

New York Adopts New Registration and Examination Requirements for Certain Investment Adviser Related Personnel and Solicitors

January 28, 2021

KEY POINTS

- Beginning February 1, new and amended rules will go into effect in New York that require certain individuals associated with investment advisers to register with the state and to meet examination requirements (or qualify for exemptions therefrom).
- With respect to investment advisers registered with the Securities and Exchange Commission (SEC), these new registration and examination requirements will only apply to individuals who meet the federal definition of an “investment adviser representative,” while a broader range of persons associated with New York State-registered investment advisers will be subject to those requirements.
- In addition, New York will now impose registration and examination requirements with respect to entities and individuals that qualify as solicitors, as defined in the state’s revised rules.

New York State recently adopted revisions to its rules relating to registration and examination requirements of individuals associated with investment advisers (such rules, the “Revised Rules”).¹ These changes mostly affect investment advisers registered with New York State (such advisers, “NY State Registered Advisers”). To a lesser degree, however, the Revised Rules also impact investment advisers registered with the SEC (such advisers, “SEC Registered Advisers”) that have natural person clients. Additionally, the Revised Rules impose registration and examination requirements on certain solicitors, regardless of whether they are associated with SEC Registered Advisers or NY State Registered Advisers. In most cases, Exempt Reporting Advisers (as defined below) should not be impacted by the Revised Rules.

These changes are further explained below and are summarized in a chart in this advisory’s appendix.

The amended rules go into effect on February 1 (the “Effective Date”). However, individuals who were serving in any capacity for at least two years prior to February 1 that would now be required to register or comply with examination requirements, will be allowed to continue to engage in investment advisory business until December 2 without passing the requisite exams, as long as they apply for registration by August 31.

¹ While this advisory focuses on registration and examination changes, the final rule amendments also require NY State Registered Advisers (as defined herein) to create and/or maintain records documenting client assets and income with respect to such client’s designation as an “accredited investor” or “qualified client,” as those terms are defined under federal securities laws. Such documentation must include evidence showing that the adviser took reasonable steps to verify such designations.

Applicability to Personnel of SEC Registered Advisers

A supervised person of an SEC Registered Adviser who represents that adviser from a place of business in New York and meets the federal definition of investment adviser representative (a “Federal IAR”), will be subject to the new registration and examination requirements described below.² In general, a Federal IAR is defined under the Investment Advisers Act of 1940 (the “Advisers Act”) as a supervised person of an SEC Registered Adviser that:

- (1) has more than five clients that are natural persons; and
- (2) has a client base more than 10 percent of which is comprised of natural persons.

In counting clients for the Federal IAR definition, “qualified clients” as defined by the Advisers Act are excluded.³ Furthermore, any supervised person who does not regularly solicit, meet with or otherwise communicate with the adviser’s clients, or who only provides impersonal investment advice, is excluded from the Federal IAR definition and, therefore, will not be subject to these New York requirements.

Since advisory personnel must have natural person clients to meet the Federal IAR definition, the new registration and examination requirements will not apply to personnel of SEC Registered Advisers that only manage private funds and/or managed accounts of institutional clients.

Applicability to NY State Registered Advisers

The Revised Rules with respect to NY State Registered Advisers apply to a broader range of individuals than they do with respect to SEC Registered Advisers. First, the registration and examination requirements apply to any individual that represents a NY State Registered Adviser in performing any activities that would deem the individual to be an investment adviser under New York law (such individual, a “NY IAR”). Based on the state’s definition of investment adviser, an individual who performs any of below acts would be deemed a NY IAR:

engages in the business of advising members of the public, either directly or through publications or writings within or from the State of New York as to the value of securities or as to the advisability of investing in, purchasing, or selling or holding securities, or who, for compensation and as a part of a regular business issues or promulgates analyses or reports concerning securities to members of the public within or from the State of New York.

Second, the registration and examination requirements apply to any “principal” or “supervisor” of a NY State Registered Adviser. Pursuant to the Revised Rules, a “principal” is any person that directly or indirectly controls a NY State Registered Adviser, and a “supervisor” is an individual who directly supervises one or more individuals associated with a NY State Registered Adviser in their capacity as NY IARs.

Prior to the adoption of the Revised Rules, there were examination requirements solely for personnel who were the equivalent of NY IARs but not for principals or supervisors that were not the equivalent of a NY IAR. Furthermore, there were no registration requirements for any personnel of NY State Registered Advisers.

² Note that, under the Revised Rules, the term “investment adviser representative” is not defined the same way with respect to individuals associated with SEC Registered Advisers and with respect to individuals associated with NY State Registered Advisers. As indicated here, for SEC Registered Advisers, the term “investment adviser representative” includes only those supervised persons of the SEC Registered Adviser that meet the federal definition of such term. However, for NY State Registered Advisers, the term “investment adviser representative” includes any supervised person of the NY State Registered Adviser that would be deemed to be an investment adviser under New York law, as further discussed herein. To distinguish between these two concepts of “investment adviser representative” as used in the Revised Rules, this advisory uses the term “Federal IAR” when referring to “investment adviser representatives” of SEC Registered Advisers and the term “NY IAR” when referring to “investment adviser representatives” of NY State Registered Advisers.

³ “Qualified clients” under the Advisers Act generally include (1) persons who have at least \$1,000,000 under management of that investment adviser, immediately after participating in an investment; (2) persons that have a net worth of at least \$2,100,000 (excluding one’s primary residence and together with one’s spouse, if a natural person); and (3) qualified purchasers or knowledgeable employees, both as defined under the Investment Company Act of 1940.

Applicability to Solicitors

Under the Revised Rules, a “solicitor” includes any individual or entity that “as a part of regular business, engages in the business of providing investment advice to the limited extent that such person receives compensation for introducing a prospective investor or investors to” a SEC Registered Adviser or a NY State Registered Adviser.⁴ As of the Effective Date, solicitors will be required to register as investment advisers in New York if they have six or more clients in New York (excluding certain “financial institutions” and “institutional buyers”⁵) and are not an SEC Registered Adviser or otherwise excluded from the state’s definition of investment adviser. If a solicitor is required to be registered in New York as an investment adviser, then its principals, supervisors and representatives are required to satisfy the same registration and examination requirements applicable to such personnel of NY State Registered Advisers, as discussed above.

Applicability to Exempt Reporting Advisers

Exempt Reporting Advisers are investment advisers that are exempt from registration with the SEC pursuant to either the private fund adviser exemption under Section 203(m) of the Advisers Act or the venture capital adviser exemption under Section 203(l) of the Advisers Act. While it is possible that an Exempt Reporting Adviser could be required to be registered with New York (and thus also be a NY State Registered Adviser), many Exempt Reporting Advisers are excluded from the state’s definition of investment adviser because they advise fewer than six clients (i.e., investment funds). The registration and examination requirements of the Revised Rules will not apply to the personnel of any Exempt Reporting Adviser that is not required to register as an investment adviser in New York, and the registration and examination requirements applicable to solicitors and personnel of solicitors will not apply to individuals associated with entities that only introduce investors to such Exempt Reporting Advisers.

Summary of Registration Process and Examination Requirements

- Individuals described above who must register with New York will apply for such registration through the online Investment Adviser Registration Depository (IARD) system by submitting a Form U4 and paying the required \$200 filing fee.
 - For individuals who are engaged in investment advisory business and/or associated with an investment adviser prior to February 1, and who will become subject to the registration requirement as of February 1, the deadline for submitting their registration application is August 31.
 - Applications will not be approved until compliance with the examination requirement, or a waiver therefrom, is confirmed by the New York Department of Law.
- The general examination requirement is a passing grade on either: (1) the Series 65 examination; or (2) all three of the Securities Industry Essentials Examination, the Series 7 examination, and the Series 66 examination.
- There are waivers from the examination requirement that are available under the following circumstances:
 - **Special Waiver.** If an individual has, in the regular course of business, engaged in investment advisory activity from a place of business in New York continuously and permissibly for at least two years prior to February 1, *upon an application to the state on Form NY-IASW*. A special waiver will not be available if an individual:
 - submits his/her Form U4 application after August 31;
 - in the two years prior to December 2, 2020 has only served as a solicitor;

⁴ Note that New York has not clearly defined whether “compensation” in this context is limited to cash compensation or whether non-cash compensation would be included. Under the SEC’s recent updates to its marketing regulations applicable to investment advisers, non-cash compensation would cause a solicitor to be subject to the Advisers Act’s revised marketing regulations.

⁵ These terms are defined under Section 11.12 of the Revised Rules.

- for two or more continuous years out of the four years prior to filing a Form U4 application with New York, had ceased acting in an investment advisory capacity from a place of business in the state; or
- is (or has been) subject to any regulatory or civil action, proceeding or arbitration, within the 10 years prior to such application, that would need to be disclosed on Form U4.
- **Prior registration.** If an individual (1) has been continuously registered to provide investment advice in any jurisdiction for at least two years prior to filing a Form U4 application with New York; (2) has not had any lapse in registration for more than two years at a time; and (3) is not (or has not been) subject to any regulatory or civil action, proceeding or arbitration, within the 10 years prior to such application, that would need to be disclosed on Form U4.
- **Certification.** If an individual currently holds one of specified list of professional designations in good standing.⁶
- Individuals who will be required to register and who are currently associated with a NY State Registered Adviser must demonstrate that they complied with the existing examination requirements for NY State Registered Adviser personnel. Historically, such compliance (including compliance by way of a waiver) has been documented through a manual process using Form NY-IAQ.
 - If New York Department of Law records reflect a valid prior Form NY-IAQ submission, an individual's Form U4 application will be approved on that basis.
 - Otherwise, an individual will be required to explain the duties performed for the adviser prior to February 1 and the reason he/she did not previously submit a Form NY-IAQ to the New York Department of Law.
- Individuals who will be required to register and who either (1) are currently associated with an SEC Registered Adviser; or (2) become associated with either an SEC Registered Adviser or NY State Registered Adviser on or after February 1, can indicate compliance with the examination requirement through the Form U4 application process or submit a Form NY-IASW to seek a special waiver from the requirement (see discussion above).

⁶ These include the following certifications: (1) Certified Financial Planner (CFP) awarded 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 Specialist (PFS) awarded by the American Institute of Certified Public Accountants; (4) Chartered Financial Analyst (CFA) awarded by the Association for Investment Management Research; and (5) Chartered Investment Counselor (CIC) awarded by the Investment Adviser Association.

Appendix

Overview of New York Registration and Examination Requirements Applicable to Individuals Under the Revised Rules

		Investment Adviser Representative	Principal ⁷	Supervisor ⁸
1	NY State Registered Advisers	Registration and examination ⁹ required for NY IARs ¹⁰	Registration and examination ⁹ required	Registration and examination ⁹ required
2	SEC Registered Advisers	Registration and examination ⁹ required for Federal IARs ¹¹	Registration and examination not required, as long as such person does not qualify as a Federal IAR ¹¹	Registration and examination not required, as long as such person does not qualify as a Federal IAR ¹¹
3	Exempt Reporting Advisers That Are Not Required to Register as Investment Advisers in New York	Registration and examination not required	Registration and examination not required	Registration and examination not required
4	Solicitors Required to Be Registered as NY State Registered Advisers¹²	Registration and examination ⁹ required for NY IARs ¹⁰	Registration and examination ⁹ required	Registration and examination ⁹ required

⁷ A principal is any person or entity directly or indirectly controlling an investment adviser or a solicitor.

⁸ A supervisor is a natural person who directly supervises one or more natural persons associated with an investment adviser in their capacity as investment adviser representatives.

⁹ Note that waivers of the examination requirement are available for certain eligible persons, as discussed in this advisory.

¹⁰ As described in this advisory, a NY IAR includes any supervised person of the NY State Registered Adviser that would be deemed to be an investment adviser under New York law.

¹¹ As described in this advisory, a Federal IAR includes only those supervised persons of the SEC Registered Adviser that meet the federal definition of such term.

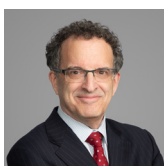
¹² As described in this advisory, solicitors are individuals or entities who, as part of a regular business, engage in the business of providing investment advice to the limited extent that they receive compensation for introducing a prospective investor or investors to NY State Registered Advisers or SEC Registered Advisers; **provided** that they have six or more clients in New York (excluding certain financial institutions and institutional buyers) and are not SEC Registered Advisers or otherwise excluded from the state's definition of investment adviser.

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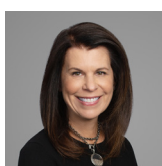
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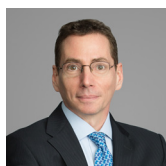
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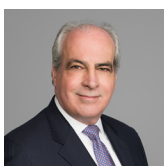
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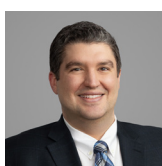
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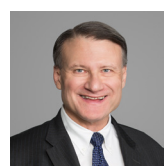
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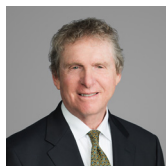
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