

## **CHAPTER 73-02-09**

### **FRAUDULENT AND UNETHICAL SALES PRACTICES AND MANIPULATIVE CONDUCT**

#### **Section**

73-02-09-01	Fraudulent Practices of Dealers and Sales Agents
73-02-09-02	Unethical Practices of Dealers
73-02-09-03	Unethical Practices of Sales Agents

#### **73-02-09-01. Fraudulent practices.**

A person who engages in one or more of the following practices has engaged in an "act, practice, or course of business which operates or would operate as a fraud" under North Dakota Century Code section 10-04-15 but acts or practices not described in this rule may also be fraudulent.

1. Entering into a transaction with a customer in any security at an excessive price or at a price not reasonably related to the current market price of the security or receiving an excessive commission or profit under the rules of the national association of securities dealers.
2. Contradicting or negating the importance of any information contained in a prospectus or other offering materials with intent to deceive or mislead or using any advertising or sales presentation in a deceptive or misleading manner.
3. For any person, in connection with the offer, sale, or purchase of a security, or the recommendation of an offer, sale, or purchase of a security, to lead a customer to believe that the person is in possession of material, nonpublic information which would impact on the value of the security.
4. In connection with the solicitation of a sale or purchase of a security, engaging in a pattern or practice of making contradictory recommendations to different investors who have similar investment objectives for some investors to sell and others to purchase the same security at approximately the same time, when not justified by the particular circumstance of each investor.
5. Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by:
  - a. Transferring securities to a customer, another broker-dealer, or a fictitious account with the understanding that those securities will be returned to the broker-dealer or its nominees;
  - b. Parking, hiding, delaying, or withholding securities from trading; or
  - c. Engaging in any unreasonable delay in delivery of securities purchased by any customers or in the payment upon request of free credit balances.
6. Although nothing in this section precludes application of the general antifraud provisions against anyone for practices similar in nature to the practices discussed in this subsection, the following subsections specifically apply only in connection with the solicitation of a purchase or sale of over the counter equity securities that are not listed on the national association of securities dealers automated quotation system (NASDAQ):
  - a. Failing to disclose the firm's present bid and ask price of a particular security at the time of solicitation and confirmation.
  - b. Failing to advise the customer, both at the time of solicitation and on the confirmation, of any and all compensation related to a specific securities transaction to be paid to the agent including commissions, sales charges, or concessions.

- c. In connection with a principal transaction, failing to disclose, both at the time of solicitation and confirmation, a short inventory position in the firm's account of more than five percent of the issued and outstanding shares of the class of securities of the issuer if the firm is a market maker at the time of the solicitation.
  - d. Conducting sales contests in a particular security.
  - e. After a solicited purchase by a customer, failing or refusing, in connection with a principal transaction, to promptly execute sell orders.
  - f. Soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market.
  - g. Engaging in a pattern of compensating an agent in different amounts for effecting sales and purchases in the same security.
- 7. Effecting any transaction in, or inducing the purchase or sale of any security by means of any manipulative, deceptive, or other fraudulent scheme or course of actions including, but not limited to, the use of boilerroom tactics or use of fictitious or nominee accounts.
  - 8. Failure to deliver a prospectus as required by federal law.

**History:** Effective September 1, 1990; amended effective January 1, 1998.

**General Authority:** NDCC 10-04-03

**Law Implemented:** NDCC 10-04-15

#### **73-02-09-02. Unethical practices of dealers.**

The purpose of this section is to identify practices in the securities business which are dishonest or unethical. The following must be deemed "dishonest or unethical practices" by any person other than a sales agent, as used in North Dakota Century Code section 10-04-11. This section is not intended to be all inclusive, and thus, acts or practices not enumerated herein may also be deemed dishonest or unethical.

- 1. Engaging in any unreasonable and unjustifiable delay in the delivery of securities purchased by any of its customers or in the payment upon request of free credit balances reflecting completed transactions of any of its customers.
- 2. Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.
- 3. Recommending to a customer the purchase, sale, or exchange of any securities without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the dealer.
- 4. Executing a transaction on behalf of a customer without authorization to do so.
- 5. Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for the execution of orders.
- 6. Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement prior to the initial transaction in the account.
- 7. Failing to segregate customers' free securities or securities held in safekeeping.

8. Hypothecating a customer's securities without having a lien thereon unless the dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by rules of the securities and exchange commission.
9. Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.
10. Failing to furnish to a customer purchasing securities in an offering registered pursuant to North Dakota Century Code section 10-04-07 or 10-04-08, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus; if the offering is not registered pursuant to section 10-04-07 or 10-04-08, the dealer shall furnish disclosure documents customarily available.
11. Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of moneys due for principal, dividends, or interest; exchange or transfer of securities; appraisals, safekeeping, or custody of securities, and other services related to its securities business.
12. Offering to buy from or sell to any person any security at a stated price unless such dealer is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.
13. Representing that a security is being offered to a customer at the market or a price relevant to the market price unless such dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by such dealer, or by any person for whom it is acting or with whom it is associated in such distribution, or any person controlled by, controlling, or under common control with such dealer.
14. Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive, or fraudulent device, practice, plan, program, design, or contrivance, which may include, but not be limited to:
  - a. Effecting any transaction in a security which involves no change in the beneficial ownership thereof;
  - b. Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this subsection shall prohibit a dealer from entering bona fide agency cross transactions for its customers; or
  - c. Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.
15. Guaranteeing a customer against loss in any securities account of such customer carried by the dealer or in any securities transaction effected by the dealer with or for such customer.
16. Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such dealer believes that such transaction was a bona fide purchase or sale of such security; or which

purports to quote the bid price or asked price for any security, unless such dealer believes that such quotation represents a bona fide bid for, or offer of, such security.

17. Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material, or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs, or otherwise designed to supplement, detract from, supersede, or defeat the purpose or effect of any prospectus or disclosure.
18. Failing to disclose that the dealer is controlled by, controlling, affiliated with, or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, the existence of such control to such customer; and if such disclosure is not made in writing, it must be supplemented by the giving of written disclosure at or before the completion of the transaction.
19. Failing to make a bona fide public offering of all of the securities allotted to a dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member.
20. Failing or refusing to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written request or complaint.
21. Failing or refusing to provide, within fourteen days or such lesser time as prescribed by the securities commissioner, information requested by the commissioner or the commissioner's representatives pursuant to the commissioner's investigative authority.
22. Extending credit to a customer in violation of the Securities Exchange Act of 1934 or the regulations of the federal reserve board.
23. Engaging in acts or practices enumerated in section 73-02-09-01.
24. Failing to promptly provide the most current prospectus, the most recently filed periodic report filed under section 13 of the Securities Exchange Act or other research reports when requested to do so by a customer in the solicitation of a sale or purchaser of an over the counter non-national association of securities dealers automated quotation system security.
25. Marking any order tickets or confirmations as unsolicited when in fact the transaction is solicited.
26. Failing to provide each customer with a statement of account which, with respect to all over the counter non-national association of securities dealers automated quotation system equity securities in the account, contains a value for each security based on the closing market bid on a date certain for any month in which activity has occurred in a customer's account, but in no event less than every three months; provided that, this subsection shall apply only if the firm has been a market maker in such security at any time during the period for which the monthly or quarterly statement is issued.
27. Engaging or aiding in boilerroom operations or high pressure tactics in connection with the promotion of speculative offerings or hot issues by means of an intensive telephone campaign, whereby the prospective purchaser is encouraged to make a hasty decision to buy irrespective of the purchaser's investment needs and objectives.
28. Engaging in other conduct such as forgery, embezzlement, nondisclosure, incomplete disclosure or misstatement of material facts, or manipulative or deceptive practices.

29. Failing to comply with any applicable provision of the Rules of Fair Practice of the national association of securities dealers or any applicable fair practice or ethical standard promulgated by the securities and exchange commission or by a self-regulatory organization approved by the securities and exchange commission.

**History:** Effective September 1, 1990.

**General Authority:** NDCC 10-04-03

**Law Implemented:** NDCC 10-04-11

### **73-02-09-03. Unethical practices of sales agents.**

The purpose of this section is to identify practices in the securities industry which are dishonest or unethical. The following must be deemed "dishonest or unethical practices" by an agent, as used in North Dakota Century Code section 10-04-11. This section is not intended to be all inclusive, and thus, act or practices not enumerated herein may also be deemed dishonest or unethical.

1. Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities, or an executed stock power of a customer unless the customer is a member of the agent's family and the act or practice is approved in advance by supervisory personnel.
2. Effecting securities transactions not recorded on the regular books or records of the dealer which the agent represents, unless the transactions are authorized in writing by the dealer prior to execution of the transactions.
3. Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.
4. Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the dealer which the agent represents.
5. Dividing or otherwise splitting the agent's commissions, profits, or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same dealer, or for a dealer under direct or indirect common control.
6. Engaging in acts or practices specified in subsections 2, 3, 4, 5, 6, 9, 10, 14, 15, 16, 17, 21, 23, 24, 25, 26, 27, 28, and 29 of section 73-02-09-02.

**History:** Effective September 1, 1990.

**General Authority:** NDCC 10-04-03

**Law Implemented:** NDCC 10-04-11