

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 6 INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES
RECORDS

12.11.6.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.6.1 NMAC - N, 1-1-2010]

12.11.6.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives.
[12.11.6.2 NMAC - N, 1-1-2010]

12.11.6.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701, hereinafter referred to in this Chapter 11 as the “New Mexico Uniform Securities Act”.
[12.11.6.3 NMAC - N, 1-1-2010]

12.11.6.4 DURATION: Permanent.
[12.11.6.4 NMAC - N, 1-1-2010]

12.11.6.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.6.5 NMAC - N, 1-1-2010]

12.11.6.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.6.6 NMAC - N, 1-1-2010]

12.11.6.7 DEFINITIONS: For purposes of 12.11.6 NMAC:

A. “discretionary power” shall not include discretion as to the price at which or the time when a transaction is or 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; and

B. “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.

[12.11.6.7 NMAC - N, 1-1-2010]

12.11.6.8 RECORDKEEPING REQUIREMENTS FOR INVESTMENT ADVISERS:

A. Recordkeeping requirements for all investment advisers. Every investment adviser registered or required to be registered under the New Mexico Uniform Securities Act shall make and keep true, accurate and current the following books, ledgers and records:

(1) a journal or journals, including cash receipts and disbursements 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 record of the investment adviser’s securities transactions in accordance with the requirements of Subsection A of 12.11.6.9 NMAC;

(4) all checkbooks, bank statements, canceled checks and cash reconciliations of the investment adviser;

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

(6) all trial balances, financial statements prepared in accordance with generally accepted accounting principles and internal audit working papers relating to the investment adviser’s business as an investment adviser; for purposes of this paragraph, “financial statements” shall mean a balance sheet prepared in accordance with generally accepted accounting principles, an income statement, a cash flow statement and a net worth computation, if applicable, as required by 12.11.5.23 NMAC;

(7) records of the investment adviser's written communications in accordance with the requirements of Subsection B of 12.11.6.9 NMAC;

(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 evidence 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 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; if the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by electronic media recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, the investment adviser shall retain a memorandum documenting its reasons for the recommendation;

(12) records of transactions in securities in which the investment adviser or an affiliated person has a beneficial ownership interest in accordance with the requirements of Subsection C of 12.11.6.9 NMAC;

(13) a copy of each written statement and each amendment or revision, given or sent to any client or prospective client of the investment adviser in accordance with the provisions of 12.11.5.12 NMAC, 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 becomes a client;

(14) 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 distribution by print and electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons, other than persons employed by or contracted with the investment adviser; however, 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;

(15) a file containing a copy of all written communications received or sent regarding any litigation involving the investment adviser or any investment adviser representative or employee and regarding any written customer or client complaint;

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

(17) 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;

(18) 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 shall at a minimum contain applications, amendments, renewal filings, correspondence and any other applicable state, federal agency or self-regulatory organization documents issued or received by the registrant or its investment adviser representatives; and

(19) a record of the investment adviser's privacy policies, all privacy notices sent to consumers or customers and the date such notices were sent.

B. Additional recordkeeping requirements for investment advisers that have custody of client securities or funds. If an investment adviser subject to Subsection A of 12.11.6.8 NMAC has custody or possession of securities or funds of any client, the records required to be made and retained pursuant to Subsection A of this section 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 any interest in each security, the amount or interest of each client and the location of each security.

C. Additional recordkeeping requirements for investment advisers that render investment management services. Every investment adviser subject to Subsection A of this section that 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) information from which the investment adviser can promptly furnish the name of each client and the current amount or interest of the client for each security in which any client has a current position.

D. Client codes or designations. Any books or records required by this section 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. Manner of record preservation. Every investment adviser subject to Subsection A of this section shall preserve the following records in the manner prescribed:

(1) all books and records required to be made under the provisions of Subsections A and B and Paragraph (1) of Subsection C of this section, except for books and records required to be made under the provisions of Paragraphs (11) and (14) of Subsection A of this section, shall be maintained and preserved in an easily accessible place for a period of not less than six years from the end of the fiscal year during which the last entry was made on record, the first two years of which shall be 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 until at least six years after termination of the enterprise;

(3) books and records required to be made under the provisions of Paragraphs (11) and (14) of Subsection A of this section shall be maintained and preserved in an easily accessible place for a period of not less than six years, the first two years of which shall be in the principal office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin or other communication including by print and electronic media;

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

(1) records required to be preserved under Paragraphs (3), (7) through (10), (13), and (15) through (17) of Subsection A and Subsections B and C of this section inclusive; and

(2) records or copies required under the provision of Paragraphs (11) and (14) of Subsection A of this section which records or related records identify the name of the investment adviser representative providing investment advice from that business location, its business locations' physical address, mailing address, electronic mailing address and telephone number.

G. The records shall be maintained for the period described in Paragraphs (1), (2) and (3) of Subsection E of this section.

H. Preservation of records upon cessation. An investment adviser subject to Subsection A of this section, 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 section for the remainder of the period specified in this section and shall notify the administrator in writing of the exact address where the books and records will be maintained during the period.

I. Preservation of records by alternative media.

(1) The records required to be maintained and preserved pursuant to this subsection may be immediately produced by any form of data storage, as provided below, and maintained and preserved for the required time by an investment adviser on:

(a) micrographic media, including microfilm, microfiche or any similar medium; or

(b) electronic storage media, including any digital storage medium or system that meets the terms of this subsection.

(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) provide promptly any of the following that the administrator 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.

(c) store separately, for the time required for preservation of the original record, a duplicate copy of the record on any medium allowed by this subsection.

(3) In the case of records on electronic storage media, the investment adviser may maintain and preserve records which, in the ordinary course of the investment adviser's business, are created by the investment adviser on electronic media or are received by the investment adviser solely on electronic media or by electronic data transmission. The investment adviser must establish and maintain procedures to:

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

(b) limit access to the records to properly authorized personnel and the administrator, including examiners and other representatives; and

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

[12.11.6.8 NMAC - Rp, 12 NMAC 11.3.6.1-10, 1-1-2010]

12.11.6.9 RECORDKEEPING REQUIREMENTS CONTINUED:

A. Record of the investment adviser's securities transactions required pursuant to Paragraph (3) of Subsection A of 12.11.6.8 NMAC.

(1) The investment adviser shall prepare a memorandum setting forth:

(a) each order given by the investment adviser for the purchase or sale of any security;

(b) any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security; and

(c) any modification or cancellation of any such order or instruction.

(2) The memorandum shall:

(a) show the terms and conditions of the order, instruction, modification or cancellation;

(b) identify the person connected with the investment adviser who recommended the transaction to the client and who placed the order;

(c) show the account for which entered, the date of entry and the bank or broker-dealer by or through which executed where appropriate; and

(d) identify orders entered pursuant to the exercise of discretionary power.

B. Records of the investment adviser's written communications required pursuant to Paragraph (7) of Subsection A of 12.11.6.8 NMAC.

(1) The investment adviser shall keep originals of all written communications received and copies of all written communications sent by the investment adviser relating 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; and

(c) the placing or execution of any order to purchase or sell any security.

(2) The investment adviser shall not be required to keep any unsolicited market letters and other similar communications or general public distribution not prepared by or for the investment adviser.

(3) 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. However, if the notice, circular or advertisement is distributed to persons named on any list, the investment adviser shall retain, with a copy of the notice, circular or advertisement, a memorandum describing the list and its source.

C. Records of transactions in securities in which the investment adviser or an affiliated person has a beneficial ownership interest required pursuant to Paragraph (12) of Subsection A of 12.11.6.8 NMAC.

(1) For the purposes of this subsection, the following definitions apply:

(a) "affiliated person" with respect to another person means any person directly or indirectly controlling, controlled by, or under common control with the other person; any officer, director or partner of the other person; or any spouse or relative, by blood or marriage, of the other person;

(b) "control" means the power to direct or influence the management or policies of a company through the ownership of voting securities by contract or otherwise; any person who owns beneficially, either

directly or through one or more controlled companies, more than 25 percent of the voting securities of a company shall be presumed to control such company; and

(c) “**primarily engaged in a business or businesses other than advising investment advisory clients**” means an investment adviser that, for each of its most recent three fiscal years or for the period of time since organization, whichever is less, derived, on an unconsolidated basis, more than fifty percent of its total sales and revenues and its income or loss before income taxes and extraordinary items from such other business or businesses.

(2) The investment adviser shall keep a record of every transaction in a security in which the investment adviser, and any person described in Paragraphs (3) or (4) of this subsection, whichever is applicable, has, or by reason of any transaction acquires, any direct or indirect beneficial ownership of such security.

(3) For all investment advisers except those that are primarily engaged in a business or businesses other than advising investment advisory clients, records of transactions shall include records of the transactions of:

(a) any partner, officer or director of the investment adviser;

(b) any employee who participates in any way in the determination of which recommendations are made;

(c) 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

(d) any person in a control relationship to the investment adviser, any affiliated person of a controlling person and any affiliated person of any affiliated person, who obtains information concerning securities recommendation being made by the investment advisor prior to the effective dissemination of the recommendations.

(4) For all investment advisers that are primarily engaged in a business or businesses other than advising investment advisory clients, records of transactions shall include records of the transactions of:

(a) any partner, officer, and director or employee of the investment advisor who participates in any way in the determination of which recommendations are made, or who, in connection with his functions or duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and

(b) any person in a control relationship to the investment adviser, any affiliated person of a controlling person and any affiliated person of any affiliated person who obtains information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of information concerning the recommendations.

(5) The investment adviser shall record each transaction no later than ten days after the end of the calendar quarter in which the transaction was effected.

(6) The investment adviser is not required to keep records of transactions:

(a) effected in any account over which neither the investment adviser nor any person described in Paragraphs (3) or (4) of this subsection has any direct or indirect influence or control; and

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

(7) The record shall state:

(a) the title and amount of the security involved;

(b) the date and nature of the transaction, such as purchase, sale or other disposition; and

(c) the name of the broker-dealer or bank with or through which the transaction was effected.

(8) An investment adviser shall not be deemed to have violated the provisions of this subsection because of the failure to record securities transactions of any person described in Paragraphs (3) and (4) of this subsection if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

[12.11.6.9 NMAC - N, 1-1-2010]

12.11.6.10 DIRECTOR MAY ORDER EXEMPTION: The director may by order exempt any investment adviser from all or part of the requirements of this section, either unconditionally or upon specified conditions, if by reason of the special nature of its business, the director finds that issuance of the order is necessary or appropriate in the public interest or for the protection of investors.

[12.11.6.10 NMAC - Rp, 12 NMAC 11.3.6.11, 1-1-2010]

12.11.6.11 EXEMPTION FOR PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE: Every investment adviser that has its principal place of business in a state other than New Mexico shall be exempt from the requirements of this section, provided the investment adviser is licensed or registered in such state and is in compliance with such state’s recordkeeping requirements.

[12.11.6.11 NMAC - Rp, 12 NMAC 11.3.6.12, 1-1-2010]

HISTORY OF 12.11.6 NMAC:

Pre-NMAC History: Material in this part was derived from that previously filed with the commission of public records - state records center and archives:

FID 67-1, Regulation 67-62, General Requirements, filed 5-18-67;

FID 76-1, Order 76-64, Regulation 76-1, Relating to Options Clearing Corporations, filed 3-26-76;

SB Rule 84-1, New Mexico Blue Sky Regulations, filed 9-5-84;

SD Rule 86-4.04, Investment Advisors' Records, filed 7-11-86.

History of Repealed Material:

12 NMAC 11.3 Subpart 6, Investment Advisors' Records (filed 4-19-99) repealed 1-1-2010.

Other History:

SD Rule 86-4.04, Investment Advisors' Records, filed 7-1-86 was **renumbered** into first version of the New Mexico Administrative Code as 12 NMAC 11.3, Investment Advisors, Investment Advisor Representatives and Federal Covered Advisors, effective 5-1-99.

That relevant portion of 12 NMAC 11.3 Subpart 6, Investment Advisors' Records (filed 4-19-99) was **renumbered, reformatted, and replaced by** 12.11.6 NMAC, Investment Advisors and Investment Advisor Representatives Records, effective 1-1-2010.