

or the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], or the rules or regulations thereunder, of material, nonpublic information by such investment adviser or any person associated with such investment adviser. The Commission, as it deems necessary or appropriate in the public interest or for the protection of investors, shall adopt rules or regulations to require specific policies or procedures reasonably designed to prevent misuse in violation of this chapter or the Securities Exchange Act of 1934 (or the rules or regulations thereunder) of material, nonpublic information.

(Aug. 22, 1940, ch. 686, title II, § 204A, as added Pub. L. 100-704, § 3(b)(2), Nov. 19, 1988, 102 Stat. 4680.)

#### Editorial Notes

##### REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in text, is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§ 78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE

Section not applicable to actions occurring before Nov. 19, 1988, see section 9 of Pub. L. 100-704 set out as an Effective Date of 1988 Amendment note under section 78o of this title.

#### § 80b-5. Investment advisory contracts

##### (a) Compensation, assignment, and partnership-membership provisions

No investment adviser registered or required to be registered with the Commission shall enter into, extend, or renew any investment advisory contract, or in any way perform any investment advisory contract entered into, extended, or renewed on or after November 1, 1940, if such contract—

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

##### (b) Compensation prohibition inapplicable to certain compensation computations

Paragraph (1) of subsection (a) shall not—

(1) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date;

(2) apply to an investment advisory contract with—

(A) an investment company registered under subchapter I of this chapter, or

(B) any other person (except a trust, governmental plan, collective trust fund, or sep-

arate account referred to in section 80a-3(c)(11) of this title), provided that the contract relates to the investment of assets in excess of \$1 million,

if the contract provides for compensation based on the asset value of the company or fund under management averaged over a specified period and increasing and decreasing proportionately with the investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify;

(3) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this subchapter, if (A) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 80a-60(a)(4)(B)(iii) of this title is satisfied, and (B) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 80a-60(a)(4)(B) of this title and does not have a profit-sharing plan described in section 80a-56(n) of this title;

(4) apply to an investment advisory contract with a company excepted from the definition of an investment company under section 80a-3(c)(7) of this title; or

(5) apply to an investment advisory contract with a person who is not a resident of the United States.

##### (c) Measurement of changes in compensation

For purposes of paragraph (2) of subsection (b), the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise.

##### (d) "Investment advisory contract" defined

As used in paragraphs (2) and (3) of subsection (a), "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person other than an investment company registered under subchapter I of this chapter.

##### (e) Exempt persons and transactions

The Commission, by rule or regulation, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from subsection (a)(1), if and to the extent that the exemption relates to an investment advisory contract with any person that the Commission determines does not need the protections of subsection (a)(1), on the basis of such factors as financial sophistication, net worth, knowledge of and ex-

perience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with this section. With respect to any factor used in any rule or regulation by the Commission in making a determination under this subsection, if the Commission uses a dollar amount test in connection with such factor, such as a net asset threshold, the Commission shall, by order, not later than 1 year after July 21, 2010, and every 5 years thereafter, adjust for the effects of inflation on such test. Any such adjustment that is not a multiple of \$100,000 shall be rounded to the nearest multiple of \$100,000.

**(f) Authority to restrict mandatory pre-dispute arbitration**

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

(Aug. 22, 1940, ch. 686, title II, §205, 54 Stat. 852; Pub. L. 86-750, §7, Sept. 13, 1960, 74 Stat. 887; Pub. L. 91-547, §25, Dec. 14, 1970, 84 Stat. 1432; Pub. L. 96-477, title II, §203, Oct. 21, 1980, 94 Stat. 2290; Pub. L. 100-181, title VII, §703, Dec. 4, 1987, 101 Stat. 1263; Pub. L. 104-290, title II, §210, Oct. 11, 1996, 110 Stat. 3436; Pub. L. 111-203, title IV, §418, title IX, §§921(b), 928, July 21, 2010, 124 Stat. 1579, 1841, 1852; Pub. L. 115-141, div. S, title VIII, §802(b)(1), Mar. 23, 2018, 132 Stat. 1140.)

**Editorial Notes**

**AMENDMENTS**

2018—Subsec. (b)(3). Pub. L. 115-141 substituted “section 80a-60(a)(4)(B)(iii) of this title” for “section 80a-60(a)(3)(B)(iii) of this title” and “section 80a-60(a)(4)(B) of this title” for “section 80a-60(a)(3)(B) of this title”.

2010—Subsec. (a). Pub. L. 111-203, §928, in introductory provisions, substituted “registered or required to be registered with the Commission” for “, unless exempt from registration pursuant to section 80b-3(b) of this title,” and struck out “make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to” after “shall” and “to” after “in any way”.

Subsec. (e). Pub. L. 111-203, §418, inserted at end “With respect to any factor used in any rule or regulation by the Commission in making a determination under this subsection, if the Commission uses a dollar amount test in connection with such factor, such as a net asset threshold, the Commission shall, by order, not later than 1 year after July 21, 2010, and every 5 years thereafter, adjust for the effects of inflation on such test. Any such adjustment that is not a multiple of \$100,000 shall be rounded to the nearest multiple of \$100,000.”

Subsec. (f). Pub. L. 111-203, §921(b), added subsec. (f). 1996—Subsec. (b)(4), (5). Pub. L. 104-290, §210(1), added pars. (4) and (5).

Subsec. (e). Pub. L. 104-290, §210(2), added subsec. (e). 1987—Pub. L. 100-181 completely revised and expanded provisions on investment advisory contracts, changing structure of section from a single unlettered paragraph to one consisting of four subsections lettered (a) to (d).

1980—Pub. L. 96-477 provided that par. (1) of this section was not to apply with respect to any investment advisory contract between an investment adviser and a business development company so long as the compensation provided for in such contract did not exceed 20 per cent of the realized capital gains upon the funds of the business development company and such business development company did not have outstanding any option, warrant, or right issued pursuant to section 80a-60(a)(3)(B) of this title and did not have a profit-sharing plan.

1970—Pub. L. 91-547 substituted reference to section “80b-3(b)” for “80b-3” of this title in first sentence, redesignated as second sentence former third sentence, designating existing provisions as cl. (A) and adding cl. (B) and items (i) and (ii) and provision respecting compensation based on asset value of company or fund under management averaged over a specified period in relation to investment record of an index of securities or such other measure of investment performance specified by Commission rules, regulations, or orders, inserted third sentence provision respecting point from which compensation is to be measured, substituted in fourth, formerly third, sentence “paragraphs (2) and (3) of this section” for “this section” and in definition of “investment advisory contract” the words “account of another person other than an investment company registered under subchapter I of this chapter” for “account for a person other than an investment company”.

1960—Pub. L. 86-750 substituted “unless exempt from registration pursuant to” for “registered under”.

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF 2010 AMENDMENT**

Amendment by sections 921(b) and 928 of Pub. L. 111-203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 418 of Pub. L. 111-203 effective 1 year after July 21, 2010, except that any investment adviser may, at the discretion of the investment adviser, register with the Commission under the Investment Advisers Act of 1940 during that 1-year period, subject to the rules of the Commission, and except as otherwise provided, see section 419 of Pub. L. 111-203, set out as a note under section 80b-2 of this title.

**EFFECTIVE DATE OF 1970 AMENDMENT**

Amendment by Pub. L. 91-547 effective on expiration of one year after Dec. 14, 1970, see section 30(1) of Pub. L. 91-547, set out as a note under section 80a-52 of this title.

**Executive Documents**

**TRANSFER OF FUNCTIONS**

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

**§ 80b-6. Prohibited transactions by investment advisers**

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
- (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
- (3) acting as principal for his own account, knowingly to sell any security to or purchase