STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION

In the matter of:

Sixth Transition Order administering the
Michigan Uniform Securities Act

Order No. 2011-009-M
_____/

Issued and entered
on March 11, 2011

By: _____
Ken Ross
Commissioner

SIXTH TRANSITION ORDER ADMINISTERING THE MICHIGAN UNIFORM SECURITIES ACT (2002), 2008 PA 551

WHEREAS, on October 1, 2009, the Michigan Uniform Securities Act (2002), 2008 PA 551, MCL 451.2101 (the "Act") *et seq.*, took effect; and

WHEREAS, Section 102(a) of the Act, MCL 451.2102(a) designates the Office of Financial and Insurance Regulation (OFIR) as the Administrator of the Act; and

WHEREAS, the Administrator is authorized under Section 605 of the Act, MCL 451.2605, to issue such orders as are necessary in the public interest or for the protection of investors that are consistent with the purposes intended by the Act; and

WHEREAS, the Administrator issued the following Transition Orders implementing the Act: (1) Order No. 09-049-M (First Transition Order), dated September 1, 2009; (2) Order No. 09-055-M (Second Transition Order), dated September 30, 2009; (3) Order No. 09-070-M, dated December 18, 2009 (Third Transition Order); Order No.10-026-M, dated March 11, 2010 (Fourth Transition Order); Order No. 10-097-M, dated November 1, 2010 (Fifth Transition Order); and

WHEREAS, Paragraph 7 of the First Transition Order, as amended by the Fourth Transition Order, prohibited new applicants for investment adviser registration and all investment advisers without custody orders from taking custody of client funds pursuant to Section 411(6) of the Act, MCL 451.2411(6), unless expressly authorized by the Administrator by order; and

WHEREAS, Paragraph 12(b) of the First Transition Order prohibited an investment adviser or an investment adviser representative from entering into, extending,

or renewing an investment advisory contract unless it provides that the investment adviser, investment adviser representative, or federal covered 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, pursuant to Section 502(3)(b) of the Act, MCL 451.2502(3)(b); and

WHEREAS, Section 411(1) of the Act, MCL 451.2411(1), authorizes the Administrator to establish financial requirements for state registered investment advisers; and

WHEREAS, on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173 (the "Dodd-Frank Act") was enacted, repealing the "private adviser" exemption from registration with the Securities and Exchange Commission under the Investment Advisers Act of 1940, 15 USC §80b-1 *et seq.*, as amended (the "Advisers Act") and transferring to and establishing state regulatory responsibility for investment advisers with assets under management less than $100,000,000.00, and establishing new exemptions from registration; and

WHEREAS, the aforementioned provisions of the Dodd-Frank Act will take effect on July 21, 2011; and

WHEREAS, the Administrator anticipates that at least 100 investment advisers will seek registration in Michigan as a result of the passage of the Dodd-Frank Act.

NOW, THEREFORE, IT IS ORDERED as follows:

1. Pursuant to Section 411(6) of the Act, MCL 451.2411(6), Paragraph 7 of the First Transition Order, as amended by the Fourth Transition Order is further amended as follows:

> 7. ~~All new applicants for investment adviser registration and all investment advisers without custody orders ISSUED BY THE ADMINISTRATOR~~ AN INVESTMENT ADVISER IS ~~are prohibited~~ **PERMITTED,** ~~under Section 411(6) of the Act, MCL 451.2411(6),~~ to take and maintain custody of client funds AND ~~or~~ securities ~~until standards for maintaining custody of customer securities and funds are established by further order or promulgation of administrative rules; However, the administrator may still review written requests for custody orders submitted by an investment adviser, and if the Administrator approves such request he may issue a custody order to that investment adviser, which order may include limitations, conditions or other requirements as~~ AS LONG AS THE INVESTMENT ADVISER MEETS THE REQUIREMENTS OF AT LEAST ONE OF PARAGRAPHS (a), (b) OR (c) BELOW:
>
> (a) THE INVESTMENT ADVISER (i) SATISFIES THE REQUIREMENTS OF RULE 206(4)-2 PROMULGATED UNDER

THE ADVISERS ACT, 17 CFR 275.206(4)-2, SUCH THAT THE CUSTODY OF CLIENT FUNDS BY THE INVESTMENT ADVISER WOULD NOT BE DEEMED A FRAUDULENT, DECEPTIVE OR MANIPULATIVE ACT, PRACTICE OR COURSE OF BUSINESS UNDER SUCH RULE IF IT WERE APPLICABLE TO THE INVESTMENT ADVISER, OR (ii) WOULD OTHERWISE NOT BE PRECLUDED FROM TAKING AND MAINTAINING CUSTODY OF CUSTOMER FUNDS UNDER FEDERAL LAW OR REGULATIONS THEN IN EFFECT AND APPLICABLE TO FEDERAL COVERED INVESTMENT ADVISERS, IF THEY WERE APPLIED TO THE INVESTMENT ADVISER; OR

(b) THE INVESTMENT ADVISER PROVIDES ADVISORY SERVICES EXCLUSIVELY TO "PRIVATE FUNDS," AS DEFINED IN SECTION 402(a) OF THE DODD-FRANK ACT, PROVIDED THAT THE REQUIREMENTS OF SUBPARAGRAPHS (i) AND (ii) BELOW ARE SATISFIED:

(i) THE EQUITY HOLDERS OF SUCH PRIVATE FUND ARE COMPRISED EXCLUSIVELY OF PERSONS WHO ARE:

(A) "QUALIFIED CLIENTS" AS DEFINED IN RULE 205-3(d)(1) PROMULGATED UNDER THE ADVISERS ACT, 17 CFR 257.205-3(d)(1); OR

(B) "ACCREDITED INVESTORS" AS DEFINED IN RULE 501(a) OF REGULATION D PROMULGATED UNDER THE SECURITIES ACT OF 1933, AS AMENDED; AND

(ii) CUSTODY OF THE FUNDS OR SECURITIES IS MAINTAINED PURSUANT TO THE TERMS OF ONE OR MORE WRITTEN AGREEMENTS, WHICH MAY INCLUDE A LIMITED PARTNERSHIP AGREEMENT, A LIMITED LIABILITY COMPANY AGREEMENT OR OTHER SIMILAR ORGANIZATIONAL OR OPERATING AGREEMENTS, BETWEEN SUCH ADVISER AND ITS PRIVATE FUND CLIENTS; OR

(c) THE INVESTMENT ADVISER IS OTHERWISE PERMITTED BY RULE OR ORDER OF THE ADMINISTRATOR TO TAKE AND MAINTAIN CUSTODY OF CLIENT FUNDS OR SECURITIES AND COMPLIES WITH SUCH RULE OR ORDER.

IT IS FURTHER ORDERED that an amended paragraph 7, without editing shown, be immediately posted to the OFIR website, http://www.michigan.gov/dleg/0,1607,7-154-10555_13047_32915---,00.html:

> 7. An investment adviser is permitted to take and maintain custody of client funds and securities as long as the investment adviser meets the requirements of at least one of paragraphs (a), (b) or (c) below:
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> (a) The investment adviser (i) satisfies the requirements of Rule 206(4)-2 promulgated under the Advisers Act, 17 CFR 275.206(4)-2, such that the custody of client funds by the investment adviser would not be deemed a fraudulent, deceptive or manipulative act, practice or course of business under such rule if it were applicable to the investment adviser, or (ii) would otherwise not be precluded from taking and maintaining custody of customer funds under federal law or regulations then in effect and applicable to federal covered investment advisers, if they were applied to the investment adviser; or
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> (b) the investment adviser provides advisory services exclusively to "Private Funds," as defined in section 402(a) of the Dodd-Frank Act, provided that the requirements of subparagraphs (i) and (ii) below are satisfied:
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> (i) the equity holders of such private fund are comprised exclusively of persons who are:
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> (A) "qualified clients" as defined in Rule 205-3(d)(1) promulgated under the Advisers Act, 17 CFR 257.205-3(d)(1); or
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> (B) "accredited investors" as defined in Rule 501(a) of Regulation D promulgated under the Securities Act of 1933, as amended; and
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> (ii) custody of the funds or securities is maintained pursuant to the terms of one or more written agreements, which may include a limited partnership agreement, a limited liability company agreement or other similar organizational or operating agreements, between such adviser and its private fund clients; or
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> (c) the investment adviser is otherwise permitted by rule or order of the Administrator to take and maintain custody of client funds or securities and complies with such rule or order.

2. Pursuant to Section 502(3)(b) of the Act, MCL 451.2502(3)(b), the introductory paragraph and subparagraph (b) of Paragraph 12 of the First Transition Order are amended as follows:

> 12. Under MCL 451.2502(3)(b), authorizing the ~~a~~Administrator to specify the contents of an investment advisory contract, an investment adviser~~, investment adviser representative, or federal covered investment adviser~~ shall not enter into, extend, or renew any investment advisory contract unless it provides in writing all of the following:
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> (b) that the investment adviser~~, investment adviser representative or federal covered 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 ("PERFORMANCE COMPENSATION"), EXCEPT THAT AN INVESTMENT ADVISORY CONTRACT MAY PROVIDE FOR COMPENSATION (INCLUDING PERFORMANCE COMPENSATION) THAT WOULD BE PERMITTED FOR FEDERAL COVERED INVESTMENT ADVISERS UNDER THE ADVISORS ACT OR ANY RULE PROMULGATED UNDER THE ADVISORS ACT, INCLUDING RULE 205-3 (17 CFR 275.205-3), AND AN INVESTMENT ADVISER MAY RECEIVE SUCH PERFORMANCE COMPENSATION. FOR PURPOSES OF THIS SUBPARAGRAPH 12(b): (i) THE TERM "INVESTMENT ADVISORY CONTRACT," AS USED IN RULE 205-3 (17 CFR 275.205-3) MAY INCLUDE A LIMITED PARTNERSHIP AGREEMENT, A LIMITED LIABILITY COMPANY AGREEMENT OR OTHER SIMILAR ORGANIZATIONAL OR OPERATING AGREEMENTS; AND (ii) THE TERM "QUALIFIED CLIENT" AS USED IN RULE 205-3 (17 CFR 275.205-3) SHALL INCLUDE "ACCREDITED INVESTORS" AS DEFINED IN RULE 501(a) OF REGULATION D PROMULGATED UNDER THE SECURITIES ACT OF 1933, AS AMENDED.

IT IS FURTHER ORDERED that an amended paragraph 12(b), without editing shown, be immediately posted to the OFIR website, http://www.michigan.gov/dleg/0,1607,7-154-10555_13047_32915---,00.html:

> 12. Under MCL 451.2502(3)(b), authorizing the Administrator to specify the contents of an investment advisory contract, an investment adviser shall not enter into, extend, or renew any investment advisory contract unless it provides in writing all of the following:
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> **********

(b) 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 ("Performance Compensation"), except that an investment advisory contract may provide for compensation (including Performance Compensation) that would be permitted for federal covered investment advisers under the Advisors Act or any rule promulgated under the Advisors Act, including rule 205-3 (17 CFR 275.205-3), and an investment adviser may receive such compensation. For purposes of this subparagraph 12(b): (i) the term "Investment Advisory Contract," as used in Rule 205-3 (17 CFR 275.205-3) may include a limited partnership agreement, a limited liability company agreement or other similar organizational or operating agreements; and (ii) the term "qualified client" as used in Rule 205-3 (17 CFR 275.205-3) shall include "accredited investors" as defined in Rule 501(a) of Regulation D promulgated under the Securities Act of 1933, as amended.

3. For the purposes of the exemption from registration contained in Section 403(2)(c) of the Act, MCL 451.2403(2)(c), the term "Institutional Investor" as defined in Section 102a(a) of the Act, MCL 451.2102a(a), includes a "private fund", as defined in Section 402(a) of the Dodd-Frank Act; provided that the equity holders of such private fund are comprised exclusively of persons who are:

(a) "qualified clients" as defined in Rule 205-3(d)(1) promulgated under the Advisers Act, 17 CFR 257.205-3(d)(1); or

(b) "accredited investors" as defined in Rule 501(a) of Regulation D promulgated under the Securities Act of 1933, as amended.

Ken Ross, Administrator
Commissioner of the Office of
Financial & Insurance Regulation