

# CHAPTER 13

## Attorney General

### ARTICLE 1 MISCELLANEOUS

#### **13-1. Inspection of Records of Charitable Trusts and Public Foundations.**

(Statutory Authority: 1976 Code § 21-31-40)

The records of any charitable trust filed in the Office of the Attorney General, or private foundation annual reports filed with the Office of the Attorney General pursuant to provisions of § 6056 of the Internal Revenue Code, may be inspected during regular business hours by any member of the general public on request, and at such reasonable and proper time as not to interfere with their use by the Office of the Attorney General or to exclude other persons from inspecting them.

#### **13-2. Limitations on Inspections.**

(Statutory Authority: 1976 Code § 21-31-40)

The Attorney General or his authorized Assistant Attorney General may limit the number of returns or file records to be made available to any person for inspection on a given date. Inspection will be allowed only in the presence of the Attorney General or an authorized Assistant Attorney General.

#### **13-3. Notes, Photo-copies, etc.**

(Statutory Authority: 1976 Code § 21-31-40)

Notes may be taken of material opened for inspection under these rules and regulations. Special permission must be obtained to make "photo-copies" under condition prescribed by the Attorney General or his authorized Assistant Attorney General.

#### **13-4. Records Concerning Charitable Purposes Only May Be Inspected.**

(Statutory Authority: 1976 Code § 21-31-40)

In instances in which the trusts for charitable purposes are combined in the written instrument with bequests or devises, in trust or otherwise, for other than charitable purposes, only that portion of the written instrument covering charitable purposes shall be available for inspection by the public, and those provisions of the written instrument wherein property is held for private purposes shall not be available for inspection by the public.

#### **13-11. Declaratory Rulings.**

(Statutory Authority: 1976 Code § 1-23-200)

The Attorney General will promptly dispose of any requests in letter form for declaratory rulings as to the applicability of any rule of his office.

#### **Editor's Note**

This regulation became effective June 2, 1978.

#### **13-12. Promulgation, Amendment, Repeal of Rules.**

(Statutory Authority: 1976 Code § 1-23-180)

Any person who is adversely affected by a rule of the Attorney General or the absence of a rule may petition the Attorney General requesting the promulgation, amendment or repeal of a rule. Such

petition may be in letter form. The Attorney General shall within thirty (30) days either deny the petition in writing, stating the reasons for denial, or initiate rulemaking proceedings.

**Editor's Note**

This regulation became effective June 2, 1978.

**13-13. Contests of Authority to Issue Regulations.**

(Statutory Authority: 1976 Code § 1-23-150)

Any aggrieved party may contest the authority of the Attorney General to promulgate a regulation by a protest in letter form. The Attorney General shall respond within thirty (30) days to such protest.

**Editor's Note**

This regulation became effective June 2, 1978.

**13-30. Repeal of Prior Regulations.**

(Statutory Authority: 1976 Code § 39-5-80)

All prior regulations of the Attorney General concerning vacation time-sharing plans, including regulations 13-21 through 13-29 of this Chapter, are hereby repealed as of October 8, 1978.

**Editor's Note**

This regulation became effective April 13, 1979.

**ARTICLE 2  
SECURITIES**

(Statutory Authority: 1976 S.C. Code §§ 35-1-101 et seq. (Supp. 2005))

**SUBARTICLE 2  
EXEMPTIONS FROM SECURITIES**

**13-201. Approved Securities Exchanges.**

The following securities markets are recognized under the provisions of Section 35-1-201(6) of the South Carolina Uniform Securities Act of 2005: the New York Stock Exchange (NYSE); American Stock Exchange (ASE); Midwest Stock Exchange; NASDAQ/National Market System; Philadelphia Stock Exchange; Pacific Stock Exchange; Chicago Board Options Exchange (CBOE).

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

**13-202. Securities of Nonprofit Organizations.**

The exemption from the registration requirements of Section 35-1-301 provided by Section 35-1-201(7) for nonprofit organizations shall not be considered to be available for debt securities issued and offered by such organizations unless the full disclosure provisions of Section 35-1-501(2) are met and the investing public is afforded the protection provided by the following as a minimum:

- (1) The organization shall be incorporated as a nonprofit, nonstock corporation.
- (2) Any organization assisting the issuer in any manner in the sale of the securities shall be required to be registered as a broker-dealer in this State.
- (3) The trustee and/or paying agent shall be independent of the issuer, the broker-dealer or any affiliate of either, and shall possess the authority to administer a trust under state and/or federal laws.
- (4) The debt securities shall meet all form and minimum provisions for debt securities established pursuant to rule or order of the Securities Commissioner.
- (5) A Prospectus, Offering Brochure, Offering Circular or similar instrument, dated and filed with the Securities Commissioner, shall be delivered to each prospective purchaser and a copy of such

instrument (signed by two officers of the issuer) shall be held in the files of the trustee and/or paying agent.

(6) Said Prospectus or similar instrument shall at a minimum contain the following information:

(a) Financial statement consisting of a statement of assets and liabilities, income and expense statement, and comparative figures showing the budget, number of pledging units, if available, and income and expenses for the past three years. If any of this information is not available, a statement to that effect should be made with an explanation of why it is not available. Obligations, if any, on existing indebtedness should be clearly stated;

(b) A pay-back or maturity schedule and sinking fund requirements, if any. If refinancing will be needed when the bonds mature, this should be clearly stated;

(c) The name, address and telephone number of the trustee and/or paying agent;

(d) Any past history of financial transactions between the issuer and broker-dealer or financing organization and any known or contemplated future transactions;

(e) The name, address and telephone number of the broker-dealer handling the issue and the name and address of the local representative of the broker-dealer;

(f) The total expenses of the issue (including remuneration to the broker-dealer);

(g) A statement on whether the offering is being made on a best efforts or firm underwriting basis, and if the former, a clear statement of the responsibilities of the financing organization and the church membership;

(h) An itemized statement of the use to which the proceeds will be put. If additional funds will be needed to complete the stated purposes, this should be disclosed together with a statement showing how such funds will be obtained;

(i) If any statements are made concerning the risk or lack of risk in purchasing the securities, they should be made in the light of the financial condition of the issuer, and not in generalities. Likewise, any comparison of yields will be considered misleading unless other comparative aspects of these investments are included;

(j) A description of the terms of the debt security offered. For details reference may be made to an indenture and/or deed of trust if such exists;

(k) If guarantee of payment is made by an affiliated organization, information describing the ability of that organization to guarantee should be furnished, including financials. The word "guarantee" should be used only if there is a second obligation by another entity;

(l) Brief information concerning the city, town or other area in which the issuer is located with special reference to the immediate neighborhood;

(m) Clear disclosure of any affiliation of the issuer or broker-dealer, or of any officers of either, with any building contractor or supplier who has an interest in or may receive any of the proceeds of the issue; and

(n) If the securities have not been registered under the South Carolina Uniform Securities Act of 2005, the Securities Act of 1933 or the securities law of the state in which the issuer is located, this should be clearly indicated, and the exemptions relied upon cited.

(7) Before reliance is placed upon the exemption provided by Section 35-1-201(7), written clearance by the Securities Commissioner must be obtained. A request for such should be accompanied by the following:

(a) A copy of the latest preliminary or definitive Prospectus, Offering Brochure or other offering document. If preliminary, a copy of the definitive instrument should be filed when available;

(b) A draft or specimen of the security;

(c) A copy of the preliminary or definitive indenture and/or trust agreement, if any;

(d) A copy of the Agreement between the issuer and broker-dealer;

(e) An Opinion of Counsel as to the legality of the issue and obligation of the issuer;

(f) Copies of all advertising materials and related literature to be used in the offer or sale of the security; and

(g) A filing fee in the amount of one hundred fifty (\$150.00) dollars.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

### **13–203. Recognized Securities Manuals.**

The following securities manuals are recognized under the provisions of Section 35–1–202(2)(D) of the South Carolina Uniform Securities Act of 2005, and the inclusion in any one of these manuals of the information specified in this Section concerning the issuer of the security, exempts such security from the requirements of Sections 35–1–301 through 35–1–306 and 35–1–504 of the South Carolina Uniform Securities Act of 2005: S&P Capital IQ Standard Corporation Descriptions; Mergent’s Manuals.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13–204. Regulation D Offerings.**

Any offer or sale of securities made in compliance with Rules 501 through 505 and 507 through 508 of Regulation D (collectively “SEC Regulation D”) under the Securities Act of 1933, as amended from time to time (except for any subsequent amendment to SEC Regulation D which the Securities Commissioner, by Rule or Order, specifically excludes) and which satisfies the following additional conditions and limitations, shall be exempt from Sections 35–1–301 to 35–1–306 of the South Carolina Uniform Securities Act of 2005:

A. Commissions. No commissions, finders fees or other remuneration shall be paid or given, directly or indirectly, to any person for soliciting any prospective purchaser unless such person is registered as a broker-dealer or agent as required by Section 35–1–401 of the South Carolina Uniform Securities Act of 2005.

B. Disqualifications. No exemption under this Rule shall be available for the securities of an issuer, if the issuer or any of its affiliates:

(1) is subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining or is subject to an order, judgment or decree of any court of competent jurisdiction, entered within five (5) years prior to commencement of the offering in reliance upon this exemption, permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with any state; or

(2) has been convicted within five (5) years prior to the commencement of the offering in reliance upon this exemption of any felony or misdemeanor in connection with the purchase or sale of any security or any felony involving fraud or deceit including but not limited to forgery, embezzlement, obtaining money under false pretenses, theft by conversion, theft by deception, larceny or conspiracy to defraud; or

(3) is subject to any order, judgment or decree issued by any State Securities Administrator, the United States Securities and Exchange Commission, the United States Commodities Future Trading Commission or the United States Postal Service in which fraud, deceit or registration violations were found after notice and opportunity for hearing, if the order was entered within five (5) years prior to the commencement of the offering in reliance upon this exemption; or

(4) is subject to an order barring or suspending membership in any self-regulatory organization registered pursuant to the Securities Exchange Act of 1934, if the order was entered within five (5) years prior to the commencement of the offering in reliance upon this exemption.

C. Waiver of Disqualification. The disqualification referred to in Subsection B above shall not apply:

(1) if the issuer or its affiliate subject to the disqualification is currently registered or licensed to conduct securities-related business in the jurisdiction where the administrative order or judgment was entered against such issuer or affiliate; or

(2) if the jurisdiction which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied; or

(3) if the Securities Commissioner, in his discretion, waives the disqualification.

D. Filing requirements. The following filing requirements are conditions precedent to the availability of this exemption:

(1) The issuer shall file with the Securities Commissioner a notice of intention to sell using the SEC Form D, described in Rule 503 of SEC Regulation D, or any successor form, at least five (5) business days prior to the first offering to an investor in this state in reliance upon this exemption. Said notice of intention to sell shall be accompanied by the following:

(a) a non-refundable filing fee in the amount of three hundred (\$300.00) dollars;

(b) a consent to service of process prescribed by Section 35-1-611(a) of the South Carolina Uniform Securities Act of 2005, on Form U-2, which has been executed by the issuer; and

(c) a copy of any prospectus or disclosure documents to be used in connection with the offer and sale of the securities.

(2) A sales report shall be filed with the Securities Commissioner no later than thirty (30) days after the termination of the offering and shall include the names and addresses of the purchasers.

(3) In the event that an offering pursuant to this exemption continues for a period of more than twelve (12) months after the time required for the filing of the initial SEC Form D in this state, prior to the expiration of twelve (12) months from such time, the issuer shall file with the Securities Commissioner a notice stating that such offering is to be renewed for an additional period of up to twelve (12) months, together with a non-refundable renewal filing fee in the amount of three hundred (\$300.00) dollars and any necessary amendments or updates to documents previously filed with the Securities Commissioner.

(4) Any filing pursuant to this exemption shall be amended by filing with the Securities Commissioner such information and changes as may be necessary to correct any material misstatement or omission in the filing. Any prospectus or disclosure documents required to be filed by this Rule that were not prepared at the time of the initial filing, or which materially differ from the prospectus or disclosure documents included in any filing shall be filed with the Securities Commissioner at least two (2) business days prior to its use in this state. There shall be no fees charged for amendment of filings pursuant to this Rule.

(5) Any notice on, amendment to or renewal of an SEC Form D required by this section shall be manually signed by a person authorized by the issuer.

(6) For purposes of this exemption, a document shall be deemed to have been filed with the Securities Commissioner only when the document has been delivered to the Office of the Securities Commissioner.

E. Any prospectus or disclosure document utilized in this State in connection with offers or sales of securities in reliance on this exemption must carry substantially the following information shown boldly:

**THESE SECURITIES ARE OFFERED PURSUANT TO A CLAIM OF EXEMPTION UNDER ONE OR MORE SECURITIES ACTS. IN MAKING AN INVESTMENT DECISION INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE PERSON OR ENTITY CREATING THE SECURITIES AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSIONER OR REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.**

**THESE SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.**

F. The Securities Commissioner in his discretion shall be entitled to postpone the effective date of any filing pursuant to this exemption pending receipt of registered or required documents or pending further review or to deny the availability of this exemption by faxing, mailing, or otherwise notifying

the issuer prior to the end of the fifth business day after filing of the SEC Form D referred to in Subsection D(1) above.

G. An issuer shall be deemed to have complied with Regulation D as used above if the issuer demonstrates to the Securities Commissioner that it has made a good faith effort to comply in all material respects with Regulation D, and the issuer otherwise qualifies for an exemption from registration under the Securities Act of 1933.

H. This exemption shall not apply to transactions offered and sold in reliance upon Rule 504 of SEC Regulation D, unless the following additional conditions are satisfied:

(1) The aggregate offering price for securities sold in South Carolina shall not exceed two hundred fifty thousand (\$250,000.00) dollars during any twelve (12) month period;

(2) The limitation on the manner of offering and resale of securities set forth in Rules 502(c) and (d) of SEC Regulation D shall be satisfied; and

(3) The "sophisticated investor" qualifications for the nature of purchasers set forth in Rule 506(b)(2)(ii) of SEC Regulation D shall be satisfied.

I. Nothing in this exemption is intended to relieve or should be construed as in any way relieving issuers or persons acting on behalf of issuers from the anti-fraud provisions of the South Carolina Uniform Securities Act of 2005.

J. The Securities Commissioner may deny, revoke or suspend the availability of this exemption pending a further investigation and determination as to whether the issuer and all other parties acting on behalf of the issuer have effected full compliance with the terms and conditions hereof, and of the South Carolina Uniform Securities Act of 2005. Neither compliance nor attempted compliance with this exemption, nor the absence of any objection or order from the Securities Commissioner with respect to any offering of securities undertaken pursuant to this exemption, shall be deemed an approval of any securities offered pursuant to this exemption.

K. The aggregate number of unaccredited investors sold under this exemption shall not exceed thirty-five (35) purchasers in this state during any twelve (12) month period, exclusive of purchasers acquiring securities registered pursuant to Section 35-1-304 of the South Carolina Uniform Securities Act of 2005.

L. All terms used in this exemption, to the extent not otherwise defined, shall have the meanings ascribed to them in SEC Regulation D.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-205. Accredited Investor Exemption.**

Any offer or sale of a security by an issuer in a transaction that meets the requirements of this Rule is exempted from Sections 35-1-301 and 35-1-504.

A. Sales of securities shall be made only to accredited investors. "Accredited investor" is defined in 17 C.F.R. 230.501(a), as amended.

B. The exemption is not available to an issuer that is in the development stage that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.

C. The issuer must reasonably believe that all purchasers are purchasing for investment and not with the view to or for sale in connection with a distribution of the security. Securities issued under this exemption may only be resold pursuant to a registration or an exemption under the South Carolina Uniform Securities Act of 2005 or other appropriate state or federal securities acts.

D. (1) A general announcement of the proposed offering may be made by any means.

(2) The general announcement must include the following:

(a) The name and address of the issuer of the securities;

(b) The name, a brief description and price (if known) of any security to be issued;

(c) A brief description of the business of the issuer;

(d) The name, address and telephone number of the person to contact for additional information; and

(e) A statement that:

(i) sales will only be made to accredited investors;

(ii) no money or other consideration is being solicited or will be accepted; and

(iii) the securities have not been registered with or approved by any state securities agency or the United States Securities and Exchange Commission and are being offered and sold pursuant to an exemption from registration.

(3) The general announcement may include additional information permitted by the Securities Commissioner.

(4) The general announcement of the proposed offering shall only contain the information that is required or permitted in Subsections D(2) and (3) of this Rule.

(5) Dissemination of the general announcement of the proposed offering to persons who are not accredited investors shall not disqualify the issuer from claiming the exemption under this Rule.

E. The issuer, in connection with an offer, may provide information in addition to the general announcement under Section D above, once the issuer has determined that the prospective purchaser is an accredited investor.

F. No telephone solicitation shall be permitted until the issuer has determined that the prospective purchaser to be solicited is an accredited investor.

G. The issuer shall file with the Securities Commission a notice of the transaction, a copy of the general announcement, and a fee of three hundred (\$300.00) dollars within fifteen (15) days after the first sale in this state.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-206. Intrastate Offering Exemption.**

A. The offer or sale of a security by an issuer, conducted solely in this state to residents of this state, shall be exempt from the requirements of Sections 35-1-301 through 35-1-306 and 35-1-504 of the Act, if the offer or sale is conducted in accordance with each of the following requirements:

(1) The issuer of the security shall be a for-profit business entity formed under the laws of the state of South Carolina and registered with the Secretary of State.

(2) The transaction shall meet the requirements of the federal exemption for intrastate offerings in Section 3(a)(11) of the Securities Act of 1933 (15 U.S.C. Section 77c(a)(11)), and SEC Rule 147 (17 C.F.R. 230.147). As such, prior to any offer or sale pursuant to this exemption, the seller shall obtain, from each prospective purchaser, documentary evidence that provides the seller with a reasonable basis to believe that such investor is a resident of the state of South Carolina.

(3) The sum of all cash and other consideration to be received for all sales of the security in reliance upon this exemption shall not exceed one million (\$1,000,000) dollars, less the aggregate amount received for all sales of securities by the issuer within the 12 months before the first offer or sale made in reliance upon this exemption.

(4) The issuer shall not accept more than five thousand (\$5,000) dollars from any single purchaser unless the purchaser is an accredited investor as defined by Rule 501 of SEC Regulation D (17 C.F.R. 230.501).

(5) The issuer must reasonably believe that all purchasers of securities are purchasing for investment purposes.

(6) A commission or other remuneration shall not be paid or given, directly or indirectly, for any person's participation in the offer or sale of securities unless the person is registered as a broker-dealer or agent under the Act.

(7) All funds received from investors shall be deposited into a bank or depository institution authorized to do business in South Carolina, and all of the funds shall be used in accordance with representations made to investors.

(8) Not less than five days prior to the use of any general solicitation, or within fifteen days after the first sale of the security pursuant to this exemption (provided no general solicitation has been used prior to such sale), whichever occurs first, the issuer shall provide a notice to the Securities

Commissioner in writing. The notice shall specify that the issuer is conducting an offering in reliance upon this exemption and shall contain the names and addresses of the following persons:

- (a) The issuer;
- (b) Officers, directors, and any control person of the issuer;
- (c) All persons who will be involved in the offer or sale of securities on behalf of the issuer; and
- (d) The bank or other depository institution in which investor funds will be deposited.

(9) The issuer shall not be, either before or as a result of the offering, an investment company as defined in Section 3 of the Investment Company Act of 1940 (15 U.S.C. Section 80a-3), or subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. Section 78m and 78o(d)).

(10) The issuer shall inform all purchasers that the securities have not been registered under the Act and, therefore, cannot be resold unless the securities are registered or qualify for an exemption from registration under the Act, subject to the provisions of Subsection (e) of SEC Rule 147 (17 C.F.R. 230.147(e)). In addition, the issuer shall make the disclosures required by R.13-204E.

(11) This exemption shall not be used in conjunction with any other exemption under these Rules or the Act, except for offers and sales to officers, directors, partners, or similar controlling persons of the issuer. Sales to such controlling persons shall not count toward the limitation in subsection A(3) above.

(12) Disqualifications. This exemption shall not be available if the issuer, or any of its officers, controlling persons, or promoters is subject to a disqualifying event specified in Subsection (d) of Rule 506 of SEC Regulation D (17 C.F.R. 230.506(d)).

(13) Nothing in this exemption is intended to relieve or should be construed as in any way relieving the issuers or persons acting on behalf of issuers from the anti-fraud provisions of the Act.

(14) Every notice of exemption provided for in Subsection A(8) above is effective for one year from the date of its filing with the Securities Commissioner and shall be accompanied by a non-refundable filing fee of three hundred (\$300.00) dollars.

**HISTORY:** Added by State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### SUBARTICLE 3

#### REGISTRATION OF SECURITIES AND NOTICE FILING OF FEDERAL COVERED SECURITIES

#### **13-301. Notice Filing Requirements for Federal Covered Securities.**

The filings listed in Section 35-1-302(a)(1) and (2) and 35-1-302(c) shall be made and fees paid in accordance with Section 35-1-702(a).

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

#### **13-302. Prospectus Content and Filing Requirements for Securities Registered by Qualification.**

As a condition of registration, a prospectus containing the information listed in Sections 35-1-304(b)(1) through (18) shall be sent or given to each person to whom an offer is made, before or concurrently with the earliest of the conditions listed in Section 35-1-304 (c)(1) through (4).

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

#### **13-303. Impoundment of Proceeds or Stock.**

A. The Securities Commissioner may require as a condition of registration that a security issued within the previous five (5) years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the security either in this State or elsewhere.

B. Impoundment of Proceeds

(1) When proceeds from the sale of securities are required to be impounded pursuant to Section A of this Rule, the proceeds must be deposited in an interest bearing escrow or trust account with an



impoundment agent. The impoundment agent may not be affiliated with the issuer, its affiliates, its officers or directors, the underwriter or any promoter and a valid impoundment agreement is required.

(2) For an impoundment agreement to be considered valid, the following terms and conditions must be met:

(a) A signed copy of the agreement must be filed with the Securities Commissioner;

(b) The agreement must be signed by an officer of the issuer, an officer of the underwriter (if applicable), and an officer of the impoundment agent. The aforesaid individuals must have the authority to sign such documents;

(c) The agreement shall provide that the impounded proceeds are not subject to claims by creditors, affiliates, associates, or underwriters of the issuer until the proceeds have been released to the issuer pursuant to the terms of the agreement;

(d) A summary of the principal terms of the agreement must be included in the registration statement; and

(e) The agreement must provide that the Securities Commissioner has the right to inspect and make or require to be made copies of the records of the impoundment agent at any reasonable time wherever the records are located.

(3) The impoundment agent shall notify the Securities Commissioner in writing upon the release of the proceeds. If the proceeds are insufficient to meet the minimum requirements as established by the Securities Commissioner in his sole discretion within the time prescribed by the agreement the impoundment agent must release and return the proceeds directly to the investors with or without interest, depending upon the terms and conditions of the agreement, and without deduction for expenses, including impoundment agent fees. All interest earned shall be distributed pro-rata to the investors, along with the proceeds.

(4) If a person, who is an underwriter or an officer, director, promoter, affiliate or associate of the issuer, purchases securities that are a part of the public offering being sold pursuant to the registration statement and if the proceeds from that purchase are used for the purpose of completing the impoundment requirements imposed by this Rule, the following conditions must be met:

(a) The persons must be purchasing the securities with investment intent rather than with intent of resale and on the same terms as unaffiliated public investors;

(b) The prospectus must contain a disclosure that such persons may purchase securities of the issuer for purposes of completing the impoundment requirements imposed by this Rule; and

(c) All securities so purchased will neither be defined as promotional shares, nor be subject to escrow under Section C of this Rule.

#### C. Escrow of Security

(1) When a security is required to be escrowed pursuant to Section A of this Rule, the security shall be escrowed with an escrow agent who is not affiliated with the issuer, its affiliates, officers or directors, the underwriter or any promoter and a valid escrow agreement is required.

(2) In order for an escrow agreement to be considered valid pursuant to this Rule, a signed copy of the agreement must be filed with and accepted by the Securities Commissioner who, in his discretion, may require additional terms and condition prior to acceptance.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-304. Underwriting Expenses, Underwriter Warrants, Selling Expenses, and Selling Security Holders.**

A. An offer or sale of securities may be disallowed by the Securities Commissioner if the underwriting expenses to be incurred exceed seventeen (17%) percent of the gross proceeds from the public offering.

B. Underwriting expenses may include but are not limited to:

(1) Commissions to underwriters or broker-dealers;

(2) Non-accountable fees or expenses to be paid to the underwriter or broker-dealer;

(3) Underwriter warrants, which shall be valued using the following formula:

$$\frac{\{(165\% \times \text{Aggregate Offering Price}) - (\text{Exercise Price} \times \text{the number of shares offered to public})\}}{2} \times \frac{\text{the number of shares underlying warrants}}{\text{the number of shares offered to public}}$$

The value may be reduced by twenty percent (20%) if the exercise period of the warrants is extended from one (1) year after the public offering to two (2) years after the public offering and by forty percent (40%) if the exercise period of the warrants is extended from one (1) year after the public offering to three (3) years after the public offering. Warrants may be granted to underwriters only under the following conditions and subject to the following restrictions:

- (a) The underwriter is a managing underwriter;
  - (b) The public offering is either a firmly underwritten offering or a “minimum-maximum” offering. Options or warrants may be issued in a “minimum-maximum” public offering only if:
    - (i) The options or warrants are issued on a pro rata basis; and
    - (ii) The “minimum” amount of securities has been sold;
  - (c) The exercise price of the warrants must be at least equal to the public offering price;
  - (d) The number of shares covered by underwriter options or warrants may not exceed ten percent (10%) of the shares of common stock actually sold in the public offering;
  - (e) The life of the options or warrants may not exceed a period of five (5) years from the completion date of the public offering;
  - (f) The options or warrants are not exercisable for the first year after the completion date of the public offering;
  - (g) Options or warrants may not be transferred, except:
    - (i) To partners of the underwriter, if the underwriter is a partnership;
    - (ii) To officers and employees of the underwriter, who are also shareholders of the underwriter, if the underwriter is a corporation;
    - (iii) By will, pursuant to the laws of descent and distribution; or
    - (iv) By the operation of law.
  - (h) The warrant agreement may not allow for a reduction in the exercise price of the options or warrants resulting from the subsequent issuance of shares by the issuer except where such issuances are pursuant to a:
    - (i) Stock dividend or stock split; or
    - (ii) merger, consolidation, reclassification, reorganization, recapitalization, or sale of assets.
- (4) Rights of first refusal, which shall be valued at one percent (1%) of the public offering or the amount payable to the underwriter if the issuer terminates the right of first refusal;
- (5) Solicitation fees payable to the underwriter, which shall be valued at the lesser of actual cost or one percent (1%) of the public offering if the fees are payable within one (1) year of the offering;
- (6) Financial consulting or financial advisory agreements with an underwriter or any other similar type of agreement or fees, however designated, which shall be valued at actual cost;
- (7) Underwriter due diligence expenses;
- (8) Payments made either six (6) months prior to or required to be made six (6) months following the public offering to investor relations firms designated by the underwriter; and
- (9) Other underwriting expenses incurred in connection with the public offering of securities as determined by the Securities Commissioner.

C. Underwriting expenses shall not include financial consulting or financial advisory agreements with the underwriter payable at the time the services are rendered provided that such agreement was entered into at least twelve (12) months prior to the registration being filed with the Securities and Exchange Commission.

D. An offer or sale of securities may be disallowed by the Securities Commissioner if the direct and indirect selling expenses of the offering exceed twenty percent (20%) of the gross proceeds from the public offering.

E. Selling expenses may include but are not limited to:

- (1) Commissions to underwriters or broker-dealers;
- (2) Non-accountable fees or expenses to be paid to the underwriters or broker-dealers;
- (3) Auditor's and accountant's fees;
- (4) Legal fees;
- (5) The cost of printing prospectuses, circulars and other documents required to comply with securities laws and regulations;
- (6) Charges of transfer agents, registrars, indenture trustees, escrow holders, depositories, engineers, appraisers, and other experts;
- (7) The cost of authorizing and preparing the securities, including issue taxes and stamps;
- (8) Financial consulting or financial advisory agreements with an underwriter or any similar type agreement or fees, however designated, which shall be valued at actual cost, excluding financial and consulting agreements which are entered into at least twelve (12) months before the registration is filed with the Securities and Exchange Commission;
- (9) Payments made either six (6) months prior to or required to be made six (6) months following the public offering to investor relations firms designated by the underwriter; and
- (10) Other cash expenses incurred in connection with the public offering of securities as determined by the Securities Commissioner.

F. A public offering or sale of securities that includes selling security holders offering more than ten percent (10%) of the securities to be sold in the public offering may be disallowed by the Securities Commissioner unless:

- (1) Selling security holders offering or selling more than ten percent (10%) but less than fifty percent (50%) of the securities to be sold in the public offering pay a pro-rata share of all selling expenses of the public offering, excluding the legal and accounting expenses of the public offering;
- (2) Selling security holders offering more than fifty percent (50%) of the securities to be sold in the offering pay a pro-rata share of all selling expenses of the public offering; and
- (3) The prospectus or offering document discloses the amount of selling expenses which the selling security holders will pay.

G. With the exception of underwriter or broker-dealer compensation, Subsections F (1), (2), and (3) above shall not apply if the selling security holders have a written agreement with the issuer, that was entered into in an arm's length transaction, whereby the issuer has agreed to pay all of the selling security holder's selling expenses.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.**

### **13-305. Options and Warrants.**

A. Options or warrants may be issued to underwriters as compensation in connection with a public offering provided those options or warrants comply with the requirements of Rule 13-304.

B. Options or warrants may be granted to unaffiliated institutional investors in connection with loans if:

- (1) The options or warrants are issued contemporaneously with the issuance of the loan;
- (2) The options or warrants are granted as the result of bona fide negotiations between the issuer and the unaffiliated institutional investor;
- (3) The exercise price of the options or warrants is not less than the fair market value of the issuer's shares of common stock underlying the options or warrants on the date that the loan was approved; and
- (4) The number of shares issuable upon exercise of the options or warrants multiplied by the exercise price thereof does not exceed the face amount of the loan.

C. Options or warrants may be granted in connection with acquisitions, reorganizations, consolidations or mergers if:

(1) They are granted to persons who are unaffiliated with the issuer; and

(2) The earnings of the issuer at the time of grant and after giving effect to the acquisition, reorganization, consolidation or merger would not be materially diluted by the exercise of the options or warrants.

D. Options and warrants may not be granted at an exercise price of less than eighty-five percent (85%) of fair market value of the issuer's underlying shares of common stock on the date of the grant. The issuer, and its officers and directors, should consider the advisability of obtaining a concurrent appraisal, by a qualified independent appraiser, of the value of the shares of common stock at the time of the grant as evidence of the fair market value.

E. The total number of options and warrants issued or reserved for issuance on the date of the public offering, may not, for one (1) year following the effective date of the offering, exceed fifteen percent (15%) of the issuer's shares of common stock outstanding at the date of the public offering plus the number of shares of common stock being offered that are firmly underwritten, or in the case of offerings not firmly underwritten, the number of shares of common stock required to be sold in order to meet the minimum offering amount. In calculating the number of options and warrants, the following are excluded:

(1) Options and warrants that were issued, or reserved for issuance, pursuant to Sections B and C, above;

(2) Options and warrants that were issued, or reserved for issuance, to employees or consultants who are not promoters, in connection with an incentive stock option plan qualified under section 422 of the Internal Revenue Code; and

(3) Options and warrants that are exercisable at or above the public offering price.

F. No options or warrants issued and outstanding at the date of the public offering, excluding those options and warrants issued pursuant to an incentive stock option plan qualified under section 422 of the Internal Revenue Code, may be exercisable more than five (5) years from the date of the public offering.

G. If the number of options and warrants that are issued and outstanding and/or reserved for issuance is material, the final offering circular shall disclose the potential dilutive effects of such options and warrants.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-306. Form and Minimum Provisions for Debt Securities.**

A. Provisions or terms of an issue of debt securities shall be considered inadequate for the protection of the security holders, and shall be considered grounds for denial of an application for registration under Section 35-1-306(a)(7) which do not as a minimum adequately define the following, either in the security itself or in a trust indenture:

(1) Maturity date which is the date upon which the principal shall become due and payable. Demand securities, with no maturity date, will not be accepted.

(2) Interest rate and interest payment dates.

(3) Assets securing the issue and the liens thereon, or if none, a statement to that effect.

(4) Conversion feature, if any, including protection of such feature from dilution.

(5) Position of the issue in the debt structure of the company, both present and future.

(6) Events of default, including provision that default in payment either of principal or interest on any one security of an issue shall constitute a default on the entire issue.

(7) Rights of the security holders in default, including the right to a list of names and addresses of all holders of an issue of registered securities in default, if there is no trustee to act for all holders, and the right of the holders of twenty-five percent (25%) in principal amount of the issue outstanding to declare the entire issue due and payable.

(8) Duties of the trustee, if any.

(9) Call features, if any.

(10) Denominations in which issued.

B. The security should be in such form, and bear such descriptive nomenclature, as is customary and recognized in the field of securities.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

### **13-307. Promoters' Equity.**

A public securities offering by a promotional or development stage company may be disallowed by the Securities Commissioner if the promoter's equity investment is less than:

A. Ten percent (10%) of the first one million (\$1,000,000.00) dollars of the aggregate public offering; and

B. Seven percent (7%) of the next five hundred thousand (\$500,000.00) dollars of the aggregate public offering; and

C. Five percent (5%) of the next five hundred thousand (\$500,000.00) dollars of the aggregate public offering; and

D. Two and one-half percent (2½%) of the balance over two million (\$2,000,000.00) dollars, which may include items submitted by the promoter to meet this requirement whose value has been accepted by the Securities Commissioner or his designee.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

### **13-308. Required Filings for Federal Covered Securities under Section 18(b)(4)(D) of the Securities Act of 1933.**

A. With respect to a security that is a federal covered security under Section 18(b)(4)(D) of the Securities Act of 1933 (15 U.S.C. Section 77r(b)(4)(D)), a notice filing, including a copy of Form D including the appendix, a consent to service of process complying with Section 35-1-611 of the South Carolina Uniform Securities Act of 2005, and a fee in the amount of three hundred (\$300.00) dollars must be filed with the Securities Commissioner not later than fifteen (15) days after the first sale of the security in this State.

B. The notice filing under Section A of this Rule is effective for one (1) year from the date of its filing with the Securities Commissioner after which time, if the offering is to continue, a renewal notice must be filed. The renewal notice filing shall include the same items as are required for an initial notice filing, including payment of the filing fee in the amount of three hundred (\$300.00) dollars.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

## **SUBARTICLE 4**

### **BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS, INVESTMENT ADVISER REPRESENTATIVES, AND FEDERAL COVERED INVESTMENT ADVISERS**

### **13-401. Examinations for Securities Agents, Investment Advisers, and Investment Adviser Representatives.**

A. Examinations for securities agents. A passing grade on an examination appropriate based upon the type of securities being sold, and the Uniform Securities Agent State Law Examination (Series 63) or the Uniform Combined State Law Exam (Series 66) or such other examination as may be designated by the Securities Commissioner by rule or order, must be furnished, as proof, in any application for registration as a principal of a broker-dealer or registration as an agent. No person who has passed the designated examinations shall again be required to pass another examination unless for a period of twenty-four (24) or more consecutive months immediately preceding the date of filing of the application he shall not have been registered as an agent, or as a principal, officer or director of a broker-dealer. An upgrading in the type of business being conducted by the agent or broker-dealer may require the passing of a new examination.

B. Examinations for investment advisers. As a condition of initial or renewal registration, every applicant for registration as an investment adviser, an investment adviser representative, or as a broker-dealer acting or proposing to act as an investment adviser, shall furnish the Securities Commissioner proof that he or she has obtained a passing score on the following examinations:

- (1) The Uniform Investment Adviser Law Examination (Series 65);

(2) The General Securities Representative Examination (Series 7) and the Uniform Combined State Law Examination (Series 66); or

(3) Such other examination as may be designated by the Securities Commissioner by rule or order.

C. Exceptions from examination requirements.

(1) If a person was registered as an investment adviser or investment adviser representative in any jurisdiction in the United States on January 1, 2000, and there has been no period longer than two years since that date in which the person was not registered as an investment adviser or investment adviser representative, that person shall not be required to satisfy the examination requirements for initial or continued registration, provided that the Securities Commissioner may require additional examinations if the person is found to have violated the South Carolina Uniform Securities Act of 2005.

(2) Any person who has been registered as an investment adviser or investment adviser representative in any state requiring the licensing, registration, or qualification of investment advisers or investment adviser representatives within the two-year period immediately preceding the date of filing of an application shall not be required to comply with the examination requirement set forth in subsection B above, provided that the person previously met the examination requirement in subsection B above.

(3) An applicant who has complied with the examination requirements in subsection B above within two years prior to the date the application is filed with the Securities Commissioner shall not be required to take and pass the required examination(s) again.

(4) An applicant who is an agent for a broker-dealer/investment adviser and who is not required by the agent's home jurisdiction to make a separate filing on the Central Registration Depository (CRD) system as an investment adviser representative, but who has previously met the examination requirement in subsection B above, necessary to provide advisory services on behalf of the broker-dealer/investment adviser, shall not be required to take and pass the required examinations again.

D. Waivers. The examination requirements of Subsection B of this Rule are waived for an individual who currently holds one or more of the following professional designations:

(1) Certified Financial Planner (CFP) issued by the Certified Financial Planner Board of Standards, Inc.;

(2) Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, Pennsylvania;

(3) Personal Financial Specialists (PFS) administered by the American Institute of Certified Public Accountants;

(4) Chartered Financial Analyst (CFA) granted by the Association for Investment Management and Research;

(5) Chartered Investment Counselor (CIC) granted by the Investment Counsel Association of America; or

(6) Such other professional designation as the Securities Commissioner may by rule or order recognize.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-402. Exemptions for Certain Canadian Broker-Dealers.**

A. A broker-dealer that is registered in Canada and that does not have a place of business in this State shall be exempt from the registration requirements of Section 35-1-401 of the South Carolina Uniform Securities Act of 2005 so long as it complies with the following conditions:

(1) It only effects or attempts to effect transactions in securities with or for, or by:

(a) an individual from Canada who is temporarily present in this State and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States; or

(b) an individual from Canada who is present in this State and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor.

(c) With or for a person from Canada who is present in this state, whose transactions are in a self-directed tax advantaged retirement plan in Canada of which the person is the holder or contributor; and,

(2) Files a notice in the form of his current application required by the jurisdiction in which his head office is located and a consent to service of process;

(3) Is a member of a self-regulatory organization or stock exchange in Canada;

(4) Maintains his provincial or territorial registration and his membership in a self-regulatory organization or stock exchange in good standing;

(5) Discloses to his clients in this state that he is not subject to the full regulatory requirements of the South Carolina Uniform Securities Act of 2005; and,

(6) Is not in violation of Section 35-1-501 or other anti-fraud provisions of the South Carolina Uniform Securities Act of 2005 and the rules and regulations promulgated thereunder.

B. An offer or sale of a security effected by a person exempt from registration pursuant to Section A of this Rule shall be deemed to be an exempt transaction not requiring registration pursuant to the South Carolina Uniform Securities Act of 2005.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-403. Broker-Dealer, Agent, Investment Adviser, and Investment Adviser Representative Registrations, Terminations, and Brochure Delivery.**

A. Investment Advisers.

(1) Initial Registration: The application for initial registration as an investment adviser pursuant to Sections 35-1-403(a) and 35-1-406(a) of the Act shall be made by completing the Form ADV (Uniform Application for Investment Adviser Registration) Parts 1 and 2 in accordance with the form instructions, and by filing the form electronically with the Investment Adviser Registration Depository (IARD) system. The application for initial registration shall also include the following:

(a) A consent to service of process complying with R.13-603;

(b) Proof of compliance by the investment adviser with the examination requirements of R.13-401;

(c) The fee required by Section 35-1-702 of the Act;

(d) The fees charged by the IARD or other designee of the Securities Commissioner for processing the filing;

(e) The proposed client contract(s) that complies with R.13-502A(16), which shall be filed directly with the Securities Commissioner;

(f) a balance sheet and an income statement as of a date within forty-five days from the date of filing of the application, which need not be audited, but which must be prepared in accordance with generally accepted accounting principles in the United States, or such other basis of accounting acceptable to the Securities Commissioner, and represented by the investment adviser as true and accurate using a form of verification acceptable to the Securities Commissioner, which shall be filed directly with the Securities Commissioner;

(g) Proof of compliance, if applicable, with the minimum financial bonding requirements of R.13-405, which shall be filed directly with the Securities Commissioner; and

(h) Any other information the Securities Commissioner may reasonably require.

(2) Annual Renewal: The application for annual renewal registration as an investment adviser pursuant to Sections 35-1-403(a) and 35-1-406(d) of the Act shall be filed before the current registration expires on December 31, and shall be filed electronically with the IARD. The application for annual renewal registration shall include the following:

(a) The fee required by Section 35-1-702 of the Act;

(b) The fees charged by the IARD or other designee of the Securities Commissioner for processing the filing; and

(c) Any other information the Securities Commissioner may reasonably require.

(3) Updates and Amendments:

(a) An investment adviser must file electronically with the IARD, in accordance with the instructions for 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 thirty days of the event that requires the filing of the amendment; and

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

(4) Complete Filing: An application for initial registration or renewal is not considered complete for the purposes of Sections 35-1-403(a), 35-1-406(a), and 35-1-406(d) of the Act, until the required fee and all required submissions have been received by the Securities Commissioner.

(5) Withdrawal: The application for withdrawal of registration as an investment adviser pursuant to Section 35-1-409 of the Act shall be completed by following the instructions for the Form ADV-W (Notice of Withdrawal from Registration as an Investment Adviser) and by filing the Form ADV-W electronically with the IARD.

#### B. Investment Adviser Representatives.

(1) Initial Application: The application for initial registration as an investment adviser representative pursuant to Sections 35-1-404(a) and 35-1-406(a) shall be made by completing the Form U-4 (Uniform Application for Securities Industry Registration or Transfer) in accordance with the form instructions, and by filing the Form U-4 electronically with the Central Registration Depository (CRD) system. The application for initial registration shall also include the following:

(a) A consent to service of process complying with R.13-603;

(b) Proof of compliance by the investment adviser representative with the examination requirements of R.13-401;

(c) The fee required by Section 35-1-702 of the Act;

(d) The fees charged by the CRD or other designee of the Securities Commissioner for processing the filing;

(e) A criminal record history in compliance with R.13-404; and

(f) Any other information the Securities Commissioner may reasonably require.

(2) Annual Renewal: The application for annual renewal registration as an investment adviser representative pursuant to Sections 35-1-404(a) and 35-1-406(d) shall be filed before the current registration expires on December 31, and shall be filed electronically with the CRD. The application for annual renewal registration shall include the following:

(a) The fee required by Section 35-1-702 of the Act;

(b) The fees charged by the CRD or other designee of the Securities Commissioner for processing the filing; and

(c) Any other information the Securities Commissioner may reasonably require.

(3) Updates and Amendments:

(a) The investment adviser representative is under a continuing obligation to update information required by the Form U-4 as changes occur;

(b) An investment adviser representative and the investment adviser must electronically file promptly with the CRD any amendments to the representative's Form U-4; and

(c) An amendment will be considered to be filed promptly if the amendment is filed within thirty days of the event that requires the filing of the amendment.

(4) Complete Filing: An application for initial registration or renewal is not considered complete for the purposes of Sections 35-1-404(a), 35-1-406(a), and 35-1-406(d) of the Act, until the required fee and all required submissions have been received by the Securities Commissioner.

(5) Withdrawal: The application for withdrawal of registration as an investment adviser representative pursuant to Section 35-1-409 of the Act shall be completed by following the instructions on the Form U-5 (Uniform Termination Notice for Securities Industry Registration) and by filing the Form U-5 electronically with the CRD.



C. Brochure Delivery. Investment advisers must comply with the terms of SEC Rule 204-3 of the Investment Adviser Act of 1940 (17 C.F.R. 275.204-3) regarding the delivery of brochures and brochure supplements.

D. Registration of FINRA Member Firms and their agents. FINRA member firms and their agents shall file all applications and amendments and pay all fees required for registration under the South Carolina Uniform Securities Act of 2005 with the CRD.

E. Registration of non-FINRA member broker-dealers and agents. Non-FINRA member firms and agents who cannot file via the CRD System must register directly with the Securities Commissioner, providing the information and using any form required for the filing of a uniform application and, upon request by the Securities Commissioner, by providing any other financial or information or record that the Securities Commissioner determines is appropriate.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-404. Criminal Record Requirement for Agents and Investment Adviser Representatives.**

Pursuant to Section 35-1-406 (a)(2), every person applying for registration as an agent or investment adviser representative in this State must request the South Carolina Law Enforcement Division to submit directly to the Securities Commissioner a criminal record history. This requirement is waived for FINRA registered broker-dealer agents.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-405. Broker-Dealer Recordkeeping, Minimum Financial Reporting and Bonding Requirements.**

#### **A. Broker-Dealer Recordkeeping Requirements.**

(1) Unless otherwise provided by order of the United States Securities and Exchange Commission ("SEC"), each broker-dealer registered or required to be registered under the South Carolina Uniform Securities Act of 2005 shall make, maintain and preserve books and records in compliance with SEC Rules 17a-3 (17C.F.R. 240.17a-3 (1996)), 17a-4 (17 C.F.R. 240.17a-4 (1996)), 15c2-6 (17 C.F.R. 240.15c2-6 (1996)) and 15c2-11 (17 C.F.R. 240.15c2-11 (1996)).

(2) To the extent that the SEC promulgates changes to the above-referenced rules, broker-dealers in compliance with such rules as amended shall not be subject to enforcement action by the Securities Commissioner for violation of this rule to the extent that the violation results solely from the broker-dealer's compliance with the amended rule.

#### **B. Broker-Dealer Minimum Financial and Financial Reporting Requirements.**

(1) Each broker-dealer registered or required to be registered under the South Carolina Uniform Securities Act of 2005 shall comply with SEC Rules 15c3-1 (17 C.F.R. 240. 15c3-1 (1996)), 15c3-2 (17 C.F.R. 240.15c3-2(1996)), and 15c3-3(17C.F.R. 240.15c-3(1996)).

(2) Each broker-dealer registered or required to be registered under the South Carolina Uniform Securities Act of 2005 shall comply with SEC Rule 17a-11 (17C.F.R. 240.17a-11) and shall file with the Securities Commissioner upon request copies of notices and reports required under Rules 17a-5, 17a-10, and 17a-11.

(3) To the extent that the SEC promulgates changes to the above-referenced rules, broker-dealers in compliance with such rules as amended shall not be subject to enforcement action by the securities division for violation of this rule to the extent that the violation results solely from the broker-dealer's compliance with the amended rule.

#### **C. Intrastate Broker-Dealer Bonding Requirements.**

Every broker-dealer registered or required to be registered under the South Carolina Uniform Securities Act of 2005 whose business is exclusively intrastate, who does not make use of any facility of a national securities exchange and who is not registered under section 15 of the Securities Exchange Act of 1934, shall be bonded in an amount of not less than fifty thousand (\$50,000.00) dollars by a bonding company qualified to do business in this State. The bond so posted must require the broker-dealer to

comply with the provisions of the South Carolina Uniform Securities Act of 2005 and those orders and regulations as the Securities Commissioner may from time to time prescribe.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.

### **13–406. Investment Adviser Minimum Capital and Bonding Requirements.**

#### A. Minimum financial requirements for investment advisers.

Unless an investment adviser posts a bond pursuant to 35–1–411(e) and Section B below an investment adviser registered or required to be registered pursuant to the South Carolina Uniform Securities Act of 2005 who has custody of client funds or securities shall maintain at all times a minimum net worth of fifty thousand (\$50,000.00) dollars, and every investment adviser registered or required to be registered under the South Carolina Uniform Securities Act of 2005 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 thirty five thousand (\$35,000.00) dollars. Should net worth fall below those levels after an investment adviser is registered, notice must be given to the Securities Commissioner by the close of business the next day. Investment activities also must cease until net worth is restored to the required levels. The term “net worth” is the excess of assets over liabilities as determined by generally accepted accounting principles, less the following:

(1) Deferred charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discounts and expenses, and all other assets of an intangible nature;

(2) Homes, home furnishings, automobiles, personal items not readily marketable, advances or loans to a related party, and assets owned or the portion of assets partially owned by another person (e.g., a spouse, if the asset is jointly owned), if net worth is being determined for an individual; and

(3) Advances or loans to stockholders and officers in the case of a corporation; advances or loans to members and managers in the case of a limited liability company; advances or loans to partners in the case of a partnership; and similar advances and loans.

#### B. Bonding requirements.

Every investment adviser having custody of or discretionary authority over client funds or securities and not meeting the minimum financial requirements required of such adviser pursuant to Section A above shall post cash or securities (in accordance with Rule 13–407 or such other rule or order promulgated by the Securities Commissioner) or a surety bond in the amount of fifty thousand (\$50,000.00) dollars for investment advisers having custody and thirty five thousand (\$35,000.00) dollars for investment advisers having discretionary authority but not custody of client funds or securities. Surety bonds required to be posted pursuant to this Rule must be posted by a bonding company qualified to do business in this State.

C. An investment adviser that has its principal place of business in a state other than this State shall be exempt from the requirements of Sections A and B above 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 net worth or bonding.

D. The Securities Commissioner may, by order, exempt certain registered investment advisers from the surety bond posting requirements.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13–407. Cash or Security Deposits in Lieu of Surety Bond.**

A deposit of cash or securities in lieu of the surety bond required by Rule 13–406 shall be considered appropriate within the intent and meaning of such section and shall be accepted by the Securities Commissioner under the following terms and conditions:

(1) With respect to a deposit of securities, that the securities be general obligations of, and be guaranteed both as to principal and interest by, the United States, any state or any political subdivision of a state, provided that such obligation currently be rated A or better in a Standard & Poor’s Corporation Record or a Mergent’s Manual, and provided further that the securities on the day of deposit have a net realizable market value of at least one hundred twenty-five percent (125%) of the penal sum of the bond required of the depositor;

(2) With respect to a deposit of cash, that the amount of the cash be at least equal to the amount of the bond otherwise required of the depositor;

(3) That as a condition of any renewal of registration by means of an in lieu deposit, cash so deposited be at least equal to the amount of the bond otherwise required of the depositor upon the renewal date and, for securities, the net realizable market value of securities so deposited be at least one hundred twenty-five percent (125%) of such sum on the renewal date;

(4) That the cash or securities shall be deposited in a bank located in South Carolina and organized under the laws of the United States or of the State of South Carolina;

(5) That the cash or securities so deposited shall be under the control of the Securities Commissioner and shall be for the use and benefit of any person damaged by any violation of the provisions of the South Carolina Uniform Securities Act of 2005, or other state securities act as the Securities Commissioner may in his discretion allow, by the depositor or his agent; and

(6) That the cash or securities so deposited shall remain on deposit and under the control of the Securities Commissioner for a period of three (3) years following termination of registration of the depositor. Any cash or securities then remaining, including any accumulated interest, shall be released to the depositor upon written request to, and then order of, the Securities Commissioner.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-408. Recordkeeping Requirements for Investment Advisers.**

A. Every investment adviser registered or required to be registered under the South Carolina Uniform Securities Act of 2005 shall make and keep true, accurate and current the following books, ledgers and records:

(1) A journal or journals, including cash receipts and disbursement records, and any other records of original entry forming the basis of entries in any ledger;

(2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts;

(3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser from a client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank or broker-dealer by or through who executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated;

(4) All check books, bank statements, canceled checks and cash reconciliations of the investment adviser;

(5) All bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business as an investment adviser;

(6) All trial balances, financial statements and internal audit working papers relating to the investment adviser's business as an investment adviser;

(7) Originals of all written communications received and copies of all written communications sent by the investment adviser relevant to (a) any recommendation made or proposed to be made and any advice given or proposed to be given, (b) any receipt, disbursement or delivery of funds or securities, or (c) the placing or execution of any order to purchase or sell any security, provided, however, (i) that the investment adviser shall not be required to keep any unsolicited market letters or other similar communications of general public distribution not prepared by or for the investment adviser, and (ii) that if the investment adviser sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than ten persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular or advertisement a memorandum describing the list and its source;

(8) A list or other record of all accounts which identifies the accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities or transactions of any client;

(9) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser;

(10) A copy in writing of each agreement entered into by the investment adviser with any client, and all other written agreements otherwise relating to the investment adviser's business as an investment adviser;

(11) A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication, including those by electronic media, that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser), and if the notice, circular, advertisement, newspaper, newspaper article, investment letter, bulletin, or other communication recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, a memorandum of the investment adviser indicating the reasons for the recommendation;

(12) Records of Beneficial ownership (investment adviser or investment adviser representative)

(a) A record of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except:

(i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and

(ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e. purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than ten (10) days after the end of the calendar quarter in which the transaction was effected.

(b) For purposes of Subsection A (12) above, the following definitions will apply:

(i) "advisory representative" shall mean any partner, officer or director of the investment adviser; any employee who participates or participated in any way in the determination of which recommendations shall or should be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations:

(A) any person in a control relationship to the investment adviser;

(B) any affiliated person of a controlling person; and

(C) any affiliated person of an affiliated person;

(ii) "control" shall mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty-five percent (25%) of the voting securities of a company shall be presumed to control such company.

(c) An investment adviser shall not be deemed to have violated the provisions of Subsection A (12) above because of the failure to record securities transactions of any advisory representative if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to promptly obtain reports of all transactions required to be recorded;

(13) Records of Beneficial ownership (other)

(a) Notwithstanding the provisions of Subsection A (12) above, where the investment adviser is primarily engaged in a business or businesses other than advising investment advisory clients, a record must be maintained of every transaction in a security in which the investment adviser or any advisory representative (as hereinafter defined) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except:

(i) transactions effected in any account over which neither the investment adviser nor any advisory representative of the investment adviser has any direct or indirect influence or control; and

(ii) transactions in securities which are direct obligations of the United States.

The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e. purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker-dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(b) An investment adviser is "primarily engaged in a business or businesses other than advising investment advisory clients" when, for each of its most recent three (3) fiscal years or for the period of time since organization, whichever is lesser, the investment adviser derived from such other business or businesses, on an unconsolidated basis, more than fifty percent (50%) of:

(i) its total sales and revenues; and

(ii) its income (or loss) before income taxes and extraordinary items.

(c) For purposes of Subsection A (13) above, the following definitions will apply:

(i) "advisory representative", when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, shall mean any partner, officer, director, or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons, who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of such recommendations or of the information concerning the recommendations:

(A) any person in a control relationship to the investment adviser;

(B) any affiliated person of a controlling person; and

(C) any affiliated person of an affiliated person;

(ii) "control" shall mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty five percent (25%) of the voting securities of a company shall be presumed to control such company.

(d) An investment adviser shall not be deemed to have violated the provisions of Subsection A (13) above because of the failure to record securities transactions of any advisory representative if the investment adviser establishes that it instituted adequate procedures and used reasonable due diligence to promptly obtain reports of all transactions required to be recorded;

(14) A copy of each written statement and each amendment or revision, given or sent, to any client or prospective client of the investment adviser, and a record of the dates that each written statement and each amendment or revision, was given, or offered to be given, to any client or prospective client who subsequently became a client;

(15) For each client that was obtained by the adviser by means of a solicitor to whom a cash fee was paid by the adviser:

(a) evidence of a written agreement to which the adviser is a party related to the payment of such fee;

(b) a signed and dated acknowledgment of receipt from the client evidencing the client's receipt of the investment adviser's disclosure statement and a written disclosure statement of the solicitor; and

(c) a copy of the solicitor's written disclosure statement. The written agreement, acknowledgment and solicitor disclosure statement will be considered to be in compliance if such documents are in compliance with Rule 275.206(4)-3 of the Investment Advisers Act of 1940.

For purposes of this Rule, the term "solicitor" shall mean any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients;

(16) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including but not limited to electronic media that the investment adviser circulates or distributes, directly, or indirectly, to two (2) or more persons (other than persons connected with the investment adviser); provided, however, that, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph;

(17) A file containing a copy of all written communications received or sent regarding any complaints or litigation involving the investment adviser or any investment adviser representative or other employee, and any current or former customer or client;

(18) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client;

(19) 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; and

(20) 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. The file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

(21) A copy, with original signatures of the investment adviser's appropriate signatory and the investment adviser representative, of each initial Form U-4 and each amendment to Disclosure Reporting Pages (DRPs Form U-4). Each copy must be retained by the investment adviser (filing on behalf of the investment adviser representative) and must be made available for inspection upon regulatory request.

(22) Where the investment adviser inadvertently held or obtained a client's securities or funds and returned them to the client within three business days, or has forwarded third-party checks within three business days, a ledger or other listing of all securities or funds held or obtained. Such ledger or other listing shall include the following information:

- (a) Issuer;
- (b) Type of Security and series;
- (c) Date of issue;
- (d) For debt instruments, the denomination, interest rate, and maturity date;
- (e) Certificate number, including any alphabetical or other prefix or suffix;
- (f) Name in which registered;
- (g) Date given to the adviser;
- (h) Date securities or funds were sent to client or sender, or date third-party checks were forwarded;

(i) Name and address to whom the securities or funds were sent, or third-party checks were forwarded;

(j) Form of delivery to client or sender, or copy of the form of delivery to client or sender; and

(k) Mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return.

(23) If an investment adviser obtains possession of securities that are acquired from the issuer in a transaction or chain of transactions not involving any public offering that comply with the exception from custody, the investment adviser shall keep and maintain the following records:

(a) A record showing the issuer's or current transfer agent's name, address, phone number, and other applicable contact information pertaining to the party responsible for recording client interests in the securities; and

(b) A copy of any legend, shareholder agreement, or other agreement, showing that those securities are transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

B. If an investment adviser subject to Section A of this Rule has custody or possession of securities or funds of any client, the records required to be made and kept under Section A above shall include:

(1) A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts;

(2) A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits;

(3) Copies of confirmations of all transactions effected by or for the account of any client; and

(4) A record for each security in which any client has a position, which record shall show the name of each client having an interest in the security, the amount or interest of each client, and the location of each security.

(5) A copy of any and all documents executed by the client (including a limited power of attorney) under which the investment adviser is authorized or permitted to withdraw a client's funds or securities maintained with a custodian upon the investment adviser's instruction to the custodian;

(6) A copy of each client's quarterly account statements, as generated and delivered by the qualified custodian. If the investment adviser also generates a statement that is delivered to the client, the adviser shall also maintain copies of such statements along with the date such statements were sent to the clients;

(7) If applicable to the adviser's situation, a copy of the special examination report verifying the completion of the examination by an independent certified public accountant and describing the nature and extent of the examination; and

(8) A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.

C. Every investment adviser subject to Subsection A of this Rule who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate and current:

(1) Records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase and sale; and

(2) For each security in which any client has a current position, information from which the investment adviser can promptly furnish the name of each client and the current amount or interest of the client.

D. Any books or records required by this Rule may be maintained by the investment adviser in such manner that the identity of any client to whom the investment adviser renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation.

E. Every investment adviser subject to Section A of this rule shall preserve the following records in the manner prescribed:

(1) All books and records required to be made under the provisions of Subsections A to C (1), inclusive, of this Rule (except for books and records required to be made under the provisions of Subsections A (11) and A (16) of this Rule), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on the record, the first two (2) years in the principal office of the investment adviser;

(2) 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 for at least three (3) years after termination of the enterprise;

(3) Books and records required to be made under the provisions of Subsections A (11) and A (16) of this Rule shall be maintained and preserved in an easily accessible place for a period of not less than five (5) years, the first two (2) 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 communications made by electronic media; and

(4) Notwithstanding other record preservation requirements of this Rule, 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: (a) records required to be preserved under Subsections A (3), A (7)-(10), A (14)-(15), A (17)-(19), B and C inclusive, of this Rule, and (b) the records or copies required under the provision of Subsections A (11) and A (16) of this Rule, 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 Subsection E (1) of this Rule.

F. An investment adviser subject to Section A of this Rule, before ceasing to conduct or discontinuing business as an investment adviser shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this Rule for the remainder of the period specified in this Rule, and shall notify the Securities Commissioner in writing of the exact address where the books and records will be maintained during the period.

#### G. Preservation and reproduction of records

(1) The records required to be maintained and preserved pursuant to Sections A through F above may be immediately produced or reproduced, and maintained and preserved for the required time by an investment adviser on:

- (a) Paper or hard copy form, as those records are kept in their original form;
- (b) Micrographic media, including microfilm, microfiche, or any similar medium; or
- (c) Electronic storage media, including any digital storage medium or system that meets the terms of this section.

(2) The investment adviser must:

(a) Arrange and index the records in a way that permits easy location, access, and retrieval of any particular record;

(b) Promptly provide any of the following that the Securities Commissioner, through one of its examiners or other representatives, may request:

(i) A legible, true, and complete copy of the record in the medium and format in which it is stored;

(ii) A legible, true, and complete printout of the record; and

(iii) Means to access, view, and print the records; and

(c) Store separately from the original record, for the time required for the original record, a duplicate copy of the record in any medium allowed by this section.

(3) With respect to records created or maintained on electronic storage media, the investment adviser must establish and maintain procedures:



(a) To maintain and preserve the records, so as to reasonably safeguard records from loss, alteration, or destruction;

(b) To limit access to the records to properly authorized personnel and the Securities Commissioner, including one or more of its examiners or other representatives; and

(c) To reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved.

H. For purposes of this Rule, “investment supervisory services” means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client; and “discretionary power” shall not include discretion as to the price at which or the time when a transaction is to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

I. Any book or other record made, kept, maintained and preserved in compliance with Rules 17a-3 [17 C.F.R. 240.17a-3] and 17a-4 [17 C.F.R. 240.17a-4] under the Securities Exchange Act of 1934, which is substantially the same as a book or other record required to be made, kept, maintained and preserved under this Rule, shall be deemed to be made, kept, maintained and preserved in compliance with this Rule.

J. Every investment adviser registered or required to be registered in this State that has its principal place of business in a state other than this State shall be exempt from the requirements of this Rule, provided the investment adviser is licensed in such state and is in compliance with such state’s recordkeeping requirements.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-409. Sole Proprietor Investment Advisers.**

An individual acting as a sole proprietor who meets the definitions of investment adviser in Section 35-1-102(15) of the Act, and investment adviser representative in Section 35-1-102(16) of the Act, must register in South Carolina as both an investment adviser and an investment adviser representative.

**HISTORY:** Added by State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-410. Investment Adviser Representatives Registered with Multiple Investment Advisers.**

A. An individual may apply to be registered as an investment adviser representative for more than one investment adviser or federal covered investment adviser by the filing of a separate Form U-4 application through the CRD by each investment adviser or federal covered investment adviser, and the payment of separate application fees as required through the CRD. By having multiple registration applications submitted on his or her behalf, the investment adviser representative affirmatively represents that he or she will make all disclosures to his or her clients and the affected investment adviser or federal covered investment adviser regarding potential conflicts of interests.

B. Each investment adviser or federal covered investment adviser that employs a multiple registered investment adviser representative shall comply with the requirements of the CRD and IARD regarding the multiple registrations of the investment adviser representative.

C. The Securities Commissioner may deny the multiple registration applications if he determines that it is not in the best interests of the public.

**HISTORY:** Added by State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-411. The Use of Senior-Specific Certifications and Professional Designations.**

A. The use of senior-specific certification or designation by any person in connection with the offer, sale, or purchase of securities, or the provision of advice as to the value 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 dishonest and unethical practice. The prohibited use of such certifications or professional designations includes, but is not limited to, 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 qualification obtained through education, training, or experience that the person using the certification or professional designation does not have; or

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

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

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

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

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

B. There is a rebuttable presumption that a designation or certifying organization is not disqualified solely for purposes of subsection A(4) above when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The National Commission for Certifying Agencies;

(3) an organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing; or

(4) any other nationally recognized accreditation organization designated by the Securities Commissioner by rule or order.

C. 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 senior citizens or retirees, 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.

D.(1) For purposes of this rule, 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 that job title:

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

(b) specifies an individual's area of specialization within the organization, unless the facts and circumstances associated with the provision or use of a job title indicate that it improperly suggests or implies certification or training beyond that which the titleholder possesses, or otherwise misleads investors.

(2) For purposes of this subsection, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

E. Nothing in this rule shall limit the Securities Commissioner's authority to enforce existing provisions of law.

**HISTORY: Added by State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.**

## **13-412. Fees.**

Every applicant applying for registration as an agent of the issuer shall pay the below specified, non-refundable fees:

A. Agent of the Issuer (initial filing fee): One hundred ten dollars;

B. Agent of the Issuer (renewal): One hundred ten dollars.

**HISTORY: Added by State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.**

**SUBARTICLE 5  
FRAUD AND LIABILITIES**

**13–501. Dishonest or Unethical Practices by Broker-Dealers and Agents.**

A. Broker-Dealers. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. Acts and practices, including but not limited to the following, are considered contrary to such standards and may constitute grounds for denial, suspension or revocation of registration, imposition of administrative fines, or such other action authorized by statute:

(1) Engaging in a pattern of unreasonable delays in the delivery of securities purchased by any of its customers and/or in the payment upon request of free credit balances reflecting completed transactions of its customers.

(2) Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.

(3) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

(4) Executing a transaction on behalf of a customer without authorization to do so.

(5) Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders.

(6) Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account.

(7) Failing to segregate customers' free securities or securities held in safekeeping.

(8) Hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by the United States Securities and Exchange Commission ("SEC") rule.

(9) Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

(10) Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus.

(11) Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business.

(12) Offering to buy from or sell to any person any security at a stated price unless such broker-dealer is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such to buy or sell.

(13) Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless such broker-dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created or controlled by such broker-dealer, or by any person for whom he is acting or with whom he is associated in such distribution, or any person controlled by, controlling or under common control with such broker-dealer.

(14) Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:

(a) Effecting any transaction in a security which involves no change in the beneficial ownership thereof;

(b) Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this Subsection shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers; or

(c) Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others;

(15) Guaranteeing a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer.

(16) Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such broker-dealer believes that such quotation represents a bona fide bid for, or offer of, such security;

(17) Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure.

(18) Failing to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, the existence of such control to such customer, and if such disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

(19) Failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group, or from a member participating in the distribution as an underwriter or selling group member.

(20) Failing or refusing to furnish a customer, upon reasonable request, information to which he is entitled, or to respond to a formal written request or complaint.

(21) Violating any rule of the Securities and Exchange Commission, or of a national securities exchange or national securities association or self regulatory association of which it is a member.

(22) Knowingly paying or splitting fees or commissions with unlicensed persons except as otherwise allowed by law.

(23) Failing to pay within thirty (30) days any fine, cost or assessment by the Securities Commissioner or any arbitration award which is not the subject of a motion to vacate or modify the award or when such a motion has been denied.

(24) Engaging in any dishonest or unethical sales practice while engaged in a telephone solicitation to include any of the following:

(a) Telephoning any person using threats, intimidation, or the use of profane or obscene language in connection with securities solicitations, recommendations, transactions or other brokerage account activity;

(b) Telephoning any person in this state after that individual has requested that they not be telephoned;

(c) Telephoning any person repeatedly in an annoying, abusive, or harassing manner, either individually or in concert with others;

(d) Telephoning any person in this state between the hours of 9:00 PM and 8:00 AM local time at the called person's location without that individual's prior consent; or

(e) Telephoning any person in this state without providing at the beginning of any telephone solicitation both the caller's identity and the identity of the broker-dealer or issuer. A telephone solicitation is defined as any telephone contact or electronic communication used to offer or sell securities, to gather information used in qualifying persons for the purpose of establishing a securities account or to make securities recommendations.

B. Agents. Each agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. Acts and practices, including but not limited to the following, are considered contrary to such standards and may constitute grounds for denial, suspension or revocation of registration, imposition of administrative fines, or such other action authorized by statute:

(1) Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer.

(2) Effecting securities transaction not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction.

(3) Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.

(4) Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents.

(5) Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control.

(6) Engaging in conduct specified in Subsection A (2), (3), (4), (5), (6), (9), (10), (14), (15), (16), (17), (20), (21), (22), (23) or (24).

C. Conduct Not Inclusive. The conduct set forth in Sections A and B above is not inclusive. Engaging in other conduct such as forgery, embezzlement, non-disclosure, incomplete disclosure or misstatement of material facts, or manipulative or deceptive practices shall also be grounds for denial, suspension or revocation of registration, imposition of administrative fines, or such other action authorized by statute.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-502. Dishonest or Unethical Practices by Investment Advisers, Investment Adviser Representatives and Federal Covered Advisers.**

A. Each investment adviser and investment adviser representative shall observe high standards of commercial honor and just and equitable principals of trade in the conduct of their business. Acts and practices, including but not limited to the following, are considered contrary to such standards and may constitute grounds for denial, suspension or revocation of registration, imposition of administrative fines, or such other action authorized by statute:

(1) Recommending to a client to whom investment supervisory, management or consulting 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 or acquired by the adviser after reasonable examination of the client's records as may be provided to the adviser.

(2) Placing an order to purchase or sell a security for the account of a client without authority to do so.

(3) 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.

(4) Exercising any discretionary power in placing an order for the purchase or sale of securities without first obtaining written discretionary authority unless the discretionary power relates solely to

the price at which, or the time when, an order involving a definite amount of specified securities shall be executed, or both.

(5) Inducing trading in a client's account that is excessive in size and frequency in view of the financial resources, investment objectives and character of the account.

(6) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the adviser, or a financial institution engaged in the business of loaning funds or securities.

(7) Loaning money to a client unless the adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the adviser.

(8) Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the adviser, its representatives or any employees or misrepresenting the nature of the advisory services being offered or fees to be charged for such services or omitting 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.

(9) Providing a report or recommendation to any adviser client prepared by someone other than the adviser, without disclosing that fact except that this prohibition does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service.

(10) Charging a client an advisory fee that is unreasonable.

(11) Failing to disclose to a client in writing before entering into or renewing an advisory agreement with that client any material conflict of interest relating to the adviser, its representatives or any of its employees, which could reasonably be expected to impair the rendering of unbiased and objective advice including:

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

(b) Charging a client an advisory fee for rendering advice without disclosing that a commission for executing securities transactions pursuant to such advice will be received by the adviser, its representatives or its employees or that such advisory fee is being reduced by the amount of the commission earned by the adviser, its representatives or employees for the sale of securities to the client.

(12) Guaranteeing a client that a specific result will be achieved (gain or no loss) as a result of the advice which will be rendered.

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

(14) Disclosing the identity, affairs, or investments of any client to any third party unless required by law to do so, or unless consented to by the client.

(15) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the adviser has custody or possession of such securities or funds when the adviser's action does not comply with the requirements of Rule 206(4)-2 under the Investment Advisers Act of 1940.

(16) Entering into, extending or renewing any investment advisory contract unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee or the formula for computing the fee, the amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser or its representatives and that no assignment of such contract shall be made by the adviser without the consent of the other party to the contract.

(17) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information in violation of Section 204A of the Investment Advisers Act of 1940.

(18) Entering into, extending, or renewing any advisory contract which would violate section 205 of the Investment Advisers Act of 1940. This provision shall apply to all investment advisers registered or required to be registered under the South Carolina Uniform Securities Act of 2005,

notwithstanding whether such investment adviser would be exempt from federal registration pursuant to section 203(b) of the Investment Advisers Act of 1940.

(19) Indicating, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of the South Carolina Uniform Securities Act of 2005 or of the Investment Advisers Act of 1940, or any other practice that would violate section 215 of the Investment Advisers Act of 1940.

(20) Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contravention of section 206(4) of the Investment Advisers Act of 1940, notwithstanding the fact that such investment adviser is not registered or required to be registered under section 203 of the Investment Advisers Act of 1940.

(21) Employing any device, scheme, or artifice to defraud or engaging in any act, practice or course of business which operates or would operate as a fraud or deceit.

(22) 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 this act or any rule or order thereunder.

B. The conduct set forth above is not inclusive. Engaging in other conduct such as non-disclosure, incomplete disclosure, or deceptive practices shall also be grounds for denial, suspension or revocation of registration, imposition of administrative fines, or such other action authorized by statute.

C. The provisions of this rule apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or other conduct not excluded from regulation pursuant to the National Securities Markets Improvement Act of 1996 (Pub. L. 104-290). The federal statutory and regulatory provisions referenced in this Rule shall apply to investment advisers, investment adviser representatives and federal covered advisers, regardless of whether the federal provision limits its application to advisers subject to federal registration.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

### **13-503. Advertising Filing Requirement.**

Any prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising relating to a security, addressed or intended for distribution to prospective investors under the South Carolina Uniform Securities Act of 2005, must be filed with the Securities Commissioner at least ten (10) business days prior to use in this State. The filing of an advertisement (or receipt thereof) does not constitute approval or a finding by the Securities Commissioner that the document is true, complete, or not misleading.

**HISTORY:** Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.

## **SUBARTICLE 6 ADMINISTRATION AND JUDICIAL REVIEW**

### **13-601. Financial Statements Submitted with an Application to Register Securities or used in a Prospectus.**

A. All financial statements submitted with an application to register securities or for inclusion in a Prospectus used in this State, except a Prospectus relating to a federal covered security, shall be audited by an Independent Certified Public Accountant regularly engaged in business as such; provided, however (1) that interim statements prepared since the close of the last fiscal year shall not be required to be audited if prepared on a basis comparable to those audited, and (2) that financial statements approved by the South Carolina Department of Insurance or the United States Securities and Exchange Commission ("SEC") may be accepted by the Securities Commissioner in his discretion.

B. Where a company has been in business for less than one (1) year and submits one statement only which covers a period of less than one (1) year, such statement shall be audited.

C. A report signed by the Independent Certified Public Accountant should accompany the statements.

D. Financial statements filed with an application for registration of securities shall be updated when necessary so that the Prospectus as finally approved and in definitive form shall contain statements as of a date not more than six (6) months prior to the date of the Prospectus.

E. A Prospectus relating to securities in registration should be amended or supplemented whenever necessary to reflect any material changes, but in any event at least once in any period of twelve (12) consecutive months, in order to bring financial data up to date. Failure of the registrant to do so shall be considered cause for suspension of registration. The Securities Commissioner shall have discretion to determine whether to require the reprinting of the entire Prospectus.

F. The Securities Commissioner by rule or order, may waive any or all of the provisions of this Order.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.**

### **13-602. Prospectus, Offering Circular, Exemption and Exception Filing Fees.**

A. Filing fees to accompany prospectus or offering circular.

(1) A filing fee of fifty (\$50.00) dollars shall accompany any Prospectus or Offering Circular amended subsequent to effectiveness of registration or filed for the purpose of maintaining registration or notice filing of the securities.

(2) A fee of one hundred (\$100.00) dollars shall accompany a request for a review by the Securities Commissioner of any preliminary or definitive Prospectus or Offering Circular for the purpose of obtaining an opinion on the eligibility of the securities for registration.

B. Fees to accompany a request for confirmation of the availability of an exemption or exception.

(1) A fee of one hundred fifty (\$150.00) dollars shall accompany the filing of a request for confirmation of the availability of an exemption under Section 35-1-201(7) of the South Carolina Uniform Securities Act of 2005, as amended.

(2) A fee of one hundred fifty (\$150.00) dollars shall accompany the filing of a request for confirmation of the availability of an exemption under Section 35-1-201 or 35-1-202 (other than Section 35-1-201(7)) or an exception under Section 35-1-102 of the South Carolina Uniform Securities Act of 2005, as amended.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006.**

### **13-603. Consents to Service of Process**

The following forms constitute compliance with Section 35-1-611(a) of the South Carolina Uniform Securities Act of 2005:

A. For broker-dealers, a fully executed Execution Page of the Form BD, Uniform Application for Broker-Dealer Registration;

B. For investment advisers, a fully executed Execution Page of the Form ADV, Uniform Application for Investment Adviser Registration;

C. For agents and investment adviser representatives, a fully executed Form U-4, Uniform Application for Securities Industry Registration or Transfer;

D. For any offer or sale of securities made in compliance with Rules 501 through 508 of SEC Regulation D under the Securities Act of 1933, a fully executed Form D, Notice of Exempt Offering of Securities; and

E. For other filings, a fully executed Form U-2, Uniform Consent to Service of Process or such other form acceptable to the Securities Commissioner.

**HISTORY: Added by State Register Volume 30, Issue No. 6, eff June 23, 2006; State Register Volume 39, Issue No. 6, Doc. No. 4525, eff June 26, 2015.**

## **ARTICLE 3 TOBACCO ENFORCEMENT**



### **13–1101. Definitions.**

A. The following definitions shall apply to all rules promulgated and contained in Article 3:

1. “Brand Family” has the same meaning as in South Carolina Code Section 11–48–20(1).
2. “Cigarette distributor” has the same meaning as in South Carolina Code Section 11–48–20(6).
3. “Cigarette” has the same meaning as in South Carolina Code Section 11–48–20(2).
4. “Directory” means the listing of tobacco product manufacturers and brands maintained by the Attorney General pursuant to South Carolina Code Section 11–48–30.
5. “Escrow deposit” means deposits required to be made into a qualified escrow fund pursuant to South Carolina Code Section 11–47–30.
6. “Falsification” means no person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when the statement is made with purpose to secure the issuance by a governmental agency of a license, permit, authorization, certificate, registration, release, or provider agreement.
7. “Master Settlement Agreement” has the same meaning as in South Carolina Code Section 11–47–20(e).
8. “Nonparticipating manufacturer” has the same meaning as in South Carolina Code Section 11–48–20(3).
9. “Participating manufacturer” has the same meaning as in South Carolina Code Section 11–48–20(4).
10. “Qualified escrow fund” has the same meaning as in South Carolina Code Section 11–48–20(5).”
11. “Tobacco product manufacturer” has the same meaning as in South Carolina Code Section 11–48–20(7).
12. “Tobacco Product Manufacturer Certificate of Compliance” or “Certificate of Compliance” or “Certification” or “Certification application” or “application” means the application required to be completed and executed by all tobacco product manufacturers pursuant to South Carolina Code Section 11–48–30.
13. “Units sold” has the same meaning as in South Carolina Code Section 11–48–20(8).

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13–1102. Quarterly Certifications and Escrow Deposits.**

- A. As authorized by South Carolina Code Section 11–48–50 and in order to promote compliance with South Carolina Code Section 11–47–10, et seq., all escrow deposits shall be made on a quarterly basis.
- B. Quarterly escrow deposits shall be made no later than 30 days after the end of each calendar quarter in which sales are made.
- C. Each failure to make a full, timely quarterly deposit shall constitute a separate violation of the South Carolina Code Sections 11–47–10, et seq. and 11–48–10, et seq.
- D. The Attorney General’s Office shall review the amount deposited by each nonparticipating manufacturer for each calendar quarter, and shall invoice each nonparticipating manufacturer for which it concludes that an additional deposit was owed.
- E. An importer shall be jointly and severally liable for all escrow deposits due from a nonparticipating manufacturer with respect to nonparticipating manufacturer cigarettes that it imports.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13–1103. Notification of Compliance.**

- A. Nonparticipating manufacturers shall provide the Attorney General with official notification of the quarterly escrow deposit no later than midnight of the day upon which an escrow deposit is required. Nonparticipating manufacturers shall also provide their quarterly reports within the same deadline.

Nothing in this rule eliminates the requirement under South Carolina Code Section 11–48–30 for a nonparticipating manufacturer to file its annual certification due on April thirtieth of each year.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13–1104. Quarterly Periods Defined.**

A. For purposes of this Article, the calendar year shall be divided into the following quarters: January first through March thirty-first; April first through June thirtieth; July first through September thirtieth; and October first through December thirty-first.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13–1105. Untimely or Incomplete Quarterly Reports or Escrow Deposits.**

A. If the required quarterly escrow deposit is not timely made in full, or the required quarterly report is not provided to the Attorney General, or the Attorney General does not receive timely official notice of the quarterly escrow deposit, the delinquent nonparticipating manufacturer and its brand families shall be removed from the directory in accordance with South Carolina Code Section 11–48–30. Any such nonparticipating manufacturer that fails in any quarter to place into escrow the funds required herein shall be subject to the penalty provisions of Section 11–47–30; shall be deemed to have failed to comply with Section 11–48–30; and shall be subject to all enforcement actions available for a violation of Section 11–48–30.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13–1106. Certification of Tobacco Product Manufacturers for Tobacco Directory.**

A. Pursuant to South Carolina Code Section 11–48–30, tobacco product manufacturers who seek to certify their cigarette brands for sale in South Carolina must complete and submit no later than the thirtieth day of April each year the “Tobacco Product Manufacturer Certificate of Compliance” made available on the South Carolina Office of the Attorney General website.

B. In exercising the discretion granted by Section 11–48–30 when considering an application submitted for certification, the Attorney General may consider the following:

1. Whether the entity tendering a certification request is a tobacco product manufacturer;
2. Whether the tobacco product manufacturer is the tobacco product manufacturer, as defined by Section 11–47–20(i), of the cigarette brand listed on the certification application;
3. Whether the brand family sought to be certified by the tobacco product manufacturer is also manufactured by another entity; and whether the tobacco product manufacturer has exclusive rights to the trademark for the brand family. Whether any other tobacco product manufacturer also manufactures cigarettes within the same brand family
4. Completeness, or lack thereof, of the certification request made by the tobacco product manufacturer;
5. Whether the tobacco product manufacturer has provided all requested documents supporting its certification request;
6. Whether the certification request is based on misrepresentation, falsification of facts, false information, nondisclosure, or concealment of facts;
7. Whether the tobacco product manufacturer is in full compliance with all provisions of local, state and federal law;
8. Whether the tobacco product manufacturer, predecessor of the tobacco product manufacturer, or previous manufacturer of the brand is the subject of litigation, including but not limited to violations of any South Carolina statute, regulation, or other law, including, but not limited to, violations of Sections 11–47–10, et seq., through 11–48–10, et seq.;
9. Whether the tobacco product manufacturer has failed to fully fund a qualified escrow fund approved by the Attorney General in a timely and thorough manner;
10. Whether all final judgments and penalties, including interest, costs and attorney fees thereon, in favor of the State of South Carolina, for violation of any South Carolina statute, regulation or other law, including but not limited to violations of Sections 11–47–10, et seq., through 11–48–10, et seq., have been fully satisfied for the brand family, or tobacco product manufacturer;

11. Whether the tobacco product manufacturer has failed to pay any judgment obtained in any jurisdiction, including any civil penalty stemming from any jurisdiction's escrow deposit laws, or whether the tobacco product manufacturer is a defendant in a pending lawsuit brought by another state for failing to sufficiently fund an escrow account pursuant to that state's escrow laws; or whether the tobacco product manufacturer has been removed from another state's tobacco directory;

12. Whether the tobacco product manufacturer has corrected deficiencies in its certification request or criteria set forth herein in a timely and thorough manner;

13. Whether the tobacco product manufacturer has complied in a timely and thorough manner with any request by the Attorney General for additional information or documentation supporting its certification request or the criteria set forth herein;

14. Whether the tobacco product manufacturer is owned, either all or in part, by a person or entity with a current or prior interest in any other tobacco product manufacturer that is, or has been, not in compliance with any South Carolina statute, regulation, or other law, including but not limited to Sections 11-47-10, et seq., through 11-48-10, et seq., or is the subject of litigation for the same;

15. Whether the tobacco product manufacturer is managed or operated by a person with a current or prior interest in any other tobacco product manufacturer that is, or has been, not in compliance with any South Carolina statute, regulation, or other law, including but not limited to Sections 11-47-10, et seq., to 11-48-10, et seq., or is the subject of litigation for the same;

16. Whether the tobacco product manufacturer is owned, either all or in part, by a person or entity, that has failed to pay any judgment obtained in any jurisdiction, including any civil penalty stemming from any jurisdiction's escrow deposit laws; and

17. Any other facts or circumstances the Attorney General determines are relevant.

C. Each Tobacco Product Manufacturer certified on the directory will be required to report its sales of cigarettes into South Carolina for each quarter, utilizing the form provided by the Attorney General on the Attorney General website.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13-1107. Removal of Tobacco Product Manufacturer from Tobacco Directory.**

A. In a manner provided in Section 11-48-30, the Attorney General shall remove a tobacco product manufacturer or brand family from the directory if the Attorney General determines that the tobacco product manufacturer or the brand family no longer meets the requirements of Sections 11-47-10, et seq., through 11-48-10, et seq., and regulations promulgated thereto.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13-1108. Rejection of Certification Application of Tobacco Product Manufacturers.**

A. In a manner provided in Section 11-48-30, the Attorney General shall reject the certification application of a tobacco product manufacturer or brand family to be listed in the directory if the Attorney General determines that the tobacco product manufacturer or the brand family does not meet the requirements of Sections 11-47-10, et seq., to 11-48-10, et seq., and regulations promulgated thereto.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13-1109. Notice of Approved Certification, Denial of Certification, and Removal from Tobacco Directory.**

A. The Attorney General shall promptly notify a tobacco product manufacturer in writing at the address supplied in the certification form by facsimile, electronic mail, or regular mail if the manufacturer has met the requirements of Section 11-48-30 and will be included in the directory. The notice shall include each brand family that the Attorney General determines will be included in the directory.

B. If the Attorney General intends to deny a tobacco product manufacturer or brand family a place in the directory, to remove a manufacturer or brand family from the directory, or to exclude an entity because the entity is not a tobacco product manufacturer, the Attorney General shall mail a written "Notice of Removal" to the manufacturer or entity. The "Notice of Removal" shall specify:

1. The factual and legal basis upon which the Attorney General's intended action rests;
  2. The actions that the tobacco product manufacturer or entity must undertake to cure the factual or legal deficiencies upon which the intended action is based, if any; and,
  3. The date upon which attempts to cure the deficiencies, if any, must be completed and documentation of completion must be submitted to the Attorney General. In no event shall the Attorney General allow the tobacco product manufacturer or entity less than seven days within which to cure the deficiencies, if any, upon which the Attorney General's intended action is based.
- C. If the deficiencies have been cured to the satisfaction of the Attorney General, the Attorney General shall notify a tobacco product manufacturer in writing by facsimile, electronic mail, or regular mail that the manufacturer or brand name family will be included in the directory in accordance with Section 11-48-30.
- D. If any of the deficiencies have not been cured to the satisfaction of the Attorney General, the Attorney General shall take action in accordance with Section 11-48-30 denying or removing a manufacturer, brand family, or entity a place in the directory.
- E. The Attorney General may, for any reason and at the Attorney General's discretion, extend any time period allowed by this article.

**HISTORY: Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.**

### **13-1110. Bond Requirement for Nonparticipating Manufacturer.**

- A. In order to promote compliance with the South Carolina Tobacco Escrow Fund Act, if a newly qualified nonparticipating manufacturer is to be listed on the South Carolina Tobacco Directory, or if the Attorney General reasonably determines that any nonparticipating manufacturer who has filed a certification pursuant to Section 11-47-30 poses an elevated risk for noncompliance with the Tobacco Escrow Fund Act, neither such nonparticipating manufacturer nor any of its brand families shall be included in the Directory unless and until such nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's compliance, has posted a bond.
- B. A nonparticipating manufacturer may be deemed to pose an elevated risk for noncompliance if:
1. The nonparticipating manufacturer has not previously established and funded a qualified escrow fund in South Carolina;
  2. The nonparticipating manufacturer has been on the tobacco directory for less than one year;
  3. The nonparticipating manufacturer has failed to make a timely and/or complete escrow deposit unless (i) the manufacturer did not make underpayment knowingly or recklessly and the manufacturer promptly cured the underpayment within 30 days of notice of it, or (ii) the underpayment or lack of payment is subject to a good faith dispute as documented to the satisfaction of the Attorney General and the underpayment is cured within 30 days;
  4. The nonparticipating manufacturer has failed to pay any judgment, regardless of the status of the judgment under applicable statutes of limitations, obtained in any jurisdiction, including any civil penalties and other monetary amounts awarded stemming from any jurisdiction's escrow deposit laws;
  5. The nonparticipating manufacturer or its brands or brand families or an affiliate or any of the affiliate's brands or brand families have been removed from the state's tobacco directory for noncompliance with the state law at any time during the calendar year or within the past three calendar years; or
  6. In addition to the reasons specified above, the Attorney General may require a bond from a nonparticipating manufacturer if the Attorney General has reasonable grounds to believe the nonparticipating manufacturer may default on its obligations under the Tobacco Escrow Fund Act.
- C. The bond shall be posted by corporate surety located within the United States in an amount equal to the greater of one hundred thousand (\$100,000) dollars or the amount of escrow the manufacturer in either its current or predecessor form was required to deposit as a result of its previous calendar year's sales in South Carolina. The bond shall be written in favor of the State of South Carolina and shall be conditioned on the performance by the nonparticipating manufacturer, or its United States importer that undertakes joint and several liability for the manufacturer's performance in accordance with the Tobacco Escrow Fund Act.

D. A newly qualified nonparticipating manufacturer may be required to post a bond under this section for the first three (3) years of the newly qualified nonparticipating manufacturer's listing or longer if the newly qualified nonparticipating manufacturer has been deemed to pose an elevated risk for noncompliance

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.

### **13-1111. Manufacturer and Importer Reports.**

A. Each manufacturer and importer that sells cigarettes in or into the State shall, within 15 days following the end of each month, file a report on a form to be prescribed by the Attorney General and certify to the State that the report is complete and accurate.

B. The report shall contain the following information: the total number of cigarettes sold by that manufacturer or importer in or into the State during that month, and identifying by name and number of cigarettes (i) the manufacturers of those cigarettes, (ii) the brand families of those cigarettes and (iii) the purchasers of those cigarettes. A manufacturer's or importer's report shall include cigarettes sold in or into the State through its sales entity affiliate.

C. The requirements of subsection (a) shall be satisfied and no further report shall be required under this Section with respect to cigarettes if the manufacturer or importer timely submits to the Department of Revenue and the Attorney General the report or reports required to be submitted by it with respect to those cigarettes under 15 U.S.C. § 376 and certifies to the State that the reports are complete and accurate.

D. Upon request by the Attorney General, a manufacturer or importer subject to this Section will provide copies of similar reports that it filed in other States.

E. Each manufacturer and importer that sells cigarettes in or into the State shall either: (i) submit its federal returns, as defined below, to the Attorney General by 60 days after the close of the quarter in which the returns were filed or (ii) submit to the United States Treasury a request or consent under Internal Revenue Code Section 6103(c) authorizing the Alcohol and Tobacco Tax and Trade Bureau and, in the case of a foreign manufacturer or importer, the U.S. Customs Service to disclose the manufacturer's or importer's federal returns, as defined below, to the Attorney General as of 60 days after the close of the quarter in which the returns were filed.

F. A manufacturer that fails to file a complete and accurate report required herein may be removed from the Tobacco Directory.

**HISTORY:** Added by State Register Volume 38, Issue No. 6, Doc. No. 4427, eff June 27, 2014.