

TITLE 15 - COMMERCE AND TRADE
CHAPTER 2D - INVESTMENT COMPANIES AND ADVISERS
SUBCHAPTER II - INVESTMENT ADVISERS

§ 80b–5. Investment advisory contracts

(a) Compensation, assignment, and partnership-membership provisions

No investment adviser, unless exempt from registration pursuant to section 80b–3 (b) of this title, shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to enter into, extend, or renew any investment advisory contract, or in any way to perform any investment advisory contract entered into, extended, or renewed on or after November 1, 1940, if such contract—

- (1) provides for compensation to the investment adviser 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) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or
- (3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

(b) Compensation prohibition inapplicable to certain compensation computations

Paragraph (1) of subsection (a) of this section shall not—

- (1) be construed to 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;
- (2) apply to an investment advisory contract with—
 - (A) an investment company registered under subchapter I of this chapter, or
 - (B) any other person (except a trust, governmental plan, collective trust fund, or separate account referred to in section 80a–3 (c)(11) of this title), provided that the contract relates to the investment of assets in excess of \$1 million,

if the contract provides for compensation based on the asset value of the company or fund under management averaged over a specified period and increasing and decreasing proportionately with the investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify;

- (3) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this subchapter, if
 - (A) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 80a–60 (a)(3)(B)(iii) of this title is satisfied, and
 - (B) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 80a–60 (a)(3)(B) of this title and does not have a profit-sharing plan described in section 80a–56 (n) of this title;
- (4) apply to an investment advisory contract with a company excepted from the definition of an investment company under section 80a–3 (c)(7) of this title; or
- (5) apply to an investment advisory contract with a person who is not a resident of the United States.

(c) Measurement of changes in compensation

NB: This unofficial compilation of the U.S. Code is current as of Jan. 5, 2009 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

For purposes of paragraph (2) of subsection (b) of this section, the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise.

(d) “Investment advisory contract” defined

As used in paragraphs (2) and (3) of subsection (a) of this section, “investment advisory contract” means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person other than an investment company registered under subchapter I of this chapter.

(e) Exempt persons and transactions

The Commission, by rule or regulation, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from subsection (a)(1) of this section, if and to the extent that the exemption relates to an investment advisory contract with any person that the Commission determines does not need the protections of subsection (a)(1) of this section, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with this section.

(Aug. 22, 1940, ch. 686, title II, § 205, 54 Stat. 852; Pub. L. 86–750, § 7, Sept. 13, 1960, 74 Stat. 887; Pub. L. 91–547, § 25, Dec. 14, 1970, 84 Stat. 1432; Pub. L. 96–477, title II, § 203, Oct. 21, 1980, 94 Stat. 2290; Pub. L. 100–181, title VII, § 703, Dec. 4, 1987, 101 Stat. 1263; Pub. L. 104–290, title II, § 210, Oct. 11, 1996, 110 Stat. 3436.)

Amendments

1996—Subsec. (b)(4), (5). Pub. L. 104–290, § 210(1), added pars. (4) and (5).

Subsec. (e). Pub. L. 104–290, § 210(2), added subsec. (e).

1987—Pub. L. 100–181 completely revised and expanded provisions on investment advisory contracts, changing structure of section from a single unlettered paragraph to one consisting of four subsections lettered (a) to (d).

1980—Pub. L. 96–477 provided that par. (1) of this section was not to apply with respect to any investment advisory contract between an investment adviser and a business development company so long as the compensation provided for in such contract did not exceed 20 per cent of the realized capital gains upon the funds of the business development company and such business development company did not have outstanding any option, warrant, or right issued pursuant to section 80a–60 (a)(3)(B) of this title and did not have a profit-sharing plan.

1970—Pub. L. 91–547 substituted reference to section “80b–3(b)” for “80b–3” of this title in first sentence, redesignated as second sentence former third sentence, designating existing provisions as cl. (A) and adding cl. (B) and items (i) and (ii) and provision respecting compensation based on asset value of company or fund under management averaged over a specified period in relation to investment record of an index of securities or such other measure of investment performance specified by Commission rules, regulations, or orders, inserted third sentence provision respecting point from which compensation is to be measured, substituted in fourth, formerly third, sentence “paragraphs (2) and (3) of this section” for “this section” and in definition of “investment advisory contract” the words “account of another person other than an investment company registered under subchapter I of this chapter” for “account for a person other than an investment company”.

1960—Pub. L. 86–750 substituted “unless exempt from registration pursuant to” for “registered under”.

Effective Date of 1970 Amendment

Amendment by Pub. L. 91–547 effective on expiration of one year after Dec. 14, 1970, see section 30(1) of Pub. L. 91–547, set out as a note under section 80a–52 of this title.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 5, 2009 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

Transfer of Functions

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.