

TITLE 15—ELECTED OFFICIALS
Division 30—Secretary of State
Chapter 51—Broker-Dealers, Agents, Investment Advisers, and
Investment Adviser Representatives

PROPOSED AMENDMENT

15 CSR 30-51.169 Fraudulent Practices of Broker-Dealers and Agents

The secretary is revising the purpose statement and amending sections (1) and adding section (1)(I).

PURPOSE: This amendment amends the rule to be in compliance with a federal court order.

PURPOSE: This rule identifies practices in the [securities business] **brokerage industry** [which] **that** are generally associated with [schemes to manipulate] **acts that deceive and defraud.**

(1) A broker-dealer or agent who engaged in one (1) or more of the following practices shall be deemed to have engaged in an “act, practice or course of business which operates or would operate as a fraud” as used in section 409.5-501 of the Missouri Securities Act of 2003 (the Act). This rule is not intended to be all inclusive and acts or practices not enumerated in this rule may also be deemed **deceitful or** fraudulent:

(A) Entering into a transaction with a customer in any security at an unreasonable price or at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit;

(B) 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;

(C) In connection with the offer, sale or purchase of a security, falsely leading a customer to believe that the broker-dealer or agent is in possession of material, nonpublic information which would have an impact on the value of the security;

(D) 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 of similar investment objective for some to sell and others to purchase the same security, at or about the same time, when not justified by the particular circumstances of each investor;

(E) Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things—1) 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, or 2) parking or withholding securities;

(F) Although nothing in this rule precludes application of the general anti-fraud provisions against anyone for practices similar in nature to the practices discussed as follows, the following paragraphs specifically apply only in connection with solicited offers or sales of designated securities in transactions not exempted in the following:

1. Failing to disclose at the time of solicitation, in either a principal or agency transaction, the price at which the broker-dealer is currently selling or offering to sell the designated security and the price at which the broker-dealer is currently buying or offering to buy the designated security, and failing to disclose those prices, which were in effect at the time of execution, on the trade confirmation of the transaction;

2. Failing to disclose, at the time of solicitation and on the trade confirmation, all compensation to be paid to the agent as a result of the transaction;

3. In connection with a principal transaction by a market maker, failing to disclose, both at the time of solicitation and on the confirmation, a short inventory position in the firm's account of more than five percent (5%) of the issued and outstanding shares of that class of securities of the issuer;

4. Conducting sales contests solely with respect to a particular security;

5. Failing or refusing to promptly execute sell orders on behalf of a customer;

6. Soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market;

7. Engaging in a pattern of enhancing the compensation of an agent with respect to sales and purchases in the same security;

8. In connection with the solicitation of a sale of an equity security, or a security containing an equity component, in which the difference between the bid and ask price is twenty-five percent (25%) or more of the ask price, to fail to—

A. Disclose to the customer the bid and ask price of the designated security as well as its spread in both percentage and dollar amounts at the time of solicitation; and

B. Include with the confirmation, in a form satisfactory to the commissioner, written explanation of the bid and ask price;

9. For the purposes of subsection (1)(F), the following shall be exempt transactions:

A. Transactions in which the price of the designated security is five dollars (\$5) or more, provided, however, that if the designated security is a unit composed of one (1) or more securities, the unit price divided by the number of components of the unit other than warrants, options, rights or similar securities must be five dollars (\$5) or more, and any component of the unit that is a warrant, option, right or similar security or a convertible security must have an exercise price or conversion price of five dollars (\$5) or more;

B. Transactions that are not recommended by the broker-dealer;

C. Transactions by a broker-dealer—

(I) Whose commissions, commission equivalents and mark-ups from transactions in designated securities during each of the immediately preceding three (3) months, and during eleven (11) or more of the preceding twelve (12) months, did not exceed five percent (5%) of its total commissions, commission-equivalents and mark-ups from transactions in securities during those months; and

(II) Who has not been a market maker in the designated security that is the subject of the transaction in the immediately preceding twelve (12) months; and

D. Any transaction(s) that, upon prior written request or upon its own motion, the commissioner conditionally or unconditionally exempts as not encompassed within the purposes of subsection (1)(F); and

10. For the purposes of subsection (1)(F)—

A. The term designated security shall mean any equity security other than a security—

(I) Registered, or approved for registration upon notice of issuance, on a national securities exchange recognized under 409.2-201(6), RSMo;

(II) Exempted as a foreign issuer pursuant to 15 CSR 30-54.260;

(III) Authorized, or approved for authorization upon notice of issuance, for quotation in the National Market System of the National Association of Securities Dealers Automated Quotation System;

(IV) Issued by an investment company registered under the Investment Company Act of 1940;

(V) That is a put option or call option issued by The Options Clearing Corporation;

or

(VI) Whose issuer has net tangible assets in excess of four (4) million dollars, as demonstrated by financial statements dated less than fifteen (15) months previously that the broker-dealer has reviewed and has a reasonable basis to believe on the date of the transaction with the person, there have been no adverse changes to the issuer's most current financial statement and—

(a) In the event the issuer is other than a foreign private issuer, the most recent financial statements for the issuer have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2.02; or

(b) In the event the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the commissioner, furnished to the commissioner pursuant to 17 CFR 240.12g3-2(b) or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction;

(G) Effecting any transaction in, or inducing the purchase or sale of any security by means of any manipulative, deceptive or other fraudulent device or contrivance including, but not limited to, the use of boiler-room tactics or use of fictitious or nominee accounts; and

(H) Failure to comply with any prospectus delivery requirement promulgated under federal law.

(I) Effecting any transaction with an investment objective that the customer has not authorized at or prior to the time such transaction is effected;

1. As used in this section (I), the following terms mean:

(A). "Effecting any transaction" means having effected a discretionary purchase or sale of a security for a retail customer's account; solicited or recommended, or otherwise provided advice, to a retail customer to buy or sell a security; or solicited, recommended, or otherwise advised, a retail customer regarding the selection of a third-party manager or subadviser to manage the investments in such customer's account;

(B). "Retail customer" means any person other than an institutional investor, regardless of whether the person has an account with the broker-dealer;

(C). "Institutional investor," the same meaning as under section 409.1-102, RSMo;

(D). "Broker-dealer," the same meaning as under section 409.1-102, RSMo; and

(E). "Person," the same meaning as under section 409.1-102, RSMo.

2. Nothing in this subsection (I) shall require broker-dealers or their agents to create or retain any record memorializing the required customer authorization.

3. If any portion of this subsection (I) is adjudicated to be invalid or unenforceable for any reason or in any application, the intent of the Commissioner is that this application

shall be severable and the remainder of the subsection (I) in its other applications shall be enforced.

AUTHORITY: sections 409.2-201, 409.4-412, 409.5-501 and 409.6-605, RSMo Supp. 2003. Original rule filed March 27, 1989, effective June 12, 1989. Amended: Filed June 29, 1990, effective Dec. 31, 1990. Emergency amendment filed Aug. 27, 2003, effective Sept. 12, 2003, expired March 9, 2004. Amended: Filed Aug. 28, 2003, effective Feb. 29, 2004.*

**Original authority: 409.2-201, RSMo 2003; 409.4-412, RSMo 2003; 409.5-501, RSMo 2003.*

PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars (\$500) in the aggregate.

*NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed amendment with the Office of Secretary of State, P.O. Box 1767, Jefferson City, MO 65102. To be considered, comments must be received within thirty (30) days after publication of this notice in the **Missouri Register**. No public hearing is scheduled.*