

12.204 : Denial, Revocation, Suspension, Cancellation and Withdrawal of Registration

(1) Dishonest and Unethical Practices in the Securities Business.

(a) Broker-dealers. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. Acts and practices, including, but not limited to the following, are considered contrary to such standards and constitute dishonest or unethical practices which are grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration, or such other appropriate action:

...

4. Except as provided in 950 CMR 12.207, recommending to a customer an investment strategy, the opening of or transferring of assets to any type of account, or 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.

...

29. Failing to act in accordance with the duties and standards described in 950 CMR 12.207.

(b) Agents. Each agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of his or her business. Acts and practices, including, but not limited to, the following, are considered contrary to such standards and constitute dishonest or unethical practices in the securities industry and are thereby grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration or such other action as is appropriate:

...

8. Engaging in conduct specified in 950 CMR 12.204(1)(a)1., 2., 3., 4., 5., 6., 10., 11., 12., 13., 18., 19., 22., 23., 27., 28., or 29.

12.205 : Investment Advisers and Federal Covered Advisers

...

(9) Fraudulent Practices/Dishonest or Unethical Practices.

...

(c) The following practices are a non-exclusive list of practices by an adviser which shall be deemed “dishonest or unethical conduct or practices in the securities business” for purposes of M.G.L. c. 110A, § 204(a)(2)(G):

1. Except as provided in 950 CMR 12.207, recommending to a client to whom investment supervisory, management or consulting services are provided an investment strategy, the opening of or transferring of assets to any type of account, or 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 overall portfolio, investment objectives, financial situation and needs, investment experience 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.

**950 CMR 12.207: Fiduciary Duty of Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives**

~~[(a) As used in 950 CMR 12.207, “adviser” refers to any person, including persons registered or excluded from registration under M.G.L. c. 110A, who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase and sale, whether through the issuance of analyses or reports or otherwise. It is a rebuttable presumption that such term includes all investment advisers and investment adviser representatives, as well as other persons who charge fees based on assets under management or portfolio performance for rendering investment advice.]~~

(1) The following practices are a non-exclusive list of practices by a broker-dealer, agent, ~~[or]~~ **investment adviser, or investment adviser representative** which shall be deemed “~~[dishonest or]~~ unethical **or dishonest** conduct or practices~~[ in the securities business]~~” for purposes of M.G.L. c. 110A, § 204(a)(2)(G):

(a) Failing to act in accordance with a fiduciary duty to a customer or client when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security, **commodity, or insurance product**.

(b) ~~[If a broker-dealer, agent, or adviser makes a standalone recommendation, the fiduciary duty required in 950 CMR 12.207(b)1. shall extend through the execution of the recommendation and shall not be deemed an ongoing obligation, except as provided in 950 CMR 12.207(b)2.][ii. If a broker-dealer, agent, or adviser makes ongoing recommendations or provides investment advice, in any capacity, to a customer or client, or receives ongoing compensation in connection with the recommendation or advice, the fiduciary duty shall be deemed an ongoing.][2. Having discretionary authority over a customer's or client's account or] a contractual fiduciary duty~~[, and failing] to act in accordance with~~ **Failing to act in accordance with a fiduciary duty to a customer or client during any period in which the broker-dealer, agent, investment adviser, or investment adviser representative:**~~

**1. Has or exercises discretion in a customer's or client's account, unless the discretion relates solely to the time and/or price for the execution of**

the order;

2. Has a contractual fiduciary duty;

3. Has a contractual obligation to monitor a customer's or client's account on a regular or periodic basis;

4. Receives ongoing compensation or charges ongoing fees for advising a customer or client, either directly or through publications or writings, as to value of securities or as to the advisability of investing in, purchasing, or selling securities, or providing the foregoing services as an integral component of other financially related services; or

5. Engages in any act, practice, or course of business that results in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis.

(c) The use of a title, purported credential, or professional designation containing any variant of the terms "adviser," "manager," "consultant," or "planner," in conjunction with any of the terms "financial," "investment," "wealth," "portfolio," or "retirement," or any terms of similar meaning or import, constitutes engaging in an act, practice, or course of business that results or would result in a customer or client having a reasonable expectation that the broker-dealer, agent, investment adviser, or investment adviser representative will monitor the customer's or client's account(s) or portfolio on a regular or periodic basis within the meaning of 950 CMR 12.207(1)(b)5., above.

(2) To meet the fiduciary duty, [a]each broker-dealer, agent, [~~or~~]investment adviser, or investment adviser representative shall [~~satisfy both the duty of~~]adhere to duties of utmost care and [~~duty of~~]loyalty to the customer or client.

(a) [~~When making a recommendation or providing investment advice, the~~]The duty of care requires a broker-dealer, agent, [~~or~~]investment adviser, or investment adviser representative to use the care, skill, prudence, and diligence that a [~~prudent~~] person acting in a like capacity and familiar with such matters would use, taking into consideration all of the relevant facts and circumstances. For purposes of this paragraph, a broker-dealer, agent, [~~or~~]investment adviser, or investment adviser representative shall make reasonable inquiry, including:

1. The risks, costs, and conflicts of interest related to [~~the recommendation or~~]all recommendations made and investment advice[~~;~~] given;
2. [~~the~~]The customer[']s or client's investment objectives, risk tolerance, financial situation, and needs[~~;~~]; and
3. [~~any~~]Any other relevant information.

(b) [~~When making a recommendation or providing investment advice, the~~]The duty of loyalty requires a broker-dealer, agent, [~~or~~]investment adviser, or investment adviser representative to:

1. Disclose all material conflicts of interest;
2. Make all reasonably practicable efforts to avoid conflicts of interest [~~and to make~~], eliminate conflicts that cannot be avoided, and mitigate conflicts that cannot be avoided or eliminated; and
3. Make recommendations and provide investment advice without regard to the financial or any other interest of [~~the broker-dealer, agent, adviser, any affiliated or related entity or its officers, directors, agents, employees, or contractors, or any other third-~~]any party other than the customer or client.

**(c) Disclosing or mitigating conflicts alone does not meet or demonstrate the duty of loyalty.**

(d) ~~[There]~~ **It** shall be ~~[a presumption of]~~ **presumed to constitute** a breach of the duty of loyalty for ~~[offering or receiving direct or indirect compensation to or from]~~ a broker-dealer, agent, ~~[or adviser for recommending an]~~ **investment adviser, or investment adviser representative to recommend any** investment strategy, the opening of or transferring of assets to a specific type of account, or the purchase, sale, or exchange of any security ~~[that is not the best of the reasonably available options for the customer or client.]~~

~~[ii. There shall not be a presumption that disclosing a conflict of interest alone shall satisfy the duty of loyalty.]~~

~~[3. Notwithstanding the presumption set forth at 950 CMR 12.207(e)2.i. above, it shall not be presumed a breach of the fiduciary duty owed to a customer or client for the broker-dealer, agent, or adviser to receive transaction-based remuneration, as long as:]~~

~~[i. the remuneration is reasonable,]~~

~~[ii. the remuneration represents the best of the reasonably available remuneration options for the customer or client, and]~~ ~~[iii. the broker-dealer, agent, or adviser has otherwise satisfied its duty of care]~~, **commodity, or insurance product, if the recommendation is made in connection with any sales contest, implied or express quota requirement, or other special incentive program.**

(3) For purposes of ~~[this section,]~~ **950 CMR 12.207**, the terms “customer” and “client” **shall include current and prospective customers and clients, but** shall not include:

(a) A bank, savings and loan association, insurance company, **trust company**, or registered investment company;

(b) A broker-dealer registered with a state securities commission (or agency or office performing like ~~[function]~~ **functions**);

(c) An investment adviser registered ~~[either]~~ with the SEC under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or agency or office performing like ~~[function]~~ **functions**); or

(d) Any other institutional buyer, as defined in 950 CMR 12.205(1)(a)6. **and 950 CMR 14.401.**

(4) Nothing in ~~[this section]~~ **950 CMR 12.207** shall be construed to apply to a person acting in the capacity of a fiduciary to an employee benefit plan, its participants, or **its** beneficiaries, as those terms are defined in the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*

(5) Nothing in ~~[this section]~~ **950 CMR 12.207** shall be construed to establish any requirements for capital, custody, margin, financial responsibility, making and keeping of records, bonding, or financial or ~~[operation]~~ **operational** reporting for any broker-dealer or agent that differ from, or

are in addition to, the requirements established under 15 U.S.C. § 78o(i).

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