

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 11 SECURITIES
PART 1 GENERAL PROVISIONS

12.11.1.1 ISSUING AGENCY: Regulation and Licensing Department - New Mexico Securities Division.
[12.11.1.1 NMAC - Rp, 12.11.1.1 NMAC, 1-1-2010]

12.11.1.2 SCOPE: All persons, whether natural or legal entities, that transact business in New Mexico as a broker-dealer, an investment adviser or an issuer of securities, and their representatives and agents.
[12.11.1.2 NMAC - Rp, 12.11.1.2 NMAC, 1-1-2010]

12.11.1.3 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”.
[12.11.1.3 NMAC - Rp, 12.11.1.3 NMAC, 1-1-2010]

12.11.1.4 DURATION: Permanent.
[12.11.1.4 NMAC - Rp, 12.11.1.4 NMAC, 1-1-2010]

12.11.1.5 EFFECTIVE DATE: January 1, 2010, unless a later date is cited at the end of a section.
[12.11.1.5 NMAC - Rp, 12.11.1.5 NMAC, 1-1-2010]

12.11.1.6 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.
[12.11.1.6 NMAC - Rp, 12.11.1.6 NMAC, 1-1-2010]

12.11.1.7 DEFINITIONS: The definitions in this section apply throughout the New Mexico Uniform Securities Act and the rules in Title 12 Chapter 11 NMAC unless the context otherwise requires.

A. “Affiliate” means a person who directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person.

B. “Bank” as defined in Section 58-13C-102B(3) is limited to institutions whose deposits or share accounts are insured to the maximum amount authorized by statute by the federal deposit insurance corporation, the national credit union share insurance fund or a successor authorized by federal law.

C. “Branch office” means any location where one or more agents or investment adviser representatives regularly conducts the business of effecting or attempting to effect transactions in any security, or transacting investment advisory business, or is held out as such, excluding:

(1) any location that is established solely for customer service and/or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office;

(2) any location that is the agent’s or investment adviser’s primary residence, provided that:

(a) only one agent or investment adviser representative, or multiple such agents or representatives who reside at that location and are members of the same immediate family, conduct business at the location;

(b) the location is not held out to the public as an office and the associated person does not meet with customers at the location;

(c) neither customer funds nor securities are handled at that location;

(d) the agent or investment adviser representative is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, advertisements and other communications to the public by such agent or investment adviser representative;

(e) the agent’s or investment adviser’s correspondence and communications with the public are subject to the firm’s supervision;

(f) electronic communications (e.g., e-mail) are made through the firm’s electronic system;

(g) all orders are entered through the designated branch office or an electronic system established by the firm that is reviewable at the branch office;

(h) written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the firm; and

- (i) a list of the residence locations is maintained by the firm;
- (3) any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided that such location complies with the provisions of Subparagraphs (a) through (h) of Paragraph (2) of this subsection;
- (4) any office of convenience, where agents or investment adviser representatives occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; and
- (5) a temporary location established in response to the implementation of a business continuity plan;
- (6) notwithstanding the exclusions provided in Paragraphs (1) through (5) of this subsection, any location that is responsible for supervising the activities of persons associated with the member at one or more non-branch locations of the member is considered to be a branch office.

D. “Broker-dealer” as defined in Section 58-13C-102C does not include:

- (1) a pension or profit sharing trust, when effecting transactions for its own account; or
- (2) an investment adviser registered under the New Mexico Uniform Securities Act or registered under the Investment Advisers Act of 1940 when placing orders for the accounts of its clients in accordance with rules prescribed by the director, provided that no commission or other remuneration is received by the investment adviser for placing orders.

E. “Control person” means an officer, director, managing partner or trustee, manager of a limited liability company or person of similar status or function or any security holder who owns beneficially or of record ten percent or more of any class of securities of an issuer.

F. “CRD” means the internet-based central registration depository that is the central licensing and registration system for broker-dealers, agents and regulators in the United States.

G. “FDIC” means the federal deposit insurance corporation of the United States.

H. “FINRA” means the financial industry self-regulatory organization created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York stock exchange. As the successor to NASD, FINRA is the entity designated as the filing depository by the SEC for purposes of the Investment Advisers Act of 1940, 15 U.S.C section 80b-1 et seq.

I. “Institutional investor” as defined Section 58-13C-102L includes but is not limited to:

- (1) an entity, other than a natural person, which is directly engaged in the business of, and derives at least eighty percent of its annual gross income from, investing, purchasing, selling or trading in securities of more than one issuer and not of its own issue, and that has gross assets in excess of \$10,000,000 at the end of its latest fiscal year;
- (2) a state, a political subdivision of a state or an agency or corporate or other instrumentality of a state or a political subdivision of a state; or
- (3) a federally recognized Indian tribe or pueblo that has total assets in excess of \$10,000,000 and that has obtained certification from the division that it is an institutional investor.

J. “IARD” means the internet-electronic filing system for registration and disclosures by investment advisers and their associated persons developed and operated by FINRA according to the requirements of the system’s sponsors, the SEC and NASAA.

K. “Investment contract” as used in Section 58-13C-102DD includes any investment by which an offeree furnishes initial value to an offeror, and a portion of this initial value is subjected to the risks of the enterprise, and the furnishing of the initial value is induced by the offeror’s promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind over and above the initial value will accrue to the offeree as a result of the operation of the enterprise, and the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

L. “NASAA” means the North American securities administrators association, www.nasaa.org. whose membership is comprised of securities administrators in the 50 states, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, Canada, and Mexico, and whose activities include among others development of model rules and uniform forms for use by state regulatory agencies.

M. “NASD” was a self-regulatory organization commonly known as the national association of securities dealers responsible for the operation and regulation of the Nasdaq stock market and over-the-counter markets and consolidated into FINRA in July 2007.

N. An “offer” is made within the meaning of Subsection O of Section 58-13C-202, so far as the securities holders of an issuer are concerned, if there is submitted to the vote of the securities holders a proposal, plan or agreement for:

- (1) a reclassification of securities of such issuer which involves the substitution or exchange of a security for another security;

(2) a statutory merger or consolidation in which securities of the issuer will become or be exchanged for securities of another issuer;

(3) a transfer of assets of the issuer to another person in consideration of the issuance of securities of the other person or any of its affiliates; or

(4) a sale of securities of the issuer to another person in consideration of the issuance or transfer to such issuer of securities of the other person or any of its affiliates.

O. “Pledge” within the meaning of Section 58-13C-202G of the New Mexico Uniform Securities Act includes a “secured party” as that term is defined in Section 55-9-102(a)(71) NMSA 1978.

P. “SEC” means the securities and exchange commission of the United States.
[12.11.1.7 NMAC - Rp, 12.11.1.7 NMAC, 1-1-2010]

12.11.1.8 [RESERVED]

12.11.1.9 FINDINGS OF THE DIRECTOR: The director finds that adoption of these rules is in the public interest, appropriate for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the New Mexico Uniform Securities Act.

[12.11.1.9 NMAC - Rp, 12.11.1.9 NMAC, 1-1-2010]

12.11.1.10 SEVERABILITY: If any provision of these rules shall be determined to be invalid, such invalidity shall not affect other provisions which can be given effect without the invalid provision, and to this end the provisions of these rules are declared severable.

[12.11.1.10 NMAC - Rp, 12.11.1.10 NMAC, 1-1-2010]

12.11.1.11 FEES: The fees set forth in this section do not include fees set by statute or as determined elsewhere in these rules; are expressly prescribed for the expenses of various matters arising pursuant to authority under the New Mexico Uniform Securities Act; are chargeable to the applicant or registrant; and unless otherwise provided, are payable at the time an application or notice is filed. None of the fees paid are refundable.

A. Administrative fees.

(1) The fee for processing a name change in registration statements on file is \$50.00.

(2) The fee for processing a name change for a registered broker-dealer or a registered investment adviser is \$50.00.

(3) The fee for an interpretative opinion, pursuant to Section 58-13C-605D, or for a no action letter is \$300.00.

B. Inspection fees. Broker-dealers and investment advisers registered or required to be registered shall be charged a fee of \$100.00 per examiner per day plus actual costs of transportation and lodging where applicable for examinations conducted pursuant to Section 58-13C-411D.

C. Successor firm fees.

(1) An application for registration of a successor firm pursuant to Section 58-13C-407A shall be accompanied by a fee of \$300.00.

(2) An application for registration of successor firms pursuant to Section 58-13C-407A shall be accompanied by an administrative fee of \$50.00 for each representative’s registration which must be transferred to the successor firm.

[12.11.1.11 NMAC - Rp, 12.11.1.11 NMAC, 1-1-2010; A, 7-1-2010]

12.11.1.12 ADMINISTRATIVE PROCEDURE:

A. Application of rule. These rules govern proceedings conducted pursuant to Section 58-13C-604B of the New Mexico Uniform Securities Act.

B. Service. Service of subpoenas, notices of intent, summary orders, notices of opportunity for hearing and final orders shall be made either:

(1) personally;

(2) by certified mail, return receipt requested, sent to the last known address of the person; or

(3) by such other means as are reasonably calculated to give actual notice.

C. Administrative conferences.

(1) Any person entitled to a hearing pursuant to Section 58-13C-604B may submit a written request to the director for an informal conference to discuss an order issued or proposed to be issued by the director. A request for an informal conference will not affect a person’s right to a formal hearing pursuant to Section 58-13C-

604B provided that a proper request for a hearing is made pursuant to Section 58-13C-604B(2). However, any person requesting an informal conference with the director must specifically waive in writing the time deadlines for setting a formal hearing pursuant to Section 58-13C-604B(2). Upon the granting of an informal conference, the formal hearing will be indefinitely postponed pending the outcome of the informal conference. A person who has formerly waived the right to have a hearing set within 60 days pursuant to Section 58-13C-604B(2) may reinstate a request for a formal hearing by written notice to the director.

(2) The director may, at the director's discretion, grant a request for an informal conference for the purpose of settlement or simplification of the issues. Conduct and statements made during informal conferences are not admissible as evidence to prove either liability or a violation of the New Mexico Uniform Securities Act or the rules thereunder. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

(3) If consistent with Section 58-13C-604B, the director may dispose of proceedings pending pursuant to that section by stipulation, agreed settlement, consent order or default.

D. Motions. Any motion made prior to the commencement of any hearing must be made in writing to the director. Motions other than those for an extension of time or for additional discovery must be accompanied by a memorandum of law and served on the opposing party. Motions shall be a maximum of ten pages in length. The director may, at the director's sole discretion, rule without a hearing upon any procedural or discovery motion not disposing of the merits of the proceeding. All motions not specifically acted upon by the director shall be deemed denied upon the filing of the final order of the director in the proceeding.

E. Discovery. Parties may, by motion to the director, request reasonable discovery in addition to those procedures granted in Section 58-13C-604B(8). The director may, at the director's sole discretion, grant or deny further discovery, or impose such limitations or conditions on discovery as may be necessary in the interests of economy and expeditious decision making. Parties are encouraged to seek agreement on the scope of discovery before presenting a motion for additional discovery to the director.

F. Venue. All hearings conducted pursuant to Section 58-13C-604B shall be conducted in the offices of the securities division or other convenient place within Santa Fe county. The director may, at the director's discretion, hold the hearing in another county of this state upon a finding that good cause exists to do so.

G. Evidence. In a proceeding held pursuant to Section 58-13C-604B, the formal rules of evidence do not apply and the director or hearing officer may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent people in the conduct of serious affairs.

H. Findings of fact and conclusions of law. The director or hearing officer may require all parties of record to file proposed findings of fact, conclusions of law or final orders at the close of the hearing.

I. Costs on appeal. The party seeking review pursuant to Section 58-13C-609 shall pay all costs of appeal, including the expenses of preparation of the record and transcript.

J. Default orders.

(1) A respondent that has received actual or constructive notice of the entry of either a summary order or notice of intent, together with a notice of opportunity for hearing, and fails to respond or appear within the time set forth in Section 58-13C-604B(2) shall be deemed to have admitted the allegations set forth in the summary order or notice of intent and shall be deemed to have consented to entry of a final order as proposed in the summary order or notice of intent.

(2) A respondent that has received actual or constructive notice of a hearing having been set and fails to appear, either in person or through counsel, at the time and place set for such hearing shall be deemed to have admitted the allegations set forth in the summary order or notice of intent that was entered in the matter before the hearing officer and shall be deemed to have consented to entry of a final order.

[12.11.1.12 NMAC - Rp, 12.11.1.12 NMAC, 1-1-2010]

12.11.1.13 ADOPTION OF UNIFORM FORMS:

A. The following uniform forms promulgated by the SEC, including subsequent amendments, are hereby adopted by reference for use in New Mexico:

- (1) **"Form ADV"**, *uniform application for investment adviser registration*;
- (2) **"Form ADV-E"**, *uniform certificate of accounting of client securities and funds in the possession or custody of an investment adviser*;
- (3) **"Form ADV-H"**, *uniform application for a temporary or continuing hardship exemption*;
- (4) **"Form ADV-W"**, *uniform notice of withdrawal from registration as investment adviser*;

- (5) **“Form BD”**, *uniform application for broker-dealer registration*;
- (6) **“Form BDW”**, *uniform request for broker-dealer withdrawal*; and
- (7) **“Form D”**, *notice of sale of securities pursuant to regulation D*.

B. The following uniform forms promulgated by FINRA and approved by the SEC, including subsequent amendments, are hereby adopted by reference for use in New Mexico:

- (1) **“Form BR”**, *uniform branch office registration form*;
- (2) **“Form U-4”**, *uniform application for securities industry registration or transfer*; and
- (3) **“Form U-5”**, *uniform termination notice for investment adviser registration*.

C. The following uniform forms adopted by NASAA, including subsequent amendments, are hereby adopted by reference for use in New Mexico:

- (1) **“Form NF”**, *uniform investment company notice filing*;
- (2) **“Form U-1”**, *uniform application to register securities*;
- (3) **“Form U-2”**, *uniform consent to service of process*;
- (4) **“Form U-2A”**, *uniform corporate resolution*; and
- (5) **“Form U-7”**, *small company offerings registration*;

[12.11.1.12 NMAC - N, 1-1-2010]

HISTORY of 12.11.1 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, filed 5-18-67;

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

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

SD Rule 86-1.01, Short Title, filed 7-11-86;

SD Rule 86-1.02, Authority, filed 7-11-86;

SD Rule 86-2.01, Definitions, filed 7-11-86;

SD Rule 86-3.06, Successor Firms Fees, filed 7-11-86;

SD Rule 86-3.07, Inspections, filed 7-11-86;

SD Rule 86-8.01, Fees, filed 7-14-86;

SD Rule 86-8.02, Administrative Fees, filed 7-14-86;

SD Rule 86-9.01, Application of Rule, filed 7-14-86;

SD Rule 86-9.02, Service, filed 7-14-86;

SD Rule 86-9.03, Administrative Conferences, filed 7-14-86;

SD Rule 86-9.04, Motions, filed 7-14-86;

SD Rule 86-9.05, Discovery, filed 7-14-86;

SD Rule 86-9.06, Venue, filed 7-14-86;

SD Rule 86-9.07, Evidence, filed 7-14-86;

SD Rule 86-9.08, Findings of Fact and Conclusions of Law, filed 7-14-86;

SD Rule 86-9.09, Costs on Appeal, filed 7-14-86.

History of Repealed Material:

12 NMAC 11.1.1.1, Index - New Mexico Blue Sky Regulations, repealed 5-1-99.

12.11.1 NMAC, General Provisions (filed 6-2-2003) repealed 1-1-2010.

Other History:

SD Rule 86-1.01, Short Title (filed 7-11-86); SD Rule 86-1.02, Authority (filed 7-11-86); SD Rule 86-2.01, Definitions (filed 7-11-86); SD Rule 86-3.06, Successor Firms Fees (filed 7-11-86); SD Rule 86-3.07, Inspections (filed 7-11-86); SD Rule 86-8.01, Fees (filed 7-14-86); SD Rule 86-8.02, Administrative Fees (filed 7-14-86); SD Rule 86-9.01, Application of Rule (filed 7-14-86); SD Rule 86-9.02, Service (filed 7-14-86); SD Rule 86-9.03, Administrative Conferences (filed 7-14-86); SD Rule 86-9.04, Motions (filed 7-14-86); SD Rule 86-9.05, Discovery (filed 7-14-86); SD Rule 86-9.06, Venue (filed 7-14-86); SD Rule 86-9.07, Evidence (filed 7-14-86); SD Rule 86-9.08, Findings of Fact and Conclusions of Law (filed 7-14-86); SD Rule 86-9.09, Costs on Appeal (filed 7-14-86) were **renumbered** into first version of the New Mexico Administrative Code as 12 NMAC 11.1, General Provisions, effective 5-1-99.

12 NMAC 11.1, General Provisions (filed 4-19-99) was renumbered, amended and replaced by 12.11.1 NMAC, General Provisions, effective 07-01-2003.

12.11.1 NMAC, General Provisions (filed 6-2-2003) was replaced by 12.11.1 NMAC, General Provisions, effective 1-1-2010.