191—50.39(502) Custody of client funds or securities by investment advisers.

50.39(1) *Safekeeping required.* An investment adviser registered or required to be registered pursuant to the Act will be deemed to have committed an unlawful and fraudulent, deceptive, or manipulative act, practice or course of business if the investment adviser has custody of client funds or securities unless:

a. The investment adviser promptly notifies the administrator in writing using Form ADV that the investment adviser has or may have custody.

b. A qualified custodian maintains client funds and securities:

(1) In a separate account for each client under each client's name;

(2) In accounts that contain only the investment adviser's client funds and securities under the investment adviser's name as agent or trustee for the clients; or

(3) The client, or the client's designated independent representative, is promptly notified in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained when the account is opened and following any changes to the information.

An investment adviser who intends to have custody of client funds or securities but is not able to utilize a "qualified custodian" as defined by paragraph 50.39(3)*"c"* must obtain approval from the administrator prior to taking custody and must comply with all of the applicable provisions of this rule including those provisions that are designated to be performed by a qualified custodian.

c. Account statements are sent:

(1) By a qualified custodian on no less than a quarterly basis to each client, or to the client's designated independent representative, whose funds or securities are kept in custody identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period. The investment adviser is not required to confirm the receipt of the account statements, but must have a reasonable belief that the qualified custodian is complying with this requirement; or

(2) By the investment adviser on no less than a quarterly basis to each client, or the client's designated independent representative, whose funds or securities are kept in custody identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period. An independent certified public accountant must verify all client funds and securities by actual examination at least once during each calendar year at a random time chosen by the accountant without prior notice or announcement to the investment adviser. The investment adviser shall direct the accountant to submit a copy of the auditor's report and financial statements to the administrator within 30 days after the completion of the examination, along with a letter indicating that the accountant examined the funds and securities and describing the nature and extent of the examination. The investment adviser shall also direct the accountant that the accountant is to directly notify the administrator in writing of any finding of a material discrepancy within one business day of the finding. The accountant may provide notice of the discrepancy to the administrator by either first-class mail or by electronic means followed by first-class mail; and

(3) By the investment adviser to each limited partner, member, or other beneficial owner, or the person's independent representative, if the investment adviser is a general partner of a limited partnership or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle.

d. An investment adviser who has custody as defined by subparagraph 50.39(3)*"a"*(3) and has fees directly deducted from client accounts provides the following safeguards:

(1) The investment adviser must obtain written authorization from the client to deduct advisory fees from the account held with the qualified custodian;

(2) Each time a fee is directly deducted from a client account, the investment adviser must concurrently:

1. Send the qualified custodian notice of the amount of the fee to be deducted from the client's account; and

2. Send the client an invoice itemizing the fee. The itemization must provide, at a minimum, the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee; and

(3) The investment adviser must notify the administrator in writing on Form ADV that the investment adviser intends to use the safeguards provided above.

e. An investment adviser who has custody as defined by subparagraph 50.39(3)*"a"*(4) and who does not meet the exception provided by paragraph 50.39(2)*"c"* complies, in addition to compliance with the safeguards set forth in paragraphs 50.39(1)*"a"* to *"c,"* with the following:

(1) Engages an independent party to review all fees, expenses, and capital withdrawals from the pooled accounts;

(2) Sends to the independent party all invoices and receipts detailing the amount of the fees, expenses, or capital withdrawals and providing the method of calculation so that the independent party can determine that a payment is in accordance with the pooled investment vehicle standards (generally the partnership agreement or membership agreement). The investment adviser shall direct the independent party to forward approval for payment of the invoice to the qualified custodian with a copy to the investment adviser; and

(3) Notifies the administrator in writing on Form ADV that the investment adviser intends to use the safeguards provided above.

For purposes of this paragraph, an "independent party" is a person that is engaged by the investment adviser to act as a monitor of the payment of fees, expenses, and capital withdrawals from the pooled investment; that does not control and is not controlled by or under common control with the investment adviser; and that does not have and has not had within the past two years a material business relationship with the investment adviser.

f. When a trust retains an investment adviser, investment adviser representative, or employee, director or owner of an investment adviser as trustee and the investment adviser acts as the investment adviser to that trust, the investment adviser:

(1) Notifies the administrator in writing that the investment adviser intends to use the safeguards provided in subparagraphs (2) and (3) below. Such notification is required to be given on Form ADV.

(2) Sends to the grantor of the trust, the attorney for the trust if it is a testamentary trust, the cotrustee (other than the investment adviser, investment adviser representative, or employee, director or owner of the investment adviser), or a defined beneficiary of the trust, at the same time that the investment adviser sends any invoice to the qualified custodian, an invoice showing the amount of the trustees' fee or investment management or advisory fee, the value of the assets on which the fees were based, and the specific manner in which the fees were calculated.

(3) Enters into a written agreement with a qualified custodian which specifies:

1. That the qualified custodian shall not deliver trust securities to the investment adviser, any investment adviser representative, or any employee, director or owner of the investment adviser, nor transmit any funds to the investment adviser, any investment adviser representative or employee, director or owner of the investment adviser, except that the qualified custodian may pay trustees' fees to the trustee and investment management or advisory fees to the investment adviser, provided that:

- The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the cotrustee (other than the investment adviser, investment adviser representative, or employee, director or owner of the investment adviser), or a defined beneficiary of the trust has authorized the qualified custodian in writing to pay the fees;
- The statements for the fees show the amount of the fees for the trustee and, in the case of statements for investment management or advisory fees, show the value of the trust assets on which the fee is based and the manner in which the fee was calculated; and
- The qualified custodian agrees to send to the grantor of the trust, the attorneys for a testamentary trust, the cotrustee (other than the investment adviser, investment adviser representative, or employee, director or owner of the investment adviser), or a defined beneficiary of the trust, at least quarterly, a statement of all disbursements from the account of the trust, including the amount of investment management fees paid to the investment adviser and the amount of trustees' fees paid to the trustee.

2. Except as otherwise set forth in the first bulleted paragraph below, that the qualified custodian may transfer funds or securities, or both, of the trust only upon the direction of the trustee (who may be the investment adviser, investment adviser representative, or employee, director or owner of the investment adviser), whom the investment adviser has duly accepted as an authorized signatory. The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the cotrustee (other than the investment adviser, investment adviser representative, or employee, director or owner of the investment adviser), or a defined beneficiary of the trust, must designate the authorized signatory for management of the trust. The direction to transfer funds or securities, or both, shall only be made:

- To a trust company, bank trust department or brokerage firm independent of the investment adviser for the account of the trust to which the assets relate;
- To the named grantors or to the named beneficiaries of the trust;
- To a third person independent of the investment adviser in payment of the fees or charges of the third person including, but not limited to, the attorney's, accountant's, or qualified custodian's fees for the trust; and taxes, interest, maintenance or other expenses, if there is property other than securities or cash owned by the trust;
- To third persons independent of the investment adviser for any other purpose legitimately associated with the management of the trust; or
- To a broker-dealer in the normal course of portfolio purchases and sales, provided that the transfer is made on a payment-against-delivery basis or a payment-against-trust receipt.

50.39(2) *Exceptions.*

a. Shares of mutual funds. With respect to the shares of an open-end company as it is defined by Section 5(a)(1) of the Investment Company Act of 1940, an investment adviser may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with subrule 50.39(1).

b. Certain privately offered securities. An investment adviser is not required to comply with subrule 50.39(1) with respect to securities that are:

(1) Acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(2) Uncertificated, and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(3) Transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

This exception is not available with respect to securities held for the account of a limited partnership, limited liability company, or other type of pooled investment vehicle unless the financial statements of the limited partnership, limited liability company, or other type of pooled investment vehicle are audited, the audited financial statements are distributed in compliance with paragraph 50.39(2)*"c,"* and the investment adviser notifies the administrator in writing on Form ADV that the investment adviser intends to comply with this subrule.

c. Limited partnerships subject to annual audit. An investment adviser is not required to comply with paragraph 50.39(1)*"c"* with respect to the account of a limited partnership, limited liability company, or other type of pooled investment vehicle that is subject to audit at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners, members, or other beneficial owners within 120 days of the end of its fiscal year. The investment adviser must notify the administrator in writing on Form ADV that the investment adviser intends to comply with this paragraph.

d. Registered investment companies. An investment adviser is not required to comply with this rule with respect to the account of an investment company registered pursuant to the Investment Company Act of 1940.

e. Beneficial trusts. An investment adviser is not required to comply with this rule or the net worth and bonding requirements of rules 191—50.40(502), 191—50.41(502), and 191—50.43(502) if the investment adviser has custody solely because the investment adviser, investment adviser representative, or employee, director or owner of the investment adviser is a trustee for a beneficial trust and if all of the following conditions are met for each trust:

(1) The beneficial owner of the trust is a parent, a grandparent, a spouse, a sibling, a child or a grandchild of the trustee, including "step" relationships;

(2) The investment adviser provides a written statement to each beneficial owner of the account setting forth a description of the requirements of subrule 50.39(1) and the reasons for noncompliance with the provisions of subrule 50.39(1);

(3) The investment adviser obtains from each beneficial owner a signed and dated statement acknowledging the receipt of the written statement; and

(4) The investment adviser retains a copy of the documents required by subparagraphs 50.39(2)*"e"*(2) and (3) until the account is closed or the investment adviser is no longer trustee.

50.39(3) *Definitions.* For the purposes of this rule:

a. "Custody" means holding, directly or indirectly, client funds or securities, having any authority to obtain possession of client funds or securities, or having the ability to appropriate client funds or securities. "Custody" includes:

(1) Possession of client funds or securities unless received inadvertently and returned to the sender promptly, but in no case later than three business days following inadvertent receipt;

(2) Receipt of checks drawn by clients and made payable to unrelated third parties, the record of which is maintained by the investment adviser in compliance with paragraph 50.42(1)*"v"* unless forwarded to the third party within 24 hours of receipt;

(3) Any arrangement including, but not limited to, a general power of attorney pursuant to which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the investment adviser's instruction; and

(4) Any capacity including, but not limited to, general partner of a limited partnership, managing member of a limited liability company, a comparable position for another type of pooled investment vehicle, or trustee of a trust that gives the investment adviser or a person supervised by the investment adviser legal ownership of or access to client funds or securities.

b. "Independent representative" means a person who:

(1) Acts as agent for an advisory client including, in the case of a pooled investment vehicle, limited partners of a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle, and who is by law or contract required to act in the best interest of the advisory client or the limited partners or members, or other beneficial owners;

(2) Does not control, is not controlled by, and is not under common control with the investment adviser; and

(3) Does not have and has not had within the past two years a material business relationship with the investment adviser.

c. "Qualified custodian" means the following independent institutions or entities that are not affiliated with the investment adviser by any direct or indirect common control and have not had a material business relationship with the investment adviser in the previous two years:

(1) A bank or savings association that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act;

(2) A registered broker-dealer holding client assets in customer accounts;

(3) A registered futures commission merchant registered pursuant to Section 4(f)(a) of the Commodity Exchange Act that is holding client funds and security futures or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon in customer accounts; and

(4) A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

This rule is intended to implement Iowa Code section 502.411(5).