Proposed Regulations
(Filed with Regulations on November 1, 2011)

950 CMR 12.205(2): Change heading to read: "Registration and Notice Filing Requirements and Private Fund Exemption"

950 CMR 12.205(2)(a) through 950 CMR 12.205(2)(b): No Change.

950 CMR 12.205(2)(c): Registration Exemption for Certain Private Fund Advisers

1. **Definitions.** For purposes of this 950 CMR 12.205(2)(c), the following definitions shall apply:

a. "Value of primary residence" means the fair market value of a person's primary residence, less the amount of debt secured by the property up to its fair market value.

b. "Private fund adviser" means an investment adviser who provides advice solely to one or more private funds.

c. "Private fund" means an issuer that qualifies for an exclusion from the definition of an investment company pursuant to section(s) 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, 15 U.S.C. 80a.

d. "3(c)(1) fund" means a private fund that qualifies for an exclusion from the definition of an investment company pursuant to section 3(c)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c)(1).

e. "Venture capital fund" means a private fund that meets the definition of a venture capital fund in SEC Rule 203(l)-1, 17 C.F.R. § 275.203(l)-1.

2. **Exemption for private fund advisers.** Subject to the additional requirements of 950 CMR 12.205(2)(c)(3), a private fund adviser shall be exempt from the registration requirements of M.G.L c.110A, § 201 if the private fund adviser satisfies all of the following conditions:

a. neither the private fund adviser nor any of its advisory affiliates are subject to a disqualification as described in Rule 262 of SEC Regulation A, 17 C.F.R. § 230.262;

b. the private fund adviser files with the state each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to SEC Rule 204-4, 17 C.F.R. § 275.204-4; and

c. the private fund adviser pays a $300 reporting fee;

3. **Additional requirements for private fund advisers to certain 3(c)(1) funds.** In order to qualify for the exemption described in 950 CMR 12.205(2)(c)(2), a private fund adviser who advises at least one (3)(c)(1) fund that is not a venture capital fund shall, in addition to satisfying each of the conditions specified in paragraphs (2)(a) through (2)(c), comply with the following requirements:

a. The private fund adviser shall advise only those 3(c)(1) funds (other than venture capital funds) whose outstanding securities (other than short-term paper) are beneficially owned solely by persons who, after deducting the value of the primary residence from the person's net worth, would each meet the definition of a qualified client in SEC Rule 205-3, 17 C.F.R. § 275.205-3, at the time the securities are purchased from the issuer;

b. At the time of purchase, the private fund adviser shall disclose the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund:

i. all services, if any, to be provided to individual beneficial owners. If no services are to be provided to individual beneficial owners, that fact must be disclosed;

ii. all duties, if any, the investment adviser owes to the beneficial owners. If no duties are owed to individual beneficial owners, that fact must be disclosed; and

iii. any other material information affecting the rights or responsibilities of the beneficial owners.

c. The private fund adviser shall obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund, and shall deliver a copy of such audited financial statements to each beneficial owner of the fund.

4. **Federal covered investment advisers.** If a private fund adviser is registered with the Securities and Exchange Commission, the adviser shall not be eligible for the exemption outlined in 950 CMR 12.205(2)(c) and shall comply with the state notice filing requirements applicable to federal covered investment advisers in M.G.L. c.110A, §202(b).

5. **Investment adviser representatives.** A person acting as an investment adviser representative is exempt from the registration requirements of M.G.L c.110A, §201 if he or she is employed by or associated with an investment adviser that is exempt from registration in the Commonwealth pursuant to 950 CMR 12.205(2) and does not otherwise act as an investment adviser representative.

6. **Electronic filing.** The report filings described in paragraph (2)(b) above shall be made electronically through the IARD. A report shall be deemed filed when the report and the fee are filed and accepted by the IARD on the behalf of the Securities Division.

7. **Grandfathering for private fund advisers with non-qualified clients.** A private fund adviser to one or more 3(c)(1) funds (other than a venture capital fund) that is beneficially owned by persons who are not qualified clients as described in subparagraph (3)(a) may nonetheless qualify for the exemption described in 950 CMR 12.205(2)(c) if:

(a) the subject fund(s) existed prior to March 30, 2012; and,
(b) as of March 30, 2012, the fund(s) cease(s) to accept beneficial owners who are not qualified clients, as described in 950 CMR 12.205(2)(c)(3)(a) of this regulation; and,
(c) the private fund adviser to the subject fund(s) was in compliance with the requirements of MGL c.110A §201(c) as of March 30, 2012; and,
(d) the private fund adviser discloses in writing the information described in paragraph 950 CMR 12.205(2)(c)(3)(b) to all beneficial owners of the fund(s); and
(e) the adviser delivers audited financial statements as required by paragraph (3)(c).

Renumber the current subsection (c) of 950 CMR 12.205(2) as subsection (d) Registration of Investment Adviser Representatives.

950 CMR 12.205(1)(a)(6)(b):

6. Institutional Buyer, for the purposes of MGL c. 110A § 401(m), shall include any of the following:

a. An organization described in Section 501(c)(3) of the Internal Revenue Code with a securities portfolio of more than $25 million.
b. An investing entity:
    i. whose only investors are accredited investors as defined in Rule 501(a) under the Securities Act of 1933 (17 CFR 230.501(a)) each of whom has invested a minimum of $50,000; and
    ii. the subject fund existed prior to March 30, 2012; and.
    iii. as of March 30, 2012, the subject fund ceased to accept new beneficial owners.
c. An investing entity whose only investors are financial institutions and institutional buyers as set forth in M.G.L. c. 110A, § 401(m) and 950 CMR 12.205(1)(a)6.a.

PROPOSED RULE TEXT ON DISCRETION AND CUSTODY REQUIREMENTS

950 CMR 12.205(5):

Discretion and Custody Requirements

a. An investment adviser registered or required to be registered under M.G.L. c. 110A who has discretionary authority over client funds or securities shall be bonded in an amount of not less than $10,000.00 by a bonding company qualified to do business in the Commonwealth.

b. An investment adviser registered or required to be registered under M.G.L. c. 110A who has custody of client funds or securities shall comply with the provisions of Rule 206(4)-2 under the Investment Advisers Act of 1940 (17 CFR 275.206(4)-2).

i. "Custody" shall have the meaning defined in Rule 206(4)-2(d)(2) under the Investment Advisers Act of 1940 (17 CFR 275.206(4)-(2)(d)(2)).

ii. An adviser is not exempt from the independent verification requirement pursuant to Rule 206(4)-2(b)(3) under the Investment Advisers Act of 1940 unless the adviser meets the following additional requirements:

A. The adviser has written authorization from the client to deduct advisory fees from the account held with the qualified custodian; and

B. The adviser sends the qualified custodian and client an invoice or statement of the amount of the fee to be deducted from the client's account each time a fee is directly deducted.

TECHNICAL CHANGE TO 950 CMR 12.203(5)(a):

(5) Duty to Amend Information Previously Filed

(a) If the information contained in any application or amended application for registration as a broker-dealer, agent, or issuer-agent changes in a material way, or is or becomes inaccurate or incomplete in any material respect, an amendment shall be filed at the time of knowledge of such change. Such amendments shall be filed with the CRD or directly with the Division. Events considered material include, but are not necessarily limited to, the following:

[1-13: no change]