not control, is not controlled by, and is not under common control with the investment adviser; and

(3) does not have, and has not had within the past two years, a material business relationship with the investment adviser.

C. "Qualified custodian" means the following independent institutions or entities that are not affiliated with the investment adviser by any direct or indirect common control and have not had a material business relationship with the investment adviser in the previous two years:

(1) a bank or savings association that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act;

(2) a registered broker-dealer holding the client assets in customer accounts;

(3) a registered futures commission merchant registered under Section 4f(a) of the Commodity Exchange Act, holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(4) a foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4117 INVESTMENT ADVISER BROCHURE RULE.

Subpart 1. **General requirements.** Unless otherwise provided in this part, an investment adviser, registered or required to be registered pursuant to Minnesota Statutes, section 80A.58, shall, in accordance with the provisions of this part, furnish each advisory client and prospective advisory client with a written disclosure statement which may be a copy of Part II of its Form ADV or written documents containing at least the information required by Part II of Form ADV, or such other information the administrator may require to carry out the public interest according to Minnesota Statutes, section 80A.85 (b).

Subp. 2. **Delivery.**

A. An investment adviser, except as provided in item B, shall deliver the statement required by this part to an advisory client or prospective advisory client:

(1) not less than 48 hours prior to entering into any investment advisory contract with the client or prospective client; or

(2) at the time of entering into any contract, if the advisory client has a right to terminate the contract without penalty within five business days after entering into the contract.

B. The delivery of the statement required by item A need not be made in connection with entering into:

(1) an investment company contract; or

(2) a contract for impersonal advisory services requiring a payment of less than $200.

Subp. 3. **Offer to deliver.**

A. An investment adviser, except as provided in item B, annually shall, without charge, deliver or offer in writing to deliver upon written request to each of its advisory clients the statement required by this part.

B. The delivery or offer required by item A need not be made to advisory clients receiving advisory services solely pursuant to:

(1) an investment company contract; or

(2) a contract for impersonal advisory services requiring a payment of less than $200.

C. With respect to an advisory client entering into a contract or receiving advisory services pursuant to a contract for impersonal advisory services that requires a payment of $200 or more, an offer of the type specified in item A shall also be made at the time of entering into an advisory contract.

D. Any statement requested in writing by an advisory client pursuant to an offer required by this subpart must be mailed or delivered within seven days of the receipt of the request.

Subp. 4. **Omission of inapplicable information.** If an investment adviser renders substantially different types of investment advisory services to different advisory clients, any information required by Part II of Form ADV may be omitted from the statement furnished to an advisory client or prospective advisory client if the information is applicable only to a type of investment advisory service or fee that is not rendered or charged, or proposed to be rendered or charged, to that client or prospective client.

Subp. 5. **Other disclosures.** Nothing in this part shall relieve any investment adviser from any obligation pursuant to any provision of the Minnesota Securities Act, Minnesota Statutes, chapter 80A, or the rules thereunder or other federal or state law to disclose any information to its advisory clients or prospective advisory clients not specifically required by this part.

Subp. 6. **Definitions.** For purposes of this part the following terms have the meanings given.

A. "Contract for impersonal advisory services" means any contract relating solely to the provision of investment advisory services:

(1) by means of written material or oral statements which do not purport to meet the objectives or needs of specific individuals or accounts;

(2) through the issuance of statistical information containing no expression of opinion as to the investment merits of a particular security; or

(3) any combination of the foregoing services.

B. "Entering into," in reference to an investment advisory contract, does not include an extension or renewal without material change of any such contract which is in effect immediately prior to the extension or renewal.

C. "Investment company contract" means a contract with an investment company registered under the Investment Company Act of 1940 which meets the requirements of Section 15(c) of that act.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.4120 EXAMINATION REQUIREMENTS.

Subpart 1. **Required examination.**

A. Unless otherwise waived by the administrator, each supervisory or control individual of an investment adviser shall take and pass within the two-year period immediately preceding the date of the application the Uniform Investment Adviser State Law Examination (S65) or the Uniform Combined State Law Examination (S66).

B. Unless otherwise waived by the administrator, each supervisory or control individual of a broker-dealer shall take and pass within the two-year period immediately preceding the date of the application at least one FINRA principal exam and either the Uniform Securities Agent State Law Examination (S63) or the Uniform Combined State Law Examination (S66).

C. Unless otherwise waived by the administrator, each agent representing a broker-dealer shall take and pass within the two-year period immediately preceding the date of the application at least one FINRA agent exam and either the Uniform Securities Agent State Law Examination (S63) or the Uniform Combined State Law Examination (S66).

Subp. 2. **Required experience.** No person shall be registered as an investment adviser or a broker-dealer unless at least one person employed full time in a supervisory capacity, by the applicant for a license, was actively engaged in the securities business in a similar supervisory capacity for a minimum of three of the preceding five years.

Subp. 3. **Exam exemption.** Any person who has been registered as an investment adviser in any state requiring the licensing, registration, or qualification of investment advisers within the two-year period immediately preceding the date of filing an application shall not be required to comply with the examination requirement in subpart 1, item A.

Subp. 4. **Professional designations in lieu of exam.** Compliance with subpart 1, item A, is waived if the applicant has been awarded any of the following designations and at the time of filing an application is current and in good standing:

A. Certified Financial Planner (CFP) awarded by the Certified Financial Planners Board of Standards.

B. Chartered Financial Consultant (ChFC) or Masters of Science and Financial Services (MSFS) awarded by the American College, Bryn Mawr, Pennsylvania.

C. Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts.

D. Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants.

E. Chartered Investment Counselor (CIC) awarded by the Investment Adviser Association.

Subp. 5. **S65 exemption.** An applicant who has taken and passed the Uniform Investment Adviser State Law Examination (S65) within two years prior to the date the application is filed with the administrator or at any time if the applicant has been registered as an investment adviser within the two years prior to the date the application is filed with the administrator shall not be required to take and pass the Uniform Investment Adviser State Law Examination again.

Subp. 6. **Prior liquidated firm.** No person shall be registered as an investment adviser or a broker-dealer if any employee of the person was an officer, supervisor, or owner of ten percent or more of the securities of any firm liquidated under the Securities Investor Protection Act of 1970, unless good cause be shown that the issuance of the license would be in the public interest according to Minnesota Statutes, section 80A.85 (b).

Subp. 7. **Unclaimed property.** As a condition of registration, every investment adviser and broker-dealer shall inform the administrator that it has complied with the requirements in Minnesota Statutes, chapter 345, relating to unclaimed property.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.5021 BROKER-DEALER CONDUCT.

Subpart 1. **Fair dealing.** Every broker-dealer and agent has the fundamental responsibility for fair dealing in all of their relationships with customers and others and must comply with NASD IM-2310-2.

Subp. 2. **Suitability.** In making recommendations to a customer, a broker-dealer must comply with NASD Conduct Rule 2310.

Subp. 3. **Supervision.** Every broker-dealer must supervise the activities of its registered agents and registered principals in compliance with NASD Conduct Rules 3010 and 3012.

Subp. 4. **Written notification.** At or before completion of each transaction with a customer, a broker-dealer must give or send to the customer a written notification that complies with Code of Federal Regulations, title 17, section 240.10b-10.

Subp. 5. **Waiver.** Upon written application, the administrator may exempt from subpart 3, on specified terms and conditions, any broker-dealer that is neither registered with the United States Securities and Exchange Commission nor a member of a self-regulatory organization if the administrator finds that it is not necessary in the public interest or for the protection of investors to subject the broker-dealer to the requirements in subpart 3.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.5022 CONTENTS OF AN INVESTMENT ADVISORY CONTRACT.

Subpart 1. **Generally.** The provisions of this part apply to federal covered investment advisers to the extent permitted by the National Securities Markets Improvement Act of 1996.

Subp. 2. **Writing requirements.** It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

A. the services to be provided, the term of the contract, the investment advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of termination or nonperformance of the contract, and any grant of discretionary power to the investment adviser;

B. that no direct or indirect assignment or transfer of the contract may be made by the investment adviser without the consent of the client or other party to the contract;

C. that the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client, unless the investment adviser adheres to the provisions in Code of Federal Regulations, title 17, section 275.205 -3; and

D. that the investment adviser, if a partnership, shall notify the client or other party to the investment contract of any change in the membership of the partnership within a reasonable time after the change.

Subp. 3. **Unlawful acts.** It is unlawful for any investment adviser to:

A. include in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of the Minnesota Securities Act or of the Investment Advisers Act of 1940, or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940; or

B. enter into, extend, or renew any advisory contract contrary to the provisions of Section 205 of the Investment Advisers Act of 1940. This provision shall apply to all advisers required to be registered under the Minnesota Securities Act, notwithstanding whether the adviser would be exempt from federal registration pursuant to Section 203(b) of the Investment Advisers Act of 1940.

Subp. 4. **Applicability of other laws.** Any person entering into or performing an investment advisory contract under this part is not relieved of any obligations under part 2876.5023 or any other applicable provision of the Minnesota Securities Act or any rule or order thereunder.

Subp. 5. **Independent agent of advisory client.** Nothing in this part shall relieve a client's independent agent from any obligation to the client under applicable law.

Subp. 6. **Definitions.** The following definitions apply for purposes of this part.

A. "Affiliate" shall have the same definition as in Section 2(a)(3) of the Investment Company Act of 1940.

B. "Assignment," as used in subpart 2, item B, includes any transaction or event that results in any change to the individuals or entities with the power, directly or indirectly, to direct the management or policies of, or to vote more than 50 percent of any class of voting securities of, the investment adviser as compared to the individuals or entities who had such power as of the date when the contract was first entered into, extended, or renewed.

C. "Client's independent agent" means any person who agrees to act as an investment advisory client's agent in connection with the contract, but does not include:

(1) the investment adviser relying on this part;

(2) an affiliated person of the investment adviser or an affiliated person of an affiliated person of the investment adviser including an investment adviser representative;

(3) an interested person of the investment adviser;

(4) a person who receives, directly or indirectly, any compensation in connection with the contract from the investment adviser, an affiliated person of the investment adviser, an affiliated person of an affiliated person of the investment adviser, or an interested person of the investment adviser; or

(5) a person with any material relationship between himself or herself, or an affiliated person of that person, and the investment adviser, or an affiliated person of the investment adviser, that exists, or has existed at any time during the past two years.

D. "Company" means a corporation, partnership, association, joint stock company, trust, or any organized group of persons, whether incorporated or not, or any receiver, trustee in a case under United States Code, title 11, or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such. "Company" shall not include:

(1) a company required to be registered under the Investment Company Act of 1940 but which is not so registered;

(2) a private investment company, for purposes of this subitem, a private investment company is a company which would be defined as an investment company under Section 3(a) of the Investment Company Act of 1940 but for the exception from that definition provided by Section 3(c)(1) of that act;

(3) an investment company registered under the Investment Company Act of 1940; or

(4) a business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940, unless each of the equity owners of any such company, other than the investment adviser entering into the contract, is a natural person or a company within the meaning of this item.

E. "Interested person" means:

(1) any member of the immediate family of any natural person who is an affiliated person of the investment adviser;

(2) any person who knowingly has any direct or indirect beneficial interest in, or who is designated as trustee, executor, or guardian of any legal interest in, any security issued by the investment adviser or by a controlling person of the investment adviser if that beneficial or legal interest exceeds:

(a) one-tenth of one percent of any class of outstanding securities of the investment adviser or a controlling person of the investment adviser; or

(b) five percent of the total assets of the person seeking to act as the client's independent agent; or

(3) any person, or partner or employee of any person, who, at any time since the beginning of the last two years, has acted as legal counsel for the investment adviser.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.5023 PROHIBITED CONDUCT IN PROVIDING INVESTMENT ADVICE.

Subpart 1. **Fiduciary duty.** A person who is an investment adviser or a federal covered investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. This part applies to federal covered investment advisers to the extent permitted by the National Securities Markets Improvement Act of 1996. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser or a federal covered investment adviser and its clients and the circumstances of each case, an investment adviser or a federal covered investment adviser shall not engage in prohibited fraudulent, deceptive, or manipulative conduct, including the following:

A. recommending to a client to whom investment advisory services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser or federal covered investment adviser;

B. exercising any discretionary authority in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary authority relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both;

C. inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives, and character of the account;

D. placing an order to purchase or sell a security for the account of a client without authority to do so;

E. placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client;

F. borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds;

G. loaning money or securities to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser;

H. misrepresenting to any client, or prospective client, the qualifications of the investment adviser, or any employee or person affiliated with the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services, or fees, in light of the circumstances under which they are made, not misleading;

I. providing a report or recommendation to any client prepared by someone other than the investment adviser without disclosing that fact. This prohibition does not apply to a situation where the investment adviser uses published research reports or statistical analyses to render advice or where an investment adviser orders such a report in the normal course of providing service;

J. charging a client an unreasonable fee;

K. failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser, or any of its employees, or affiliated persons which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(1) compensation arrangements connected with investment advisory services to clients which are in addition to compensation from such clients for such services; and

(2) charging a client an investment advisory fee for rendering investment advice when compensation for effecting securities transactions pursuant to such advice will be received by the investment adviser or its employees or affiliated persons;

L. while acting as principal for its own advisory account, to knowingly sell any security to or purchase any security from a client, or while acting as broker-dealer for a person other than the client, to knowingly effect any sale or purchase of any security for the account of the client, without disclosing to the client in writing before the completion of the transaction the capacity in which it is acting and obtaining the consent of the client to the transaction:

(1) the prohibitions of this item shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction;

(2) the prohibitions of this item shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer acts as an investment adviser solely:

(a) by means of publicly distributed written materials or publicly made oral statements;

(b) by means of written materials or oral statements not purporting to meet the objectives or needs of specific individuals or accounts;

(c) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or

(d) any combination of the foregoing services;

(3) publicly distributed written materials or publicly made oral statements shall disclose that, if the purchaser of the advisory communication uses the investment adviser's services in connection with the sale or purchase of a security which is a subject of the communication, the investment adviser may act as principal for its own account or as agent for another person. Compliance by the investment adviser with the foregoing disclosure requirement shall not relieve it of any other disclosure obligations under the Minnesota Securities Act;

(4) definitions for purposes of this item:

(a) "publicly distributed written materials" means written materials which are distributed to 35 or more persons who pay for those materials;

(b) "publicly made oral statements" means oral statements made simultaneously to 35 or more persons who pay for access to those statements;

M. guaranteeing a client that a specific result will be achieved with advice rendered;

N. publishing, circulating, or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940;

O. making, in the solicitation of clients, any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading;

P. failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940;

Q. disclosing the identity, investments, or other financial information of any client or former client unless required by law to do so, or unless consented to by the client;

R. taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of the securities or funds when the action of the investment adviser is subject to and does not comply with part 2876.4116;

S. engaging in any act, practice, or course of business which is fraudulent, deceptive, manipulative, or unethical; or

T. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the Minnesota Securities Act, Minnesota Statutes, chapter 80A, or any rule or order thereunder.

Subp. 2. **Agency cross transactions.** The prohibitions of subpart 1 shall not apply to an investment adviser effecting an agency cross transaction for an advisory client provided the following conditions are met:

A. the advisory client executes a written consent prospectively authorizing the investment adviser to effect agency cross transactions for such client;

B. before obtaining written consent from the client, the investment adviser makes full written disclosure to the client that, with respect to agency cross transactions, the investment adviser will act as broker-dealer for, receive commissions from, and have a potentially

conflicting division of loyalties and responsibilities regarding both parties to the transactions;

C. at or before the completion of each agency cross transaction, the investment adviser or any other person relying on this subpart sends the client a written confirmation. The written confirmation shall include:

(1) a statement of the nature of the transaction;

(2) the date the transaction took place;

(3) an offer to furnish, upon request, the time when the transaction took place; and

(4) the source and amount of any other remuneration the investment adviser received or will receive in connection with the transaction. In the case of a purchase, if the investment adviser was not participating in a distribution, or, in the case of a sale, if the investment adviser was not participating in a tender offer, the written confirmation may state whether the investment adviser has been receiving or will receive any other remuneration and that the investment adviser will furnish the source and amount of such remuneration to the client upon the client's written request;

D. at least annually, and with or as part of any written statement or summary of the account from the investment adviser, the investment adviser or any other person relying on this subpart sends each client a written disclosure statement identifying:

(1) the total number of agency cross transactions during the period for the client since the date of the last such statement or summary; and

(2) the total amount of all commissions or other remuneration the investment adviser received or will receive in connection with agency cross transactions for the client during the period;

E. each written disclosure and confirmation required by this subpart must include a conspicuous statement that the client may revoke the written consent required under item A at any time by providing written notice to the investment adviser;

F. no agency cross transaction may be affected in which the same investment adviser recommended the transaction to both any seller and any purchaser;

G. for purposes of this subpart, "agency cross transaction for an advisory client" means a transaction in which a person acts as an investment adviser in relation to a transaction in which the investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, acts as a broker-dealer for both the advisory client and another person on the other side of the transaction. When acting in such capacity the person is required to be registered as a broker-dealer in this state unless excluded from the definition; and

H. nothing in this subpart shall be construed to relieve an investment adviser from acting in the best interests of the client, including fulfilling a duty with respect to the best price and execution for the particular transaction for the client nor shall it relieve any investment adviser of any other disclosure obligations imposed by the Minnesota Securities Act, Minnesota Statutes, chapter 80A.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.5024 REGULATION OF BUSINESS OF FINANCIAL PLANNING.

Subpart 1. **Definition.** "Business of financial planning" means providing, or offering to provide, financial planning services or financial counseling or advice, on a group or individual basis. Any person who, on advertisements, cards, signs, circulars, letterheads, or in any other manner, indicates that the person is a "financial planner," "financial counselor," "financial adviser," "investment counselor," "estate planner," "investment adviser," "financial consultant," or any other similar designation or title or combination thereof, is

considered to be representing himself or herself to be engaged in the business of financial planning.

Subp. 2. **Generally.** The provisions of this part apply to federal covered investment advisers to the extent permitted by the National Securities Markets Improvement Act of 1996, Public Law 104-290.

Subp. 3. **Prohibition.** It is a fraudulent act, practice, and course of business within the meaning of Minnesota Statutes, section 80A.68, for any person registered or required to be registered under the Minnesota Securities Act, Minnesota Statutes, chapter 80A, to represent on advertisements, cards, signs, circulars, letterheads, or in any other manner, that the person is engaged in the business of financial planning unless the person provides a disclosure document to the client. A copy of the disclosure document must be delivered or mailed to the client when an account is opened. A licensed broker-dealer is authorized to mail the disclosure document on behalf of its agents. A record of the disclosure must be maintained for a period of three years. The disclosure document must contain the following:

A. the basis of any fees, commissions, or other compensation received by the person in connection with the rendering of financial planning services or financial counseling or advice in the following language:

"My compensation may be based on the following:

(a) ... commissions generated from the products I sell you,

(b) ... fees, or

(c) ... a combination of (a) and (b). [Comments]";

B. the identification of companies and/or affiliates that supply products or services offered or sold by the person in the following language:

"I am authorized to offer or sell products and/or services issued by or through (name of firm(s) and/or affiliates):

The products will be traded, distributed, or placed through the (name of clearing/trading firm(s) and/or affiliates)";

C. the licenses held by the person under Minnesota Statutes, chapter 60K, 80A, or 82 in the following language:

"The (insert the term used by agent engaged in the business of financial planning) assigned to your account is licensed in Minnesota as:

(a) ... an insurance producer,

(b) ... a broker-dealer agent or broker-dealer,

(c) ... a real estate broker or salesperson, or

(d) ... an investment adviser"; and

D. the specific identity of any financial products or services, by category, for example mutual funds, stocks, or limited partnerships, the person is authorized to offer or sell in the following language:

"The license(s) entitles me to offer and sell the following products and/or services:

(a) ... securities, specifically the following: [List],

(b) ... real property,

(c) ... insurance,

(d) ... other: [List]."

Subp. 4. **Exemption.** The disclosure document need not be provided to a client who meets the requirements in Minnesota Statutes, section 80A.46, clause (13).

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.5025 PROHIBITED USES OF SENIOR-SPECIFIC CERTIFICATIONS AND PROFESSIONAL DESIGNATIONS.

Subpart 1. **Generally.** The provisions of this part apply to federal covered investment advisers to the extent permitted by the National Securities Markets Improvement Act of 1996, Public Law 104-290.

Subp. 2. **Prohibited uses of senior-specific certifications and professional designations.**

A. The use of a senior-specific certification or professional designation by any person in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees, in such a way as to mislead any person shall be a fraudulent, deceptive, and manipulative act or practice in the securities, commodities, investment, franchise, banking, finance, or insurance business.

B. The prohibited use of senior-specific certifications or professional designations includes the following:

(1) use of a certification or professional designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) use of a nonexistent or self-conferred certification or professional designation;

(3) use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or designation does not have; and

(4) use of a certification or professional designation that was obtained from a certifying or designating organization that:

(a) is primarily engaged in the business of instruction in sales or marketing;

(b) does not have reasonable standards or procedures for assuring the competency of its certificants or designees;

(c) does not have reasonable standards or procedures for monitoring and disciplining its certificants or designees for improper or unethical conduct; or

(d) does not have reasonable continuing education requirements for its certificants or designees in order to maintain the certificate or designation.

Subp. 3. **Regulated certifications and professional designations.**

A. There is a rebuttable presumption that a certifying or designating organization is not disqualified solely for purposes of subpart 1, item B, subitem (4), when the certification or designation issued from the organization does not primarily apply to sales or marketing and when the organization or the certification or designation in question has been accredited by:

(1) the American National Standards Institute;

(2) the National Commission for Certifying Agencies; or

(3) any organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes."

B. In determining whether a combination of words or an acronym standing for a combination of words constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing seniors, factors to be considered shall include:

(1) use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "registered," "chartered,"

"adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) the manner in which those words are combined.

C. For purposes of this part, unless used in a manner that would mislead or confuse a reasonable consumer, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when the job title:

(1) indicates seniority or standing within the organization; or

(2) specifies an individual's area of specialization within the organization.

For purposes of item C, financial services regulatory agency includes an agency that regulates insurers, insurance producers, broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.6052 ACCOUNTING PRINCIPLES.

All financial statements required by this chapter or by any official form of the administrator shall be prepared in accordance with generally accepted accounting principles unless otherwise permitted by rule or order.

Financial statements shall be audited by independent certified public accountants who shall express an opinion thereon, except where the particular form or this chapter permits the use of unaudited statements. Any financial statements prepared in accordance with the rules and requirements of the Securities and Exchange Commission shall satisfy the requirements of this part, provided, however, that the statements are audited by an independent certified public accountant who expresses an opinion thereon.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*

2876.6110 CONSENT TO SERVICE OF PROCESS.

Persons required to file with the administrator a consent to service of process should file Form U-2, Uniform Consent to Service of Process.

Statutory Authority: *MS s 45.023; 80A.82*

History: *34 SR 593*