

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 7 INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES
RULES OF CONDUCT AND PROHIBITED BUSINESS PRACTICES

12.11.7.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.7.1 NMAC - Rp, 12.11.7.1 NMAC, 1-1-2010]

12.11.7.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as an investment adviser and their representatives. To the extent that the conduct alleged constitutes fraud or deceit, the provisions of this section also apply to all other persons, in addition to investment advisers and investment adviser representatives, who advise others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing or selling securities or who, for compensation and as part of a regular business, issue or promulgate analyses or reports relating to securities.
[12.11.7.2 NMAC - Rp, 12.11.7.2 NMAC, 1-1-2010]

12.11.7.3 STATUTORY AUTHORITY: Section 58-13C-605A NMSA 1978 authorizes the director to adopt, amend and repeal rules necessary or appropriate to carry out the provisions of the New Mexico Uniform Securities Act, Sections 58-13C-101 to 701 NMSA 1978, hereinafter referred to in this Chapter 11 as the “New Mexico Uniform Securities Act”.
[12.11.7.3 NMAC - Rp, 12.11.7.3 NMAC, 1-1-2010]

12.11.7.4 DURATION: Permanent.
[12.11.7.4 NMAC - Rp, 12.11.7.4 NMAC, 1-1-2010]

12.11.7.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.7.5 NMAC - Rp, 12.11.7.5 NMAC, 1-1-2010]

12.11.7.6 OBJECTIVE: To implement new rules and revise existing rules to better reflect the realities of current financial, commercial and regulatory principles and practices affecting the securities markets.
[12.11.7.6 NMAC - Rp, 12.11.7.6 NMAC, 1-1-2010]

12.11.7.7 DEFINITIONS: [RESERVED]

12.11.7.8 [RESERVED]

12.11.7.9 CONTRACT WAIVING RIGHTS PROHIBITED: An investment adviser shall not enter into any contract with a customer if the contract contains any condition, stipulation or provision binding the customer to waive any rights under the New Mexico Uniform Securities Act, or any rule or order thereunder, or of the Investment Advisers Act of 1940. Any such condition, stipulation or provision is void.
[12.11.7.9 NMAC - Rp, 12 NMAC 11.3.9.2, 1-1-2010]

12.11.7.10 WRITTEN CONTRACT REQUIRED:

A. No registered investment adviser may enter into, extend or renew any investment advisory contract with a customer in this state unless the contract is in writing and a copy of the contract is given to the customer within 15 days after the execution of the contract. Such contract shall disclose, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or non-performance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.

B. It is unlawful to enter into, extend or renew any investment advisory contract if the investment advisory contract:

(1) provides for compensation to the investment adviser 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 unless such contract complies with rule 205-3 under the Investment Advisors Act of 1940;

(2) fails to provide in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

C. Paragraph (1) of Subsection B of this section shall not:

(1) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; and

(2) apply to an investment advisory contract with a person who is not a resident of the United States.

D. The director, by rule, upon the director's own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from Paragraph (1) of Subsection B of this section, if and to the extent that the exemption relates to an investment advisory contract with any person that the director determines does not need the protections of Paragraph (1) of Subsection B, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser or investment adviser representative, and such other factors as the director determines are consistent with this section. [12.11.7.10 NMAC - Rp, 12.11.7.10 NMAC, 1-1-2010]

12.11.7.11 [RESERVED]

12.11.7.12 PROHIBITED BUSINESS PRACTICES BY FEDERAL COVERED ADVISERS: The provisions of 12.11.7.13 and 12.11.7.14 NMAC apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). An investment adviser or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser or a federal covered adviser shall not engage in any unlawful, unethical or dishonest conduct or practices. [12.11.7.12 NMAC - Rp, 12.11.7.12 NMAC, 1-1-2010]

12.11.7.13 PROHIBITED BUSINESS PRACTICES BY INVESTMENT ADVISERS: The following are deemed to be unlawful, unethical, or dishonest conduct or practice by an investment adviser or investment adviser representative without limiting those terms to the practices specified herein:

A. recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser;

B. exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specific security shall be executed, or both;

C. inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account;

D. placing an order to purchase or sell a security for the account of a client without authority to do so;

E. placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client;

F. borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a depository institution engaged in the business of loaning funds;

G. loaning money to a client unless the investment adviser is a depository institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser;

H. misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or to misrepresent the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the

statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading;

I. providing a report or recommendation to any advisory client prepared by someone other than the investment adviser without disclosing that fact; this prohibition does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service;

J. charging a client an unreasonable advisory fee;

K. failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(1) compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

(2) charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the investment adviser or its employees;

L. guaranteeing a client that a specific result will be achieved (e.g. gain or no loss), with advice which will be rendered;

M. publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940;

N. disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client;

O. taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of such securities or funds and the adviser's action does not comply with the requirements of Rule 206(4)-2 under the Investment Advisers Act of 1940;

P. failing to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940 or any other practice contrary to the provisions of Section 215 of the Investment Advisers Act of 1940;

Q. engaging in any act, practice or course of business which is fraudulent, deceptive or manipulative, contrary to the provisions of or in violation of the New Mexico Uniform Securities Act or any other rule of the director;

R. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the New Mexico Uniform Securities Act or any rule or regulation thereunder;

S. using in a misleading manner any term or abbreviation that states or implies that a person has special expertise, certification, or training in financial planning, including, but not limited to, the misleading use of a senior-specific certification or designation as set forth in 12.11.17 NMAC;

T. having custody of client funds or securities unless the investment adviser or investment adviser representative complies with the provisions of 12.11.5.22 NMAC;

U. failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information by the investment adviser, or any investment adviser representative or employee, taking into consideration the nature of the investment adviser's business;

V. entering into, extending, or renewing any investment advisory contract that violates the provisions of this subsection;

(1) it is unlawful to enter into, extend or renew any investment advisory contract if the investment advisory contract:

(a) provides for compensation to the investment adviser 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 unless such contract complies with rule 205-3 under the Investment Advisers Act of 1940;

(b) fails to provide in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(c) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change;

(2) Subparagraph (a) of Paragraph (1) of this subsection shall not:

(a) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date; and

(b) apply to an investment advisory contract with a person who is not a resident of the United States;

(3) the director, by rule, upon the director's own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons or transactions, from Subparagraph (a) of Paragraph (1) of this subsection, if and to the extent that the exemption relates to an investment advisory contract with any person that the director determines does not need the protections of Subparagraph (a) of Paragraph (1) of this subsection, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser or investment adviser representative, and such other factors as the director determines are consistent with this section;

W. failing or refusing to furnish a client, upon reasonable request, information to which the client is entitled, or to respond to a formal written demand or complaint;

X. in connection with the offer, purchase or sale of a security, leading a client to believe that the investment adviser or investment adviser representative is in possession of material, non-public information that would affect the value of the security;

Y. failing to comply with any securities-related arbitration award, unless a proceeding to vacate or modify such award is pending or unless the time limit to commence such a proceeding has not yet expired; and

Z. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for an investment adviser or investment adviser representative to do directly under the provisions of the New Mexico Uniform Securities Act, this chapter or any other rule of the director.

[12.11.7.13 NMAC - Rp, 12.11.7.13 NMAC, 1-1-2010]

12.11.7.14 PROHIBITED BUSINESS PRACTICES LISTED ARE NOT EXCLUSIVE: The conduct set forth in 12.11.7.13 NMAC is not exclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers and federal covered advisers, to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

[12.11.7.14 NMAC - Rp, 12.11.7.14 NMAC, 1-1-2010]

HISTORY OF 12.11.7 NMAC:

Pre-NMAC History: Material in this part was derived from that previously filed with the commission of public records - state records center and archives:

FID 67-1, Regulation 67-62, General Requirements, 5-18-67

FID 76-1, Order 76-64, Regulation 76-1, Relating to Options Clearing Corporations, 3-26-76

SB Rule 84-1, New Mexico Blue Sky Regulations, 9-5-84

SD Rule 86-4.06, Rules of Conduct, 7-1-86

SD Rule 95-4.06, Rules of Conduct, 10-14-95

SD Rule 86-4.07, Prohibited Business Practices, 7-1-86.

History of Repealed Material:

12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices (filed 12/9/2008) repealed 1-1-2010.

Other History:

SD Rule 86-4.07, Prohibited Business Practices (filed 7-1-86) and SD Rule 95-4.06, Rules of Conduct (filed 10-14-95) was **renumbered** into first version of the New Mexico Administrative Code as 12 NMAC 11.3, Investment Advisers, Investment Advisor Representatives and Federal Covered Advisors, effective 5/01/1999.

Those relevant portions of 12 NMAC 11.3, Subparts 9, Rules of Conduct and Subpart 10, Prohibited Business Practices (filed 4-19-99), were renumbered, reformatted, amended and replaced by 12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices, effective 12-31-2008.

12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices (filed 12/9/2008) was replaced by 12.11.7 NMAC, Investment Advisers And Investment Adviser Representatives Rules of Conduct And Prohibited Business Practices, effective 1-1-2010.