Comments from R. Michael Underwood to the Florida Office of Financial Regulation
Submitted via flrules.org on February 6, 2015

On proposed new rule 69W-600.0151, F.A.C.:

Subject: The Minimum Net Capital Requirement Should Be Abolished or a Bond System Established

Comment: The minimum net capital requirement for investment advisers should be abolished. The Financial Services Commission (the "Commission") is not required to impose a net capital requirement. Indeed, the Commission is not permitted to impose this burden on investment advisers unless it is found to protect the public. See Fla. Stat. § 517.12(9)(b) ("The commission may by rule require the maintenance of a minimum net capital for … investment advisers … to assure adequate protection for the investing public"). This kind of regulation has the anticompetitive effect of excluding those unable to meet and maintain the minimum net capital requirement. Industry professionals recognize that the Commission's net capital requirement serves more as a barrier to entry or a regulatory trap than protection for the investing public. Moreover, the Securities and Exchange Commission, while requiring maintenance of minimum net capital for broker-dealers, does not require minimum net capital for investment advisers, placing Florida state-covered investment advisers at a competitive disadvantage. See 17 C.F.R. § 240.15c3-1.

If the Commission, nevertheless, believes minimum net capital requirements for Florida investment advisers is sound policy, why is use of a surety bond to satisfy such a requirement, as advocated at the rule development workshop on December 18, 2014, not permitted by this rule? Such a rule is needed because surety bonds are not considered "assets" under generally accepted accounting principles, which are incorporated within the proposed rule. See Notice of Proposed Rule, 41 Fla. Admin. Weekly 533 (January 29, 2015) (to be codified at 69W-600.0161(1)(c), F.A.C.). Other states allow state-covered investment advisers to secure a bond in lieu of maintaining required minimum net capital. See, e.g., S.C. Code of Regulations R. 13-406; 6 Del. Admin. Code SEC 704. Allowing Florida investment advisers to satisfy the minimum net capital requirement through a surety bond would genuinely protect the investing public. It would additionally function as insurance against an investment adviser's inadvertent failure to meet the requirements and eliminate uncertainty as to when the net capital calculation must be made.

Respectfully submitted,

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On proposed amendments to rules 69W-600.0132 and 600.0131, F.A.C.

Subject: Mandatory Concurrent Invoicing Is Unnecessary and Should Be Eliminated

Comment: Florida's concurrent invoicing requirement should be abolished. See Notice of Proposed Rule, 41 Fla. Admin. Weekly 526 (January 29, 2015) (to be codified at 69W-600.0132(2)(i)2., F.A.C.) (requiring investment advisers to provide its client a concurrent invoice each time a custodian is billed for a fee to be deducted from the client's account); See also Notice of Proposed Rule, 41 Fla. Admin. Weekly 523 (January 29, 2015) (to be codified at 69W-600.0131(1)(v), F.A.C.) (failure to send an invoice to an investment adviser's client each time a fee is deducted from the client's account is a prohibited business practice). The required concurrent invoice is duplicative of the account statement sent to the investment adviser's client by the qualified custodian. The concurrent invoice is required to repeat the methodology for determination of the investment adviser's fee already found in the investment adviser's Advisory Contract, New Account Form, Form ADV and annual brochure. Moreover, Florida advisers are required to have a reasonable basis for believing the qualified custodian will send that account statement, at least quarterly, to each of the adviser's clients for which it maintains funds or securities, identifying funds and securities in the account at the end of the period. See Rule 69W-600.0132(2)(d)1., F.A.C. This requirement tracks the federal regulation at 17 C.F.R. § 275.206(4)–2(a)(3), but the additional invoice required to be sent by investment advisers in Florida is absent from the federal scheme. Florida's requirement is a trap for former federal-covered advisers and places all state-covered advisers at a competitive disadvantage.

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On proposed rules 69W-1000.001, 600.0131, 600.0132, 600.014, and 600.0151

Subject: The Punishment Matrix Does Not Reflect Explicit Legislative Intent and Should Be Withdrawn With Any Proposed Rules Reference There

Comment: The Florida Office of Financial Regulation (the "Office") should respond to many first offense rule violations with a notice of noncompliance and the Florida Financial Services Commission (the "Commission") should indicate the same on the Division of Securities' disciplinary guidelines or "punishment matrix." As the punishment matrix currently exists and as proposed, fines and other sanctions for first offenses of many violations on the chart should not be authorized. This is because the Commission has failed in its duty under Fla. Stat. § 120.695(2)(b) to identify those of its rules that violation of which harm no one. It is beyond question "the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with an agency's rules." Fla. Stat. § 120.695(1). Moreover, "[i]t is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response [when] it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it." Id. The Office's effort to educate newly-registered investment advisers is commendable, but because many Florida investment advisers are former federal-covered advisers, they are beyond the reach of these efforts. Because the Commission has ignored the explicitly stated intent of the Legislature that requires many of the boxes in the first offense column contain only "notice of noncompliance," the Commission should withdraw this proposed rule and all of its pending regulations that propose offenses appearing in the disciplinary guidelines of the Office's Division of Securities until the review required by law has been conducted.

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