

Massachusetts Securities Division Adopts Regulations for Use of Expert Network Services 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 use of expert network services by investment advisers in Massachusetts (regardless of whether the adviser is registered with the Division or exempt from registration). Under new 950 CMR 12.205(9)(c)(16), investment advisers in Massachusetts will be required to obtain a written certification (see below) before engaging an expert network service (the "Expert Network Rule"). The Expert Network Rule will become effective December 1, 2011.

Use of Expert Network Services

The Expert Network Rule states that prior to obtaining Investment Consulting Services in exchange for compensation, either directly from a consultant or indirectly through a Matching or Expert Network Service, the investment adviser must obtain a written certification that:

- (i) describes all confidentiality restrictions relevant to the potential consultation which the consultant has, or reasonably expects to have;
- (ii) affirmatively states that the consultant will not provide any Confidential Information to the investment adviser; and
- (iii) is signed and dated by the consultant, and is accurate as of the date of the initial, and any subsequent, consultations.

In addition, an investment adviser who comes into possession of material Confidential Information through a consultation is precluded from trading any relevant security until such time as the Confidential Information is made public. For purposes of the Expert Network Rule, (a) Confidential Information means any non-public information, which one is bound by a confidentiality agreement or fiduciary (or similar) duty not to disclose, (b) Matching or Expert Network Service means a firm that for compensation matches consultants with investment advisers and (c) Investment Consulting Services means a consultation for the purposes of assisting the investment adviser's decision as to whether to buy, sell, or abstain from buying or selling, positions in client accounts.

It should also be noted that the Division will not object to an investment adviser's procurement of an electronic signature for the certification, provided the investment adviser retains the electronic documents in compliance with general books and records requirements.

Applicability to SEC Registered Investment Advisers in Massachusetts

The adopting release is vague with respect to whether the Expert Network Rule would be preempted by federal law and therefore not applicable to SEC registered investment advisers in Massachusetts. As a conservative approach, we would recommend that SEC registered investment advisers based in Massachusetts comply with the Expert Network Rule given this ambiguity.

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