"any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities . . . ."[2]

5. The Advisers Act, specifically excludes certain persons, whose activities might otherwise bring them within the scope of the "investment adviser" definition:

   a. a bank, or any bank holding company but not a non-bank subsidiary of a bank holding company;

   b. any lawyer, accountant, engineer or teacher whose performance of investment advisory services is solely incidental to the practice of his profession;

   c. any broker or dealer whose performance of investment advisory services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation therefor;

   d. the publisher of any bona fide newspaper, news magazine, or business or financial magazine of general and regular circulation;[3]

   e. any person whose advice, analyses and reports relate solely to U.S. Government securities or to securities exempted from the Securities Exchange Act of 1934 (the "Exchange Act"); and

   f. such other persons designated by the SEC.

6. In addition, though they may meet the federal definition of an investment advisor, the following classes of persons need not register with the SEC:

   a. any "intra-state adviser," that is, any investment adviser advising clients who are all residents of the State in which the adviser has its principal office and place of business, and who does not furnish advice, analyses or reports as to any nationally traded security;

   b. any investment adviser whose only clients are insurance companies;

   c. any investment adviser who, during the course of the preceding 12 months, has had fewer than 15 clients,[4] and who . . . [does not hold] himself out generally to the public as an investment adviser . . . . "

   d. The Florida Statute.

7. The definition of an investment adviser under Florida's securities laws is very similar to the federal definition. It reads:

"any person who for compensation engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the

advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services."

8. In Florida, an "investment adviser" does not include the following:

    a. Any attorney or accountant whose performance of such services is solely incidental to the practice of her or his profession;

    b. Any bank, bank holding company or trust company;

    c. Any person who renders investment advice exclusively to insurance or investment companies;

    d. any person who does not hold herself or himself out to the general public as an investment adviser and has at least 6 but no more than 15 clients within 12 consecutive months in this state; or

    e. Any person whose transactions in this state are limited to those transactions described in Sec. 222(d) of the Investment Advisers Act of 1940. [5]

B. Registration of Investment Advisers. Every investment advisor, unless exempt from registration, must register either with the State of Florida (under $25 million of assets under management) or the SEC. Application for registration with the SEC as an investment adviser is filed on Form ADV. The same form is used by the State of Florida at the present time.

C. Civil Sanctions by the SEC and the State of Florida.

1. The SEC and the State of Florida are empowered to censure an adviser, to place limitations on the activities, functions or operations or to suspend or revoke the registration of any adviser if certain specified violations are found and if such sanctions are in the public interest. In addition, civil money penalties may be imposed in administrative proceedings, and temporary (without a hearing) and permanent (with a hearing) cease-and-desist orders can be issued . There is also authority to order accounting and disgorgement of profits resulting from securities law violations.

D. Criminal Sanctions.

1. The Advisers Act provides courts with the authority to impose a fine up to $10,000 and imprisonment of up to five years. See Section 217. In addition, under a separate statute, an organization may be fined as much as the greater of: (1) twice the gross gain of the defendant; or (2) twice the gross loss to any person other than the defendant.[6]

E. Registration.

1. State versus Federal Registration

    a. As noted earlier, in 1996, Congress passed the National Securities Markets Improvement Act of 1996 ("NSMIA"), which divided the regulation of investment advisers between the states and the SEC.

Under NSMIA, the SEC regulates: (1) advisers that manage assets over $25 million;[7] (2) advisers to registered investment companies; (3) advisers that are not regulated by the state where they claim their principal place of business;[8] and (4) any one for whom the SEC grants an exemption from the general prohibition on SEC registration.

b. The SEC has granted exemptions to the prohibition against registering with the SEC to four categories of investment advisers. That is, it has allowed them to register with the SEC despite the fact that they did not meet the statutory requirements for SEC registration. Those categories were: (1) NRSRO's (nationally recognized statistical rating organizations, such as Moody's and Standard & Poor); (2) pension consultants if the aggregate value of assets of the pension plans under management is at least $50 million; (3) certain affiliates of federally registered advisers; and (4) start-up advisers that have a reasonable expectation they will be eligible to register with the SEC.

c. In addition, there are two new rules applicable to the determination of whether an adviser must register with the SEC. First, under Rule 203A-1, registration is optional for certain advisers that manage assets between $25-30 million. Second, Rule 203A-4 provides a safe harbor for state registered advisers that manage less then $30 million in assets and that reasonably believe they are not required to register.

d. It is important to note that advisers that are required to be state registered still are subject to some federal regulation. For example, these advisers still are subject to federal anti-fraud, insider trading, limitations on contracts and limitations on agency cross transactions rules and regulations. Conversely, advisers that are federally registered still may be subject to state-imposed anti-fraud standards. Additionally, states may require federally registered advisers to file a "notice" registration (sometimes including a filing fee), alerting the state that the adviser is doing business in the state and to register "investment adviser representatives" with the state.

e. Finally, with respect to state registration requirements, Congress provided a national de minimus standard in NSMIA under which an adviser may not be required to register in any state unless the adviser: (a) has a place of business in the state; or (b) has had more than five clients in that state in the preceding 12 month period.

F. Forms and Filing[9]

1. An application for registration as an investment adviser is made by filing a completed Form ADV with the SEC.[10] Prompt amendment of Form ADV is required if information provided in response to certain questions becomes inaccurate.[11] All other changes of circumstance affecting the

accuracy of items of Form ADV are to be amended within 90 days of the end of the adviser's fiscal year. If the adviser has custody of any client's funds or requires prepayment of advisory fees in excess of $500 from such client, six months or more in advance, the adviser also must file an audited balance sheet.

2. The state of Florida has been using the same federal ADV form to register new advisers who are not eligible to register with the SEC. The state Securities Commission has promulgated regulations regarding the type of financial statements that must be maintained and filed. These are generally similar to the SEC's requirements. See, e.g., Florida Rule 3E-300.002(4) regarding the financial statement requirements and Rule 3E-301.002(7) stating that the federal ADV form is to be used for registration in Florida.

II. Advertising[12]

A. The Advertising Rule (Rule 206(4)-1) Investment adviser advertising is regulated under SEC Rule 206(4)-1, which defines "advertisement" to include any notice, circular, letter or other written communication addressed to more than one person (or any notice or other announcement in any publication or by radio or television) which offers, among other things, "any investment advisory service with regard to securities." The Rule further provides that the use of certain types of advertisements would constitute a fraudulent, deceptive or manipulative act, practice or course of business. These types of advertisements include any advertisement that:

1. refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser;

2. Refers, directly or indirectly, to past specific recommendations of the investment adviser which were, or would have been, profitable to any person;[13]

3. Represents, directly or indirectly, that any graph, chart, formula or other device being offered can, in and of itself, be used to determine which securities to buy or sell, or when to buy or sell them;

4. Contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, or

5. Contains any untrue statement of a material fact, or which is otherwise false or misleading.

B. Advertising of Past Performance. The SEC initially took the position that investment advisers were completely barred from advertising past performance or "model" results. Later, it determined that various types of advertisements containing past performance information were permissible provided certain conditions were met. In 1986, the staff ostensibly "summarized" its position in a

letter to Clover Capital Management, Inc.[14] in which it stated that the general anti-fraud provisions of Rule 206(4)-1 would prohibit any advertisement that:

1. fails to disclose the effect of material market or economic conditions on the results portrayed (e.g., an advertisement stating that the accounts of the adviser's clients appreciated 25% in value without disclosing that the market generally appreciated 40% during the same period);
2. includes model or actual results that do not reflect the deduction of advisory fees, brokerage or other commissions, and any other expenses that a client would have paid or actually paid;
3. fails to disclose whether and to what extent the results portrayed reflect the reinvestment of dividends and other earnings; suggests or makes claims about the potential for profit without also disclosing the possibility of loss;
4. compares model or actual results to an index without disclosing all material facts relevant to the comparison (e.g., an advertisement that compares model results to an index without disclosing that the volatility of the index is materially different from that of the model portfolio);
5. fails to disclose any material conditions, objectives, or investment strategies used to obtain the results portrayed (e.g., the model portfolio contains equity stocks that are managed with a view towards capital appreciation); or
6. fails to disclose prominently, if applicable, that the results portrayed relate only to a select group of the adviser's clients, the basis on which the selection was made, and the effect of this practice on the results portrayed, if material.

C. Past Performance Rule Modified. Over the last 12 years since the Clover Management Letter was issued, the SEC has continued to modify its position on the limits of permissible advertising of past performance. However, the rules remain very restrictive and detailed and not much broader than those outlined in the Clover Capital letter. They should be examined closely before using past performance results in any advertising.

D. Records of Performance Information. The investment adviser record-keeping rule (Rule 204-2) requires investment advisers to keep all of their advertisements and all documents necessary to form the basis for performance information in advertisements for five years.

E. No Testimonials" Rule. Rule 206(4)-1(a)(1) forbids the use of a testimonial (i.e., a statement of a customer's experience or endorsement) in an advertisement by an investment adviser because the testimonial may give rise to a fraudulent or deceptive implication, or mistaken inference, that the experience of the person giving the testimonial is typical of the experience of the adviser's clients. Though there are some limited exceptions to this prohibition, care should be taken before using "testimonial" advertising.

F. Use of Articles from News Media

1. The SEC staff takes the position that bona fide unbiased third-party reports generally are not prohibited by the prohibition on the use of testimonials.[15] The staff has also stated that the subsequent distribution by an investment adviser of a bona fide news article written by an unbiased third party is not subject to the requirements of the rules prohibiting advertisements that refer to past recommendations of investment advisers when past specific recommendations happen to be referred to within the article.

G. AIMR Performance Presentation Standards

1. AIMR, which is a membership trade organization, has established Performance Presentation Standards ("PPS") intended to provide guidance for investment advisers in connection with calculating and reporting their investment performance in a uniform manner. The PPS represent ethical principles intended "to promote full disclosure and fair representation of performance results to clients and prospective clients." While adherence to the standards is not mandated by law (even though many clients may require adherence to the PPS), the SEC examination staff has taken the position that if an adviser advertises that it is "AIMR compliant" and it is not, the adviser may have violated Section 206 of the Advisers Act. Further, AIMR takes the position that to be "AIMR compliant," the adviser must adhere to all of the standards set forth by AIMR and not just some of them.

III. The "Brochure Rule" (Rule 204-3)

A. A registered investment adviser must furnish each present and prospective advisory client with a copy of a written disclosure document. This document is commonly known as the adviser's "brochure." The disclosure document may be either a copy of Part II of the adviser's Form ADV, or a written document containing at least the information required by Part II of Form ADV.[16] Delivery of the written disclosure document must be made not less than 48 hours prior to entering into any advisory contract (either written or oral) with any current or prospective advisory client, or may be made at the time of entering into such an agreement, if the client has a right to terminate the advisory contract within five days after entering into it. A written disclosure document need not be offered or delivered in connection with entering into any contract for impersonal advisory services[17] which involves payment of less than $200.

B. A registered investment adviser must, in addition, offer to deliver free of charge a copy of its written disclosure document annually to all clients. Delivery of the disclosure document must be made to the client within seven days of the client's request.

C. Separate disclosure rules apply to wrap fee arrangements.

IV. Record-keeping Requirements

A. Section 204 of the Advisers Act provides that any registered investment adviser must keep such records as the SEC requires. These records are subject to inspection by the SEC and the State of Florida at any time.

B. Rule 204-2 contains a detailed listing of those records required to be kept by investment advisers. Generally, records required to be kept pursuant to Rule 204-2 must be kept for not less than five years from the end of the fiscal year during which the last record entry was made.[18] Records relating to the most recent two years must be kept at the office of the adviser; records for the remaining time may be kept in any "easily accessible place." All organizational and governing documents of the adviser (corporate articles, partnership agreements, by-laws, etc.) must be kept at the adviser's principal place of business until three years after the termination of the adviser's enterprise.

C. Florida Rule 3E-600.014 contains a similar listing of records required by Florida and Florida's record retention periods.

V. Restrictions on Investment Advisory Contracts. The Advisers Act prohibits the inclusion of certain types of provisions. Those are:

A. Prohibition on Performance Fees (Section 205(2)).

1. Except under limited circumstances, no advisory contract may provide for compensation to be paid to the adviser on the basis of a share of capital gains or appreciation of any portion of the client's funds. This general prohibition does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. This prohibition also does not apply to, among other contracts, those which relate to the investment of assets in excess of $1 million, provided certain conditions are met.

2. This prohibition extends to any advisory contract which provides that fees will be waived or refunded if a client's account does not meet a specified level of performance or which otherwise makes receipt of advisory fees contingent on the investment performance because such a provision is tantamount to a fee dependent on a client's account achieving a specified level of capital gains.

B. No Assignment Without Permission

1. All advisory contracts must contain terms to the effect that no assignment of the contract may be made by the adviser without the consent of the client party.[19]

C. No Hedge Clauses

1. It is considered a fraudulent and deceptive business practice for an adviser to imply that a client has, by contract or otherwise, waived any rights the client may have to claim certain legal remedies. Section 215 of the Advisers Act further declares most such "hedge clauses" appearing in advisory contracts to be void.

VI. The Anti-fraud Provisions of the Advisers Act

A. Federal Anti-Fraud Provisions. Section 206 of the Advisers Act is a general "antifraud" provision under which numerous activities of investment advisers are regulated, either explicitly (by rule) or implicitly (by case law and SEC interpretation). As discussed in more detail below, Section 206 provides that it shall be unlawful for any investment adviser (whether exempted from registration or not):

1. to employ any device, scheme, or artifice to defraud any client or prospective client;

2. to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

3. acting as principal for his own account or as broker for another client, knowingly to sell any security to or purchase any security from a client, or to effect any security transaction on behalf of the account of a client, without previously disclosing the details of the transaction to the client and obtaining the client's consent thereto (except when a client deals with a customer of a broker-dealer and the broker-dealer is not also acting as investment adviser in relation to the transaction); or

4. to engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative.

B. Florida's Anti-Fraud Provisions. Florida also has an anti-fraud provision, and while the language may be somewhat different and much more detailed, it generally prohibits the same type of conduct as does the federal anti-fraud provision. Florida's provisions read as follows:

1. It is unlawful and a violation of the provisions of this chapter for a person: In connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, including any security exempted under the provisions of s. 517.051 and including any security sold in a transaction exempted under the provisions of s. 517.061, directly or indirectly:

   a. To employ any device, scheme, or artifice to defraud;

   b. To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

   c. To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

   d. To publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, communication, or broadcast which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from an issuer,

underwriter, or dealer, or from an agent or employee of an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount of the consideration.

e. In any matter within the jurisdiction of the department, to knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.

f. For purposes of ss. 517.311 and 517.312 and this section, the term "investment" means any commitment of money or property principally induced by a representation that an economic benefit may be derived from such commitment, except that the term "investment" does not include the purchase of a business opportunity, business enterprise, or real property or the purchase of tangible personal property, in both cases subject to exceptions.

C. Specific Anti-fraud Provisions. The SEC has spent considerable time and effort defining some of the specifics of the federal anti-fraud provisions, and it is worth reviewing those. As also noted at the very beginning of this outline, the staff of the Florida Securities Department has indicated that it will find violations in situations where the federal law would have been violated. Some of the more common prohibitions under federal law are:

1. "Scalping" and Related Activities Advisers and associated persons of advisers should not acquire securities, then recommend such securities to clients in anticipation of prices rising due to client purchases, and sell their securities at a profit, or otherwise trade in securities for their own accounts contrary to the recommendations made to clients.

2. Non-disclosure of Material Facts. In a 1990 SEC decision, non-disclosure in an advisory contract of fees received by an adviser for managing a money market fund into which excess cash was swept, and inadequate disclosure of "float" benefits to the investment adviser's affiliated broker-dealer, violated the anti-fraud provisions of the Act.[20] In another decision, an administrative law judge found fraudulent an investment adviser's failure to adequately disclose its "soft dollar" arrangements to its clients or the SEC.[21]

3. Principal Transactions (Section 206(3)). Section 206(3) specifically addresses the problem of "principal transactions," that is, of securities transactions conducted by an adviser with a client when the adviser has an interest in the securities being traded or is representing another party to the transaction who has such an interest. Principal transactions are illegal unless the adviser discloses to the client before the completion of the transaction, in writing, that the adviser will be acting as principal in a proposed transaction, and receives the client's consent to the transaction.

4. Special Rule for "Agency Cross Transactions" (Rule 206(3)-2) Agency cross transactions" are defined as transactions in which an adviser also acts directly (or through an affiliate) as broker for both the client and a person on the other side of the transaction. Such transactions generally are not permissible if the adviser, acting alone or with an affiliated broker-dealer, recommends the transaction to both the purchaser and seller of a security unless notice and consent, on a transaction-by-transaction basis has occurred. However, in other cases (e.g., if one side of the trade is an unsolicited order) these transactions are permissible provided certain conditions are met, primary among them is that the client gives informed written consent prior to the transaction.
5. Financial Responsibility of Advisers. There are no specific requirements under the Advisers Act, but Rule 206(4)-4 requires disclosure to clients of any financial condition that is reasonably likely to impair the ability of the adviser to meet its contractual commitments to clients.
6. Advisers Participating in Limited Partnerships. Investment advisers who participate in limited partnership ventures as general partners may not receive any remuneration which is greater than that which the adviser would normally receive from a pro-rata return on the adviser's actual capital contribution. A greater return would raise questions of compliance with the prohibition on incentive or performance fees.

D. General Rules Applicable to Portfolio Management. A number of portfolio management practices, while not specifically barred by the provisions of the Advisers Act, may be found to violate the anti-fraud provisions of the Act. The following rules apply generally to portfolio management practices engaged in by an investment adviser:

1. Brokerage must be allocated generally on the basis of "best execution" of the client's trade orders.
2. Purchases of securities for clients must be "suitable" to client needs and meet any and all requirements set out in the relevant advisory contract.
3. Advisers must not engage in excess trading in accounts ("churning") to generate commissions.
4. If research services are received by the adviser from broker-dealers in return for brokerage placed, the services must be "research" within the meaning and intent of Exchange Act Section 28(e). Generally, to qualify, the research must be used to assist the adviser in its investment management functions.
5. Every adviser must have fair and equitable formulas for determining (a) the allocation of securities; and (b) the dissemination of recommendations among diverse clients, which formulas must be applied consistently.
6. The adviser should develop policies and procedures to ensure that personal trading conducted by "access persons" is in accordance with the adviser's obligation to put the interests of its clients first and foremost.[22]

E. Personal Trading By Adviser and "Access Persons". Another area that the SEC regulates under the antifraud provisions of the Advisers is personal trading by advisory personnel. When the adviser, its "access persons" and/or employees trade for their own accounts, conflicts of interest can arise.[23] At a minimum, advisers must disclose to clients whenever it recommends a security to a client in which the adviser or any of its employees has an interest and make additional disclosure in its Form ADV that it has policies and procedures relating to conflicts of interest, including those conflicts that can arise in connection with personal trading. Further, the record-keeping rules mandate that advisers maintain a quarterly record of every transaction in a security in which the adviser or any of its advisory representatives has a direct or indirect beneficial interest.[24]

F. Third-Party Referral Arrangements. Rule 206(4)-3 provides that no adviser may pay a fee to a solicitor who has obtained clients for the adviser unless certain conditions are met. In general, a solicitor must provide any potential client with copies of both: (1) the adviser's current brochure; and (2) a disclosure statement describing the terms of the solicitation agreement between the adviser and the solicitor (including information as to fees paid and compensation received by the solicitor from the adviser). A signed, written confirmation that the client has received the disclosure materials must be kept by the adviser.

G. Disclosure of Material Financial and Disciplinary Information. SEC rule 204(4)-4 requires all investment advisers to disclose certain material financial and disciplinary information to their clients.

H. Insider Trading and Securities Fraud Enforcement Act "ITSFEA". This new statute added Section 204A to the Advisers Act. That section imposes additional responsibilities and liabilities upon advisers[25] and requires an adviser to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the adviser or any of its affiliates or employees.

I. Additional Considerations: Representations to the Public.

1. Effect of SEC Registration. Allusions to the fact of SEC registration may state that the adviser is so registered but must not imply that registration indicates sponsorship, recommendation, approval or acknowledgment of the adviser's ability by the SEC or by any U.S. Government agency or official.

2. Use of Term "Investment Counsel". The term "investment counsel" (unless used accurately to describe the title of registration in certain states) may not be used to describe an adviser unless his principal business is acting as an investment adviser and a substantial part of that business consists of rendering "investment supervisory services."[26]

VII. Compliance with the Securities Exchange Act of 1934.

A. Of course, the use of inside information in trading securities is prohibited by Rule 10b-5 of the Securities Exchange Act of 1934. However, an analysis of how that rule applies to investment advisers is beyond the scope of this outline.

B. Section 13(d) Reporting

1. Section 13(d) of the Exchange Act provides that any person who acquires beneficial ownership of five percent of any publicly traded equity security must send a notice to the issuer of the security and to each exchange on which the security is traded, and file a statement with the SEC. The statement must contain certain information and exhibits.

2. An investment adviser with discretionary management authority is treated as having beneficial ownership of all the securities in discretionary accounts. Those securities must be aggregated with the adviser's other direct and indirect ownership for purposes of determining the percentage limit. In addition, the owner of each discretionary account with five percent or more in a covered security must file separately.

C. Rule 13f-1 Reporting

1. If an adviser has investment discretion with respect to accounts of $100 million or more of exchange-traded or National Association of Securities Dealers Automated Quotation System ("NASDAQ") securities, the adviser must file a Form 13F within 45 days of each calendar quarter end, reporting: (1) the name of issuer; (2) the number of shares held; and (3) the aggregate fair market value of each security held.

D. Section 16(b) Reporting and Disgorgement

1. Section 16(a) of the Exchange Act requires reporting of ownership and changes in ownership by any director or officer of an issuer, or by a direct or indirect beneficial owner of more than ten percent of any class of equity security registered under Section 12 of the Exchange Act ("covered security"), to the SEC, the national securities exchange (if the security is registered with such exchange) and the issuer.

2. For reporting purposes, an investment adviser with discretionary authority is treated as a beneficial owner of covered securities held in discretionary accounts and is, for purposes of the ten percent test, required to aggregate the shares of those securities held directly or indirectly, and in the discretionary accounts.[27]

3. Due to the highly technical nature of Sections 16(a) and (b) and the rules thereunder, you should consult counsel before engaging in securities transactions as an officer, director or ten percent beneficial owner.

[1] This memorandum discusses, in summary form, some of the disclosure, reporting and other obligations imposed upon investment advisers under federal securities law, as well as the limited regulation between the SEC and the states. We have not attempted to describe every requirement to which an investment adviser may be subject. We do not discuss, for example, fiduciary duties under the 1940 Act, or investment restrictions in such statutes as the Employee Retirement Income Security Act, the Public Utility Holding Company Act, the Bank Holding Company Act, the Homeowners' Loan Act, and the Federal Communications Act. Moreover, since the

following discussion is necessarily general in nature, reference must be made as appropriate to the applicable statutes, regulations and forms for more complete information in complying with the applicable requirements. Advice concerning any given activity or event would depend upon the particular circumstances involved, which in some cases, might make the principles discussed on the following pages inapplicable. In particular cases, it would be advisable to consult with counsel.

[2] Section 202(a)(11). The staff of the SEC takes the position that providing generalized advice about investing in "types" or "classes" of securities or investments (e.g., mutual funds, limited partnerships, bonds, equity securities) is an activity that requires registration under the Advisers Act.

[3] In Lowe v. SEC, 472 U.S. 181 (1985), the Supreme Court held that this exception applies to bona fide nonpersonalized securities newsletters.

[4] Rule 203(b)(3)-1 under the Advisers Act defines special circumstances under which a limited partnership (rather than its limited partners separately) may be counted as one "client" of the partnership's general partner-adviser for purposes of the 15-person restriction.

[5] Section 222(d) of the Advisors Act prohibits states from regulating investment advisors who do not have a place of business in the state and who render advise to less than 6 clients in the state.

[6] See 18 U.S.C. § 3571(d). See also, the U.S. Sentencing Guidelines, adopted under 28 U.S.C. § 994(p), which provides judges with a complex eight-step analysis for sentencing organizations convicted of federal offenses.

[7] An adviser with assets over $25 million must make two determinations before the value of an account can be counted towards the $25 million threshold. First, the adviser must determine whether the account is a securities portfolio. Second, the adviser must determine whether the account receives continuous, regular, supervisory services.

[8] As of February 1998, four states -- Colorado, Iowa, Ohio and Wyoming -- have not enacted investment adviser statutes. Consequently, advisers that have their principal offices in these states must register with the SEC, regardless of the amounts of assets under their management. Likewise, advisers with their principal offices in a foreign county must register with the SEC.

[9] The remainder of this outline address the standards applicable to federally registered advisers.

[10] Within 45 days of filing the Form ADV registration application, the SEC either must grant registration or begin proceedings to deny it, assuming the Form ADV has been completed fully and properly. The SEC staff will return any Form ADV that is not fully and properly completed, in which event the 45-period will begin again.

[11] Form ADV must be amended "promptly" (which has not been defined by the Advisers, the SEC or the courts) if the information provided in response to the following items becomes inaccurate for any reason: Part I, Item 1, 2, 3, 4, 5, 8, 11, 13A, 13B, 14A or 14B. Likewise, the Form ADV must be amended "promptly" if any of the information provided in response to the following items become inaccurate in any material manner: Part I, Item 9 or 10, all of Part II (except Item 14), and all of Schedule H.

[12] This discussion does not cover the broader area of the rules applicable to advertising by registered investment companies.

[13] Advertisements that set out or offer to furnish a list of all recommendations made by the investment adviser within the immediately preceding period of not less than one year are permissible provided that the advertisement containing or offering such a list meets certain conditions.

[14] Clover Capital Management, Inc. (October 27, 1986) ("Clover Capital").

[15] Kurtz Capital Management (January 18, 1988) ("Kurtz").

[16] The disclosure requirements of this rule are not intended to be exclusive, and compliance with this rule does not relieve advisers of any other obligation to disclose information to clients, particularly as promulgated under the anti-fraud provisions of the Advisers Act.

[17] "Impersonal advisory services" means advice not purporting to be tailored to the specific needs of a particular client and/or statistical reports which do not provide advice as to any particular security.

[18] Note that a significant exception to this general rule is found in Rule 204-2(e)(3), which requires books and records necessary to form the basis for or demonstrate the calculation of performance must be maintained for a period of not less than five years from the end of the fiscal year during which the adviser last published the figures.

[19] Note that the consents of the client party need not be written, allowing for the use of "negative" consents to the assignment.

[20] In the Matter of Thomson McKinnon Management L.P., Release No. IA-1243 (July 26, 1990).

[21] In the Matter of Kingsley, Jennison, McNulty & Morse, Inc., SEC Pub. File No. 3-7446 (November 14, 1991).

[22] The term "access person" is defined in the 1940 Act and generally includes those persons who are involved in the investment process such as portfolio managers, analysts and traders.

[23] See In the Matter of Alliance Capital Management, L.P., IA Rel. No. 1630 (April 28, 1997); In the Matter of Ronald V. Speaker and Janus Capital Management, IA Rel. No. 1605 (Jan. 13, 1997); In the Matter of Roger W. Honour, IA Rel. No. 1527 (Sept. 29, 1995).

[24] See Rule 204-2(a)(12).

[25] In addition, Section 203(e)(5) authorizes the SEC to sanction advisers failing to supervise adequately persons who violate securities laws.

[26] The term "investment supervisory services" is defined to mean the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client. See Advisors Act Sec. 202(13).

[27] In addition, under Section 16(b) of the Exchange Act, any director or officer of an issuer, or a direct or indirect beneficial owner of more than ten percent of covered securities is required to disgorge to the issuer any profit made, or loss avoided from any purchase and sale (or sale and purchase) of such issuer's stock within a six-month period ("short-swing profit"). This means that any two transactions of an opposite nature (i.e., a purchase and a sale) within any six-month period, however unrelated, may lead to recovery by the issuer of any profit realized, or loss avoided. For purposes of disgorgement, an investment adviser with discretionary authority for accounts holding covered securities has beneficial ownership of those securities only if the

adviser has a "pecuniary interest" in the securities. "pecuniary interest" does not include the right to receive advisory fees unless certain performance-based fees are involved. It should be noted that the "pecuniary interest" exception applies only to disgorgement obligations.

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