

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR

In the matter of the adoption of New)	NOTICE OF ADOPTION,
Rules I and II, the amendment of)	AMENDMENT, AND TRANSFER
ARM 6.10.101, 6.10.102 securities)	
regulation; 6.10.208, 6.10.209,)	
6.10.210 for filings, 6.10.302,)	
6.10.305, 6.10.306 securities)	
exemptions, 6.10.401, 6.10.402)	
fraudulent and unethical practices,)	
6.10.501, 6.10.503, 6.10.504,)	
6.10.506, 6.10.507, and 6.10.510)	
broker-dealers and investment)	
advisers, and the transfer of ARM)	
6.10.608 transactional exemption)	

TO: All Concerned Persons

1. On April 30, 2020, the Commissioner of Securities and Insurance, Montana State Auditor (CSI), published MAR Notice No. 6-250 pertaining to the public hearing on the proposed adoption, amendment, and transfer of the above-stated rules at page 719 of the 2020 Montana Administrative Register, Issue Number 8.

2. The CSI has adopted the following rules as proposed: New Rule I (6.10.211) and New Rule II (6.10.308).

3. The CSI has amended the following rules as proposed: ARM 6.1.101, 6.10.208, 6.10.209, 6.10.210, 6.10.302, 6.10.305, 6.10.306, 6.10.401, 6.10.402, 6.10.501, 6.10.503, 6.10.504, 6.10.506, 6.10.507, and 6.10.510.

4. The CSI has amended the following rule with the following changes to the original proposal, stricken matter interlined:

6.10.102 DEFINITIONS As used in this subchapter, unless the context indicates otherwise:

(1) through (4) remain as proposed.

~~(5) "Investment adviser" means a person who is:~~

~~(a) an insurance agent who, for a fee, provides investment advice to a client and who must be licensed as an investment adviser or investment adviser representative;~~

~~(b) an insurance agent, who, for a fee, performs an analysis of a client's estate and who must be licensed as an investment adviser or investment adviser representative.~~

~~(c) an insurance agent who receives a commission from the sale of insurance to a client who makes such purchase with the proceeds of securities the~~

~~insurance agent recommended be sold and who must be licensed as an investment adviser or investment adviser representative;~~

~~(d) an insurance agent or other person who advertises or otherwise holds themselves out as a provider of investment advice.~~

(6) through (13) remain as proposed, but are renumbered (5) through (12).

AUTH: 30-10-107, MCA

IMP: 30-10-104, 30-10-107, MCA

5. The CSI has transferred ARM 6.10.608 to 6.10.307 as proposed.

6. The CSI has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT NO. 1: On several occasions, the Economic Affairs Interim Committee (EAIC) objected to MAR Notice No. 6-250 under 2-4-305(9), MCA, asking the CSI to delay adoption of the proposed rule. The EAIC asked for the rationale for the rule notice.

RESPONSE NO. 1: The CSI met in person and telephonically with the EAIC on several occasions to discuss the rule notice. The discussions ultimately focused on consideration of the proposed new definition of "Investment adviser" in ARM 6.10.102(5)(a) through (d). On September 10, 2020, the CSI met telephonically with the EAIC where the CSI indicated that it would delete ARM 6.10.102(5)(a) through (d) in the final rule. Based on the same, the EAIC has withdrawn its objection, based on this deletion.

COMMENT NO. 2: We object to the proposed amendment to ARM 6.10.102(5)(a) through (d), because an investment adviser is not an insurance agent.

RESPONSE NO. 2: See the CSI's response to Comment No. 1 above, deleting ARM 6.10.102(5)(a) through (d) in the final rule.

COMMENT NO. 3: Writing on behalf of 12 state-registered investment advisers, we object to the proposed amendment of ARM 6.10.402, believing it is unnecessary and should not be deemed a fraudulent and unethical practice if an adviser accesses a client's account held at another financial institution with the client's permission.

RESPONSE NO. 3: When an adviser accesses a client's account with the client's own unique log-in, the adviser is in effect pretending to be that client and has the same access to the account as the client, raising multiple concerns including, but not limited to, cybersecurity risks, custody concerns, and other issues. The updated rule will permit access to a client's account where certain conditions are met; please see ARM 6.10.402(1)(w)(i) through (iii). Finally, these proposed changes implement amendments made to the NASAA Prohibited Conduct of Investment Advisers, Investment Adviser Representatives and Federal Covered Investment Advisers

Model Rule USA 2002 502(b) and NASAA Unethical Business Practices of Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers Model Rule 102(a)(4)-1. Accordingly, the CSI will amend ARM 6.10.402 as proposed.

COMMENT NO. 4: Writing on behalf of 12 state-registered investment advisers, we object to the proposed amendment of ARM 6.10.510, requiring the implementation of written physical security and cybersecurity policies and procedures and a business continuity and succession plan. We believe the rules will be overly burdensome and add another layer of regulation and oversight that will adversely impact an adviser's ability to compete in the current business environment.

RESPONSE NO. 4: The CSI believes the physical security and cybersecurity safeguards required by the proposed amendment are more than reasonably necessary to aid in the protection of a client's personally identifiable information and other sensitive and confidential information from cybersecurity and physical security threats and breaches. Similarly, a business continuity and succession plan should ensure the continuity of services and the smooth wind down of an adviser's business in the event of death or other disruption of business activities – all of which protect and minimize risk to the adviser's clients. Further, the amendments incorporate provisions of the NASAA Model Rule on Business Continuity and Succession Planning Model Rule 203(a)-1A, and Investment Adviser Information Security and Privacy Rule. Accordingly, the CSI will amend ARM 6.10.510 as proposed.

/s/ Mary Belcher
Mary Belcher
Rule Reviewer

/s/ Michelle Dietrich
Michelle Dietrich
Chief Legal Counsel

Certified to the Secretary of State October 13, 2020.