

ACT 286

S.B. NO. 1138

A Bill for an Act Relating to the Uniform Securities Act (Modified).

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 485-1, Hawaii Revised Statutes, is amended to read as follows:

“§485-1 Definitions. When used in this chapter the following terms, unless the text otherwise indicates, have the following meaning:

- (1) “Commissioner” means the commissioner of securities of the State.
- (2) “Salesman” means any individual other than a dealer who represents a dealer or issuer in effecting or attempting to effect purchases or sales of securities. “Salesman” does not include an individual who represents an issuer in (A) effecting transactions in a security exempted by clauses (1), (2), (3), or (10) of section 485-4, (B) effecting transactions exempted by section 485-6, or (C) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this State. A partner, officer, or director of a dealer or issuer, or a person

- occupying a similar status or performing similar functions, is a salesman only if he otherwise comes within this definition.
- (3) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Dealer" does not include (A) a salesman, (B) an issuer, (C) a person who has no place of business in this State if (i) he effects transactions in this State exclusively with or through the issuers of the securities involved in the transactions; other dealers; or banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (ii) during any period of twelve consecutive months he does not direct more than fifteen offers to sell or to buy into this State in any manner to persons other than those specified in clause (i), whether or not the offeror or any other offerees is then present in this State, or (D) any person licensed as a real estate broker or real estate salesman under the laws of the State while effecting transactions in a security exempted by section 485-6(14).
 - (4) "Fraud", "deceit", and "defraud" are not limited to common-law deceit.
 - (5) "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.
 - (6) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include (A) a bank, savings institution, or trust company; (B) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession; (C) a dealer whose performance of these services is solely incidental to the conduct of his business as a dealer and who receives no special compensation for them; (D) a publisher of any bona fide newspaper, news magazine, or business of financial publication of general, regular, and paid circulation; (E) a person whose advice, analyses, or reports relate only to securities exempted by section 485-4(1); (F) a person who has no place of business in this State if (i) his only clients in this State are other investment advisers, dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (ii) during any period of twelve consecutive months he does not direct business communications into this State in any manner to more than five clients other than those specified in clause (i), whether or not he or any of the persons to whom the communications are directed is then present in this State; (G) a person who is employed by a mutual fund which is registered with the Securities and Exchange Commission; or (H) such other persons not within the intent of this paragraph as the commissioner may by rule or order designate.

- (7) "Investment adviser representative" means any individual other than an investment adviser who represents an investment adviser in the business of advising others, either directly or through publications or writings as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.
- [(7)] (8) "Issuer" means any person who issues or proposes to issue any security, except that (A) with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an incorporated¹ investment trust not having a board of directors (or persons performing similar functions) or of the fixed restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and (B) with respect to certificates of interest in oil, gas, or mining titles or leases, there is not considered to be any "issuer".
- [(8)] (9) "Nonissuer" means not directly or indirectly for the benefit of the issuer.
- [(9)] (10) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.
- [(10)] (11) (A) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.
- (B) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.
- (C) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.
- (D) A purported gift of assessable stock is considered to involve an offer and sale.
- (E) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.
- (F) The terms defined in this subsection do not include (i) any bona fide pledge or loan; (ii) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; (iii) any act incident to a class vote by stockholders, pursuant to the articles of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or (iv) any act incident to a

judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash.

- [(11)] (12) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act of 1935", and "Investment Company Act of 1940" mean the federal statutes of those names as amended before or after June 7, 1957.
- [(12)] (13) "Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, variable annuity contract, voting trust certificate, certificate of deposit for a security, certificate of interest in an oil, gas, or mining title or lease, option on commodity futures contracts or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or fixed annuity contract.
- [(13)] (14) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico."

SECTION 2. Section 485-14, Hawaii Revised Statutes, is amended to read as follows:

"§485-14 Registration of dealers, investment advisers, [and] salesmen[,] and investment adviser representatives. (a) It is unlawful for any person to transact business in this State as a dealer, investment adviser, [or] salesman, or investment adviser representative unless registered under this chapter.

(b) Eligibility for registration as a dealer. To be eligible for registration as a dealer an applicant must be of good repute and have had (or if the applicant is a partnership or corporation have at least one partner, officer, or employee who has) at least one year of experience as a full-time security salesman or experience as a security salesman on a part-time basis found by the commissioner of securities to be substantially equivalent thereto, provided that the foregoing experience requirement shall not apply to issuers of securities applying for registration as dealers for the sole purpose of issuing and selling securities issued by them.

(c) Application for registration as a dealer. An application for registration as a dealer in writing shall be filed in the office of the commissioner in such form as the commissioner may prescribe, duly verified by oath, and shall state the principal office of the applicant wherever situated, and the location of the principal office and branch offices in the State, if any, the name and style of doing business, the names, residence, and business of principals, copartners, officers, and directors, specifying as to each his capacity and title, the general plan and character of business, the length of time the dealer has been engaged in business and information as to the time, place, and character of experience as a securities salesman. The commissioner may also require such additional information as to the applicant's previous history, record, and association as he deems necessary to establish the good repute in business of the applicant. There shall be filed with such application an irrevocable written consent to the service

of process upon the commissioner in actions against the dealer in manner and form provided in section 485-12.

(d) Eligibility for registration as an investment adviser. To be eligible for registration under this chapter, an investment adviser shall be of good repute, shall have complied with provisions mandatory of this section, and shall take and pass an oral or written examination, or both, prescribed by the commissioner, to test the applicant's knowledge of the securities business; provided that [an applicant who has evidence of successfully passing an examination required by the Securities and Exchange Commission or by any national securities exchange or national securities association registered under the Securities Exchange Act of 1934 or who was registered as an investment adviser by the Securities and Exchange Commission as of January 1, 1983, shall be exempt from this requirement.] the Commissioner may by rule or regulation set forth exemptions to the examination requirement. Every person required to take such an examination at or before the time of the examination, shall pay to the commissioner a fee of \$100.

(e) Registration of investment advisers. An application for registration, duly verified by oath by the applicant, shall be filed in the office of the commissioner accompanied by (1) an irrevocable written consent to the service of process upon the commissioner in actions against the investment adviser in manner and form provided in section 485-12, (2) the applicant's photograph, and (3) a form of the disclosure statement described in section 485-25(c)(4). Information on the registration statement shall include:

- (1) The name and form of organization under which the investment adviser engages or intends to engage in business; the name of the state or other sovereign power under which the investment adviser is organized; the location of the investment adviser's principal business office and branch offices, if any; the names and addresses of the investment adviser's partners, officers, directors, and persons performing similar functions or, if the investment adviser is an individual, of such individual; and the number of the investment adviser's employees;
- (2) The education, the business affiliations for the past five years, and the present business affiliations of the investment adviser and of the investment adviser's partners, officers, directors, and persons performing similar functions and of any controlling person thereof;
- (3) The nature of the business of the investment adviser, including the manner of giving advice and rendering analyses or reports;
- (4) A balance sheet certified by an independent public accountant and other certified financial statements[;] if the investment advisor has custody of or discretionary authority over client money, securities or other assets, or an unaudited, verified balance sheet and financial statements if the investment advisor has no custody of or discretionary authority over client money, securities or other assets;
- (5) The nature and scope of the authority of the investment adviser with respect to clients' funds and accounts;
- (6) The basis or bases upon which the investment adviser is compensated;
- (7) Whether the investment adviser, or any person employed by or associated in business with the investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of the investment adviser under section 485-15;

- (8) A statement as to whether the principal business of the investment adviser consists or is to consist of acting as investment adviser; and
- (9) Such other information as to the applicant's previous history, record, and association as the commissioner deems necessary to establish the good repute of the applicant.

The commissioner may use a uniform registration form adopted by the North American Securities Administrators Association, the Securities and Exchange Commission, or any national securities exchange or national securities association registered under the Securities Exchange Act of 1934; provided such form encompasses the information required under this section.

If an applicant is currently registered by the United States Securities and Exchange Commission or any national securities exchange or national securities association registered under the Securities Exchange Act of 1934, the commissioner may accept a certified copy of the registration application the applicant submitted to obtain such registration in lieu of the application required by this section.

(f) Approval, bond. If the commissioner finds that the applicant for registration as a dealer is eligible for such registration, then he shall register the applicant as a dealer upon payment of the fee hereinafter provided and upon such dealer's filing a bond in the sum of \$5,000 running to the State conditioned upon the faithful compliance with this chapter by the dealer and by all salesmen registered by him while acting for him. The bond shall be executed as surety by a surety company authorized to do business in the State; provided that no bond is required of or from any such applicant if the applicant at the time of making his application is a member of any recognized stock or bond exchange which has been in existence for a period of five years prior to April 29, 1931; provided further that no bond is required of a dealer if the aggregate par value of the securities to be sold is less than \$5,000 or in the case of no par value stock, if the price at which the stock is to be offered to the public is less than \$5,000 if the person selling or offering the securities for sale to the public notifies the commissioner in writing of his intention to make the sale and after the sale files with the commissioner a statement of the kind and amount of stock sold and the price received therefor, but where the aggregate par value of the securities or the price at which the stock is to be offered to the public is less than \$5,000 no more than one such sale or offering shall be allowed within a period of one year; provided further that in lieu of the above bond any dealer may deposit and keep deposited with the commissioner cash in the amount of \$5,000 or securities to be approved by the commissioner having a market value at all times of not less than \$5,000 which cash or securities shall be held in trust for the fulfilling of the same terms and conditions as in the case of a bond required by this section, which cash or securities may be withdrawn at any time subject to the deposit in lieu thereof of cash or other securities of equal value, or upon the filing of a bond as provided in this section, and which cash or securities will be so held in trust for a period of two years beyond the revocation or termination of the registration of the dealer depositing the same.

(g) Investment adviser's approval; bond, insurance required. If the commissioner finds that the applicant for registration as an investment adviser is eligible for such registration, the commissioner shall register the investment adviser upon a payment of a fee hereinafter provided and upon such investment adviser filing a bond in the sum of [\$10,000] \$50,000 with the State as the obligee. The bond requirement shall be \$5,000 if the adviser does not have custody of or discretionary authority over client money, securities or other assets. The bond shall be conditioned upon the faithful compliance with this

chapter by the investment adviser. The bond shall be executed as a surety by a surety company authorized to do business in the State[.], provided that in lieu of the above bond any investment adviser may deposit and keep deposited with the commissioner cash in the applicable amount of \$50,000 or \$5,000 or securities to be approved by the commissioner having a market value at all times of not less than \$50,000 or \$5,000 which cash or securities shall be held in trust for the fulfilling of the same terms and conditions as in the case of a bond required by this section, which cash or securities may be withdrawn at any time subject to the deposit in lieu thereof of cash or other securities of equal value, or upon the filing of a bond as provided in this section, and which cash or securities will be so held in trust for a period of two years beyond the revocation or termination of the registration of the investment adviser depositing the same. In addition, the investment adviser shall file with the commissioner a certificate of insurance which indicates that such investment adviser's business is insured for errors and omissions for at least \$100,000 per occurrence with a \$200,000 aggregate for those with less than two years experience and a \$500,000 aggregate for those with two or more years of experience for the protection of the investment adviser's client.

(h) Eligibility for registration as a salesman. To be eligible for registration under this chapter a salesman shall be of good repute, shall have complied with the provisions mandatory of this section, shall be designated as a salesman by a registered dealer, and shall take and pass an oral or written examination, or both, prescribed by the commissioner, to test his knowledge of the securities business. Every person required to take such an examination shall, at or before the time he takes the same, pay a fee as prescribed by the commissioner. No person shall be designated as a salesman by, or shall act as a salesman for, more than one registered dealer.

(i) Registration of salesmen. An information statement, containing such information as the commissioner shall prescribe, duly verified by oath by the applicant, shall be filed in the office of the commissioner, together with an appointment of the applicant as a salesman by a registered dealer. If the commissioner finds a salesman designated by any registered dealer to be eligible for registration as a salesman, he shall register the person as a salesman upon the payment of the fee hereinafter provided.

(j) Eligibility for registration as an investment adviser representative. To be eligible for registration under this chapter an investment adviser representative shall be of good repute, shall have complied with the provisions mandatory of this section, shall be designated as a representative by a registered investment adviser and shall take and pass an oral or written examination, or both, prescribed by the commissioner, to test his knowledge of the investment advisory and securities business; provided that the commissioner may by rule or regulation set forth exemptions to the examination requirement. Every person required to take such an examination shall, at or before the time he takes the same, pay a fee as prescribed by the commissioner. No person shall be designated as an investment adviser representative by, or shall act as an investment adviser representative for, more than one registered investment adviser.

(k) Registration of investment adviser representative. An information statement, containing such information as the commissioner shall prescribe, duly verified by oath by the applicant, shall be filed in the office of the commissioner, together with an appointment of the applicant as an investment adviser representative by a registered investment adviser. If the commissioner finds an investment adviser representative designated by any investment adviser

to be eligible for registration as an investment adviser representative, he shall register the person as an investment adviser representative upon the payment of a fee hereinafter provided.

[(j)] (l) Recording; duration; renewal; fee. The name and addresses of all persons found eligible for registration as dealers, investment advisers, [or] salesmen, or investment adviser representatives and all orders with respect thereto shall be recorded in a register of dealers, investment advisers, [and] salesmen, and investment adviser representatives kept in the office of the commissioner which shall be open to public inspection. Except as hereinafter provided, every registration under this section shall expire on December 31 in each odd-numbered year. Applications for renewals shall be made not less than thirty nor more than sixty days before the end of the odd-numbered year. Any applicant for renewal of a dealer [or], investment adviser, [or] salesman, or investment adviser representative registration [license] who does not submit his application within the time prescribed by this section shall pay a penalty of one hundred per cent of the applicable renewal fee. Any applicant for renewal of a dealer or investment adviser [license] registration who submits his application after December 31 of the odd-numbered year shall be required to reapply as a new dealer or investment adviser. The registration of any dealer, investment adviser [or] salesman, or investment adviser representative may be revoked or terminated prior to its expiration by written notice filed with the commissioner by the registered dealer, [or] registered salesman, registered investment adviser, or registered investment adviser representative concerned, and the revocation shall take effect as of the date and time of filing of the notice. Upon revocation or termination of the registration of any dealer, investment adviser, salesman, or investment adviser representative, the dealer's, investment adviser's, salesman's, or investment adviser representative's certificate of registration shall be surrendered to the commissioner for cancellation. The fee for registration and for each biennial renewal shall be \$50 in the case of dealers and investment advisers and \$10 in the case of salesmen[,], and investment adviser representatives.

[(k)] (m) Changes. Changes in registration occasioned by changes in the personnel of a partnership or in the principals, copartners, officers, or directors of any dealer or investment adviser's business may be made from time to time by written application setting forth the facts with respect to such change.

[(l)] (n) Announcement of registration application. The commissioner, by rule, may require an applicant for initial registration as a dealer, investment adviser, [or] salesperson, or investment adviser representative to publish an announcement of the application in one or more newspapers of general circulation in this State.

[(m)] (o) Notice of intent to offer. Every registered dealer who intends to offer any security of any issue registered or to be registered shall notify the commissioner in writing of his intention so to do. The notice shall contain the name of the dealer, shall state the name of the security to be offered for sale, and whenever a dealer has prepared such notice and has forwarded the same by registered mail, postage prepaid, and properly addressed to the commissioner, such dealer, as to the contents of the notice and the filing thereof, is deemed to have complied with the requirements of this subsection.

[(n)] (p) Issuers as dealers. Any issuer of a security required to be registered under this chapter selling such securities (other than in exempt transactions as defined in section 485-6), and any issuer of an exempt security as defined in section 485-4(9) and (10) offering such securities (other than (1) in exempt transactions as defined in section 485-6, or (2) through a dealer registered pursuant to this chapter) shall file with the commissioner a bond or

deposit securities or cash in an amount, based on the total capitalization, to be determined by the commissioner in his discretion, which amount, however, shall not be less than \$5,000, nor more than \$25,000, subject also to the same conditions as herein prescribed in the case of dealers, and may appoint salesmen in the manner herein prescribed in the case of dealers.

[(o)] (q) Capital requirement for dealers and investment advisers[.] who have custody of or discretionary authority over client money, securities, or other assets. The commissioner may by rule require a minimum capital requirement for registered dealers which shall not be less than \$5,000 in the case of dealers and prescribe a ratio between net capital and aggregate indebtedness. The commissioner may by rule require a net worth requirement which shall not be less than \$5,000 for investment advisors."

SECTION 3. Section 485-15, Hawaii Revised Statutes, is amended to read as follows:

"§485-15 Denial, revocation of dealers', investment advisers', [and] salesmen's, and investment adviser representative's registration; suspension during investigation, etc. Upon the finding of errors in a registration statement or the filing of complaints by consumers or by any government agency, the commissioner may conduct an investigation of the applicant or registrant and registration under section 485-14 may be refused or any registration granted may be revoked by the commissioner of securities if after a reasonable notice and a hearing the commissioner determines that the applicant or registrant so registered:

- (1) Has violated this chapter or any rule made hereunder;
- (2) Has made a material false statement in the application for registration;
- (3) Has been guilty of a fraudulent act in connection with any sale of securities, or has been or is engaged or is about to engage in making fictitious or pretended sales or purchases of any such securities or has been or is engaged or is about to engage in any practice or sale of securities which is fraudulent or in violation of law; or
- (4) Has demonstrated his unworthiness to transact the business of dealer, investment adviser, [or] salesman[.], or investment adviser representative.

In cases of charges against a salesman or investment adviser representative notice thereof shall also be given the dealer or investment adviser employing such salesman[.] or investment adviser representative. Pending the hearing the commissioner may order the suspension of the dealer's, investment adviser's, [or] salesman's, or investment adviser representative's registration; provided the order states the cause for the suspension.

Until the entry of a final order the suspension of the dealer's or investment adviser's registration, though binding upon the persons notified thereof, shall be deemed confidential, and shall not be published, unless it appears that the order of suspension has been violated after notice.

In the event the commissioner determines to refuse or revoke a registration as hereinabove provided, he shall enter a final order herein with his findings on the register of dealers, investment advisers, [and] salesmen[.], and investment adviser representatives; and suspension or revocation of the registration of a dealer or investment adviser shall also suspend or revoke the registration of all his salesmen[.] or investment adviser representatives.

It shall be sufficient cause for refusal or cancellation of registration in case of a partnership or corporation or any unincorporated association, if any

member of a partnership or any officer or director of the corporation or association has been guilty of any act or omission which would be cause for refusing or revoking the registration of an individual dealer, investment adviser, [or] salesman[,], or investment adviser representative."

SECTION 4. Section 485-19, Hawaii Revised Statutes, is amended to read as follows:

"§485-19 Injunctions. Whenever it shall appear to the commissioner of securities either upon complaint or otherwise, that in the issuance, sale, promotion, negotiation, advertising, or distribution of any securities within the State, including any security exempted under section 485-4, and including any transaction exempted under section 485-6, any person, as defined in this chapter:

- (1) Has employed or employs, or is about to employ any device, scheme, or artifice to defraud or for obtaining money or property by means of any false pretense, representation, or promise;
- (2) Or that any such person has made, makes, or attempts to make in the State fictitious or pretended purchases or sales of securities;
- (3) Or has engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the purchase or sale of securities (A) which is in violation of law, (B) or which is fraudulent, (C) or which has operated or which would operate as a fraud upon the purchaser; any one or all of which devices, schemes, artifices, fictitious or pretended purchases or sales of securities, practices, transactions, and courses of business are declared to be and are hereinafter referred to as fraudulent practices;
- (4) Or that any person is acting as dealer, investment adviser, [or] salesman, or investment adviser representative within the State without being duly registered as such dealer, investment adviser, [or] salesman, or investment adviser representative as provided in this chapter;

the commissioner may investigate and whenever he believes from evidence satisfactory to him: that any such person has engaged in, is engaged, or is about to engage in any of the practices or transactions hereinbefore referred to as and declared to be fraudulent practices; or is selling or offering for sale any securities in violation of this chapter or is acting as a dealer, investment adviser, [or] salesman, or investment adviser representative without being duly registered as provided in this chapter, the commissioner may, in addition to any other remedies, bring suit in the name and on behalf of the State against such person and any other person or persons concerned in or in any way participating in or about to participate in such fraudulent practices or acting in violation of this chapter, to enjoin such person and such other person or persons from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof or in violation of this chapter.

In any such court proceedings the commissioner may apply for and on due showing be entitled to have issued the court's subpoena requiring forthwith the appearance of any defendant and his employees, salesmen, or agents and the production of documents, books, and records as may appear necessary for the hearing of such petition to testify and give evidence concerning the acts or conduct or things complained of in the application for injunction. In the suit the circuit courts sitting without a jury have jurisdiction of the subject matter and a judgment may be entered awarding such injunction as may be proper."

SECTION 5. Section 485-25, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing:

- (1) That the investment adviser shall not be compensated 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) That no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract;
- (3) That the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change;
- (4) That the investment adviser and investment adviser representative shall disclose to the client in a separate disclosure statement the capacity in which the investment adviser [is] and investment adviser representative are acting and the compensation to be received in situations where (A) the investment adviser's is acting as principal for the investment adviser's own account and knowingly sells any security to or purchases any security from a client for whom he is acting as investment adviser, or, (B) the investment adviser is acting as broker for a person other than the client and knowingly effects any sale or purchase of securities, real estate, insurance contracts, annuities contracts, or any types of real or personal property for the account of the client; and
- (5) That the investment adviser and investment adviser representative shall provide the disclosure statement described in subsection (c)(4) and obtain the written consent of the client to the transactions described in the disclosure statement prior to the closing of the transactions.

Clause (1) does not 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. “Assignment”, as used in clause (2), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but, if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.”

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 7. This Act shall take effect upon its approval.

(Approved June 8, 1985.)

Note

1. So in original.