

Massachusetts Securities Division Adopts Regulations Regarding The Charging Of Performance Based Fees By Investment Advisers

August 15, 2011

THE FOLEY ADVISER - AUGUST 15, 2011

written by [Peter M. Rosenblum](#), [Jeffrey D. Collins](#)

On August 8, 2011, the Massachusetts Securities Division (the "Division") adopted regulations regarding the charging of performance based fees by investment advisers (the "Performance Fee Rule".) Under new regulation 950 CMR 12.205(9)(c)(17), investment advisers in Massachusetts (regardless of whether they are registered with the Division or exempt from registration) will be prohibited from charging performance based fees unless those fees comply with Rule 205-3 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). Rule 205-3 states that an investment adviser may only charge a performance fee with respect to "qualified clients" (see below). The Performance Fee Rule will become effective upon publication in the Massachusetts Register. The next publication of the Massachusetts Register is scheduled for August 19, 2011.

Performance Based Fees

Rule 205-3 provides an exception to the general prohibition on performance based fees if the client is a "qualified client." On July 12, 2011, the SEC issued an order (the "Order") raising the dollar thresholds set forth in Rule 205-3, such that a performance fee may only be charged if the client (i) has at least \$1,000,000 under management of the investment adviser or (ii) has a net worth of more than \$2,000,000. These tests are measured at the time the client contract is entered into. The Order becomes effective as of September 19, 2011 (until such time, the dollar tests under Rule 205-3 are \$750,000 under management of the investment adviser or a net worth in excess of \$1,500,000). It should be noted that Qualified Purchasers (as defined in section 2(a)(51)(A) of the Investment Company Act of 1940) remain eligible to be charged performance fees in all cases.

If you have questions about the Performance Fee Rule, please contact [Jeffrey D. Collins](#) or [Peter M. Rosenblum](#) of Foley Hoag's Investment Management group, or contact your lawyer at Foley Hoag.