

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
AT RICHMOND, SEPTEMBER 12, 2014

SCC-CLERK'S OFFICE  
REGISTRATION CONTROL CENTER

2014 SEP 12 P 2: 32

COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

*Ex Parte:* In the matter of  
Adopting a Revision to the Rules  
Governing the Virginia Securities Act

CASE NO. SEC-2014-00041

ORDER TO TAKE NOTICE

Section 12.1-13 of the Code of Virginia ("Code") provides that the State Corporation Commission ("Commission") shall have the power to promulgate rules and regulations in the enforcement and administration of all laws within its jurisdiction. Section 13.1-523 of the Virginia Securities Act ("Act"), § 13.1-501 *et seq.* of the Code, provides that the Commission may issue any rules and regulations necessary or appropriate for the administration and enforcement of the Act.

The rules and regulations issued by the Commission pursuant to the Act are set forth in Title 21 of the Virginia Administrative Code. A copy also may be found at the Commission's website, [www.scc.virginia.gov/case](http://www.scc.virginia.gov/case).

On June 3, 2013, the Commission adopted numerous changes to its Rules governing broker-dealers, broker-dealer agents and agents of the issuer, 21 VAC 5-20-10 *et seq.* ("Rules").<sup>1</sup> These changes included substantial revisions to numerous chapters of Title 21 of the Virginia Administrative Code entitled "Securities Act Rules," including Chapter 20 concerning broker-dealers. As part of these revisions, changes were made to Rule 21 VAC 5-20-280, titled "Prohibited Business Conduct," which governs broker-dealer and agent business conduct.

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<sup>1</sup> *Ex Parte: In the Matter of Adopting a Revision to the Rules Governing the Virginia Securities Act*, Case No. SEC-2012-00038, 2013 S.C.C. Ann. Rept 473, Order Adopting Amended Rules, (May 13, 2013).

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Significant changes to Rule 280 that were adopted in 2013 included the following:

- Repealing Rule 280 E;
- Combining into one subdivision (Rule 280 A (15)) examples of known broker-dealer manipulative, deceptive, or fraudulent practices, including several provisions from former Rule 280 E; and
- Adding new regulations under Rule 280 A, including subdivisions A (32) through A (39), governing broker-dealer business conduct and that included revised provisions previously found in former Rule 280 E (6).

The changes also revised the language of some of the provisions formerly appearing in Rule 280 E.

For example, the changes to Rule 280 A (32) through (39) omitted prefatory language of former Rule 280 (E) (6) that stated:

Although nothing in this subsection precludes application of the general antifraud provisions against anyone for practices similar in nature to the practices discussed below, the following subdivisions a through f specifically apply only in connection with the solicitation of a purchase or sale of OTC (over the counter) unlisted non-NASDAQ equity securities.

Following adoption of the revisions in 2013, the Division of Securities and Retail Franchising ("Division") was alerted to a potential federal preemption problem regarding Rule 21 VAC 5-20-280 A (32). Rule 280 A (32) states as follows:

No broker-dealer who is registered or required to be registered shall . . . [f]ail 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; . . . .

This rule – which was a revised provision of former Rule 280 E (6) (a) – requires disclosures concerning compensation both at the time of solicitation and on the confirmation of sale for the transaction. The concern raised with the Division was that Rule 280 A (32) creates a writing and record requirement at the point of confirmation of sale that may be in conflict with or may exceed requirements under federal securities law and the Securities and Exchange Commission's

("SEC") rules. The concern also noted that the preemption issue was exacerbated because Rule 280 A (32) omitted the prefatory language under former Rule 280 E (6) that had limited application of this rule to certain transactions.

No comments were filed addressing this rule or the possible preemption issue following the Commission's issuance of the notice order proposing the amendment to Rule 21 VAC 5-20-280 A. After consulting with Division's counsel, however, it was concluded that Rule 21 VAC 5-20-280 A (32) may be preempted under the applicable provisions of the National Securities Markets Improvements Act ("NSMIA"), 15 U.S.C. § 78o (i)(1).

On December 16, 2013, the Division issued a policy statement addressing enforcement of Rule 21 VAC 5-20-280 A (32). The policy statement stated that, until such time as the Commission amended the rule, the Division would not audit for compliance or pursue enforcement against any registered broker-dealer agent for failing to comply with the written disclosure requirements of the rule. The policy statement further advised that registered broker-dealers and their agents may operate as they had prior to the adoption of Rule 21 VAC 5-20-280 A (32) with respect to compensation disclosures on sales confirmation related to specific securities transactions consistent with SEC rules.

The Division, however, noted that broker-dealer and broker-dealer agents were not relieved of their obligations under § 13.1-502 of the Act to make adequate material disclosures relating to agent compensation in a securities transaction at the point of sale. The Division also noted that the policy statement should not be construed as precluding the Division from investigating or pursuing enforcement against any broker-dealer or broker-dealer agent for failing to make adequate material disclosures relating to agent compensation at the point of sale.

In conjunction with issuance of the policy statement in December 2013, the Division formed a working group with representatives of certain registered broker-dealers, the Securities Industry and Financial Markets Association, and the Financial Services Institute to work through NSMIA issues concerning Rule 21 VAC 5-20-280 A (32) as well as other similar issues raised by the revisions to Rule 280 adopted in 2013.

As a result of ongoing discussion within this working group, the Division identified several concerns regarding certain provisions of Rule 280 A, including Rule 280 A (32). These concerns included:

- Potential preemption issues and the expansion of the scope of Rule 280 A (32) through (39) following the omission of the prefatory language of former Rule 280 E;
- Compliance issues raised by the industry to satisfy Rule 280 A (32);
- Revised language of certain provisions in Rule 280 A that differed from the language of similar provisions in former Rule 280 E; and
- The lack of uniformity and consistency between Rule 280 and other, similar provisions adopted by the SEC and various states.

The Division proposes to amend Rule 21 VAC 5-20-280 to address these concerns. The proposed changes include:

- (a) removing certain provisions of Rule 280 A, including parts of Rule 280 A (15) and Rule 280 A (32) through (39), that were formerly part of Rule 280 E;
- (b) placing the removed provisions from Rule 280 A into a new proposed Rule 280 D;
- (c) adding the prefatory language under former Rule 280 E (6) to specify that the subject provisions apply only in connection with the solicitation of a purchase or sale of OTC (over the counter) unlisted non-NASDAQ equity securities;

(d) Revising the language of certain provisions under current Rule 280 A (15) (D) (and which the Division proposes moving to Rule 280 D) to more closely match the language of similar provisions under former Rule 280 E; and

(e) Making certain typographical and stylistic revisions.

The Division also proposes to make conforming amendments to Rule 21 VAC 5-20-280 B (6) and Rule 21 VAC 5-20-285 B that include references to provisions in Rule 280 A for which amendments are proposed.

Through these proposed amendments, the Division intends to avoid the possible preemption issues raised regarding the current rule. Additionally and in the interest of uniformity, the proposed change will harmonize the current rule with other similar rules adopted in other states. Finally, the SEC and the North American Securities Administrators Association ("NASAA") are examining the adequacy of disclosure of certain fees charged by broker-dealers related to certain securities transactions by their customers. Rather than abide by the current rule that ultimately may conflict with proposals by the SEC and NASAA, the Division recommends amending Rule 21 VAC 5-20-280 to make it consistent with the SEC's regulations and NASAA's model rules in this area pending any future change.

Accordingly, the Division has submitted to the Commission proposed revisions to Rule 21 VAC 5-20-280 and Rule 21 VAC 5-20-285 of the Virginia Administrative Code.

The Division has recommended to the Commission that the proposed revisions should be considered for adoption. The Division also has recommended to the Commission that a hearing should be held only if requested by those interested parties who specifically indicate that a hearing is necessary and the reasons therefore.

A copy of the proposed revisions may be requested by interested parties from the Division by telephone, mail, or e-mail request and also can be found at the Division's website: [www.scc.virginia.gov/srf](http://www.scc.virginia.gov/srf). Any comments to the proposed rules and requests for hearing with the reasons stated therefore must be received by November 5, 2014.

Accordingly, IT IS ORDERED THAT:

(1) The proposed revisions are appended hereto and made a part of the record herein.

(2) Comments or requests for hearing on the proposed revisions must be submitted in writing to Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P. O. Box 2118, Richmond, Virginia 23218, on or before November 5, 2014. Requests for hearing shall state why a hearing is necessary and why the issues cannot be adequately addressed in written comments. All correspondence shall contain reference to Case No. SEC-2014-00041. Interested persons desiring to submit comments electronically may do so by following the instructions available at the Commission's website <http://www.scc.virginia.gov/case>.

(3) The proposed revisions shall be posted on the Commission's website at <http://www.scc.virginia.gov/case> and on the Division's website at <http://www.scc.virginia.gov/srf>. Interested persons also may request a copy of the proposed revisions from the Division by telephone, mail, or e-mail.

AN ATTESTED COPY HEREOF, together with a copy of the proposed revisions, shall be sent to the Registrar of Regulations for publication in the Virginia Register.

AN ATTESTED COPY hereof shall be sent to the Director of the Division of Securities and Retail Franchising, who shall forthwith provide notice of this Order via U.S. mail or e-mail to any interested persons as he may designate.

STATE CORPORATION COMMISSION, DIVISION OF SECURITIES AND RETAIL  
FRANCHISING

Proposed Rule Changes\_2014\_Securities

**21VAC5-20-280. Prohibited business conduct.**

A. Every broker-dealer is required to observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. The acts and practices described below are considered contrary to such standards and may constitute grounds for denial, suspension, or revocation of registration or such other action authorized by the Act. No broker-dealer who is registered or required to be registered shall:

1. Engage in a pattern of unreasonable and unjustifiable delays 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, or take any action that *directly or indirectly interferes with a customer's ability to transfer his account*; provided that the account is not subject to any lien for moneys owed by the customer or other bona fide claim, including, but not limited to, seeking a judicial order or decree that would bar or restrict the submission, delivery or acceptance of a written request from a customer to transfer his account;
2. Induce 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. Recommend to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the customer. The reasonable basis to recommend any such transaction to a customer shall be based upon the risks associated with a particular security, and the information obtained through the

diligence and inquiry of the broker-dealer to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's investment objectives, financial situation, risk tolerance and needs, tax status, age, other investments, investment experience, investment time horizon, liquidity needs, and any other relevant information known by the broker-dealer or of which the broker-dealer is otherwise made aware in connection with such recommendation;

4. Execute a transaction on behalf of a customer without authority to do so or, when securities are held in a customer's account, fail to execute a sell transaction involving those securities as instructed by a customer, without reasonable cause;

5. Exercise 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. Execute any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account, or fail, prior to or at the opening of a margin account, to disclose to a noninstitutional customer the operation of a margin account and the risks associated with trading on margin at least as comprehensively as required by FINRA Rule 2264;

7. Fail to segregate customers' free securities or securities held in safekeeping;

8. Hypothecate a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by Rules of the SEC;

9. Enter into a transaction with or for a customer at a price not reasonably related to the current market price of a security or receiving an unreasonable commission or profit;

10. Fail to furnish to a customer purchasing securities in an offering, 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, by the following means: (i) hard copy prospectus delivery or (ii) electronic prospectus delivery.

When a broker-dealer delivers a prospectus electronically, it must first allow its clients to affirmatively opt-in to the program. The acknowledgement of the opt-in may be by any written or electronic means, but the broker-dealer is required to acknowledge the opt-in. For any client that chooses not to opt-in to electronic delivery, the broker-dealer shall continue to deliver to the client a hard copy of the prospectus;

11. Introduce customer transactions on a "fully disclosed" basis to another broker-dealer that is not exempt under § 13.1-514 B 6 of the Act;

12. a. Charge 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;

b. Charge a fee based on the activity, value or contents (or lack thereof) of a customer account unless written disclosure pertaining to the fee, which shall include information about the amount of the fee, how imposition of the fee can be avoided and any consequence of late payment or nonpayment of the fee, was provided no later than the date the account was established or, with respect to an existing account, at least 60 days prior to the effective date of the fee;

13. Offer to buy from or sell to any person any security at a stated price unless the broker-dealer is prepared to purchase or sell at the price and under such conditions as are stated at the time of the offer to buy or sell;

14. Represent that a security is being offered to a customer "at a market" or a price relevant to the market price unless the broker-dealer knows or has reasonable grounds to believe that a market for the security exists other than that made, created or controlled by the broker-dealer, or by any person for whom he is acting or with whom he is associated in the distribution, or any person controlled by, controlling or under common control with the broker-dealer;

15. ~~Offer~~ Effect any transaction in, or induce the purchase or sale of, ~~or effect any transaction in,~~ 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 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; however, nothing in this subdivision shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers;

c. Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in the security or raising or depressing the price of the security, for the purpose of inducing the purchase or sale of the security by others;

~~d. 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;~~

~~e. Contradicting or negating the importance of any information contained in a prospectus or other offering materials that would deceive or mislead or using any advertising or sales presentation in a deceptive or misleading manner;~~

~~f. Leading a customer to believe that the broker-dealer or agent is in possession of material, nonpublic information that would affect the value of the security;~~

~~g. 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;~~

~~h. Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things, (i) 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 (ii) parking or withholding securities;~~

~~i. 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;~~

~~j. Failing to comply with any prospectus delivery requirements promulgated under federal law or the Act;~~

~~k. Failing to promptly provide the most current prospectus or the most recently filed periodic report filed under § 13 of the Securities Exchange Act when requested to do so by a customer;~~

~~l. Marking any order tickets or confirmations as unsolicited when in fact the transaction was solicited; or~~

~~m. Failing to comply with the following provisions in connection with the solicitation of a purchase or sale of a designated security:~~

~~(1) Failing to disclose to the customer the bid and ask price at which the broker-dealer effects transactions with individual, retail customers of the designated security as well as its spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents; or~~

~~(2) Failing to include with the confirmation, the notice disclosure contained under 21VAC5-20-285, except the following shall be exempt from this requirement:~~

~~(a) Transactions in which the price of the designated security is \$5.00 or more, exclusive of costs or charges; however, if the designated security is a unit composed of one 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 \$5.00 or more, and any component of the unit that is a warrant, option, right, or similar securities, or a convertible security must have an exercise price or conversion price of \$5.00 or more;~~

~~(b) Transactions that are not recommended by the broker-dealer or agent;~~

~~(c) Transactions by a broker-dealer: (i) whose commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the preceding three months, and during 11 or more of the preceding 12 months, did not exceed 5.0% of its total commissions, commission equivalents, and mark-ups from transactions in securities during those months; and (ii) who has not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the preceding 12 months; and~~

~~(d) Any transaction or transactions that, upon prior written request or upon its own motion, the commission conditionally or unconditionally exempts as not encompassed within the purposes of this section;~~

~~(3) For purposes of this section, the term "designated security" means any equity security other than a security:~~

~~(a) Registered, or approved for registration upon notice of issuance, on a national securities exchange and makes transaction reports available pursuant to 17 CFR 11Aa3-1 under the Securities Exchange Act of 1934;~~

~~(b) Authorized, or approved for authorization upon notice of issuance, for quotation in the NASDAQ system;~~

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

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

~~(e) Whose issuer has net tangible assets in excess of \$4,000,000 as demonstrated by financial statements dated within no less than 15 months that the broker-dealer~~

~~has reviewed and has a reasonable basis to believe are true and complete in relation to the date of the transaction with the person; and~~

~~(i) In the event the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2-02 under the Securities Exchange Act of 1934; or~~

~~(ii) 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 SEC; furnished to the SEC pursuant to 17 CFR 240.12g3-2(b) under the Securities Exchange Act of 1934; 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.~~

16. Guarantee a customer against loss in any securities account of the customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for the customer;

17. Publish or circulate, or cause 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 the broker-dealer believes that the transaction was a bona fide purchase or sale of the security; or which purports to quote the bid price or asked price for any security, unless the broker-dealer believes that the quotation represents a bona fide bid for, or offer of, the security;

18. Use 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;

19. Fail to make reasonably available upon request to any person expressing an interest in a solicited transaction in a security, not listed on a registered securities exchange or quoted on an automated quotation system operated by a national securities association approved by regulation of the commission, a balance sheet of the issuer as of a date within 18 months of the offer or sale of the issuer's securities and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, the names of the issuer's proprietor, partners or officers, the nature of the enterprises of the issuer and any available information reasonably necessary for evaluating the desirability or lack of desirability of investing in the securities of an issuer. All transactions in securities described in this subdivision shall comply with the provisions of § 13.1-507 of the Act;

20. Fail to disclose that the broker-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 the security, the existence of control to the customer, and if disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction;

21. Fail to make a bona fide public offering of all of the securities allotted to a broker-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;

22. Fail or refuse to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written request or complaint;

23. Fail to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian, in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets;

24. Market broker-dealer services that are associated with financial institutions in a manner that is misleading or confusing to customers as to the nature of securities products or risks;

25. In transactions subject to breakpoints, fail to:

a. Utilize advantageous breakpoints without reasonable basis for their exclusion;

b. Determine information that should be recorded on the books and records of a member or its clearing firm, which is necessary to determine the availability and appropriateness of breakpoint opportunities; or

c. Inquire whether the customer has positions or transactions away from the member that should be considered in connection with the pending transaction, and apprise the customer of the breakpoint opportunities;

26. Use a certification or professional designation in connection with the offer, sale, or purchase of securities, that indicates or implies that the user has special certification or

training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

a. The use of such certification or professional designation includes, but is not limited to, the following:

(1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) Use of a nonexistent or self-conferred certification or professional designation;

(3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or

(4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:

(a) Is primarily engaged in the business of instruction in sales and/or marketing;

(b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subdivision 26 a (4) of this subsection, when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or

(3) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency when that job title:

(1) Indicates seniority within the organization; or

(2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3 (a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1)).

- e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of law;
27. Represent that securities will be listed or that application for listing will be made on a securities exchange or the NASDAQ system or other quotation system without reasonable basis in fact for the representation;
28. Falsify or alter so as to make false or misleading any record or document or any information provided to the commission;
29. Negotiate, facilitate, or otherwise execute a transaction on behalf of an investor involving securities issued by a third party pursuant to a claim for exemption under subsection B of § 13.1-514 of the Act unless the broker-dealer intends to report the securities owned and the value of such securities on at least a quarterly basis to the investor;
30. Offer or sell securities pursuant to a claim for exemption under subsection B of § 13.1-514 of the Act without having first verified the information relating to the securities offered or sold, which shall include, but not be limited to, ascertaining the risks associated with investing in the respective security;
31. Allow any person to represent or utilize its name as a trading platform without conspicuously disclosing the name of the registered broker-dealer in effecting or attempting to effect purchases and sales of securities;
- ~~32. Fail 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;~~

~~33. Fail to disclose, both at the time of solicitation and on the confirmation in connection with a principal transaction, a short inventory position in the firm's account of more than 3.0% of the issued and outstanding shares of that class of securities of the issuer;~~

~~34. Conduct sales contests in a particular security without regard to an investor's suitability;~~

~~35. Fail or refuse to promptly execute sell orders in connection with a principal transaction after a solicited purchase by a customer;~~

~~36. Solicit a secondary market transaction when there has not been a bona fide distribution in the primary market;~~

~~37. Compensate an agent in different amounts for effecting sales and purchases in the same security;~~

~~38. Fail to provide each customer with a statement of account with respect to all securities in the account, containing a value for each such 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 three months;~~

~~39. Fail to comply with any applicable provision of the FINRA Rules or any applicable fair practice or ethical standard promulgated by the SEC or by a self-regulatory organization approved by the SEC; or~~

4032. Engage in any conduct that constitutes a dishonest or unethical practice including, but not limited to, forgery, embezzlement, nondisclosure, incomplete disclosure or material omissions or untrue statements of material facts, manipulative or deceptive practices, or fraudulent course of business.

B. Every agent is required to observe high standards of commercial honor and just and equitable principles of trade in the conduct of his business. The acts and practices described

below are considered contrary to such standards and may constitute grounds for denial, suspension, or revocation of registration or such other action authorized by the Act. No agent who is registered or required to be registered shall:

1. Engage 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;
2. Effect any securities transaction not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transaction is authorized in writing by the broker-dealer prior to execution of the transaction;
3. Establish or maintain an account containing fictitious information in order to execute a transaction which would otherwise be unlawful or prohibited;
4. Share directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;
5. Divide or otherwise split the agent's commissions, profits or other compensation from the purchase or sale of securities in this state with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control;
6. Engage in conduct specified in subdivision A 2, 3, 4, 5, 6, 10, 15, 16, 17, 18, 23, 24, 25, 26, 28, 30, 31, or ~~32, 34, 35, 36, 39, or 40~~ of this section;
7. Fail to comply with the continuing education requirements under 21VAC5-20-150 C;  
or
8. Hold oneself out as representing any person other than the broker-dealer with whom the agent is registered and, in the case of an agent whose normal place of business is not on the premises of the broker-dealer, failing to conspicuously disclose the name of

the broker-dealer for whom the agent is registered when representing the dealer in effecting or attempting to effect the purchases or sales of securities.

C. No person shall publish, give publicity to, or circulate any notice, circular, advertisement, newspaper article, letter, investment service or communication which, though not purporting to offer a security for sale, describes the security, for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

D. The purpose of this subsection is to identify practices in the securities business which are generally associated with schemes to manipulate and to identify prohibited business conduct of broker-dealers or sales agents who are registered or required to be registered.

1. 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.

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. 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 affect 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 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.

5. Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things, (i) 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 (ii) parking or withholding securities.

6. Although nothing in this subsection precludes application of the general antifraud provisions against anyone for practices similar in nature to the practices discussed below, the following subdivisions a through f specifically apply only in connection with the solicitation of a purchase or sale of OTC (over the counter) unlisted non-NASDAQ equity securities:

a. 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.

b. In connection with a principal transaction, 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 3.0% of the issued and outstanding shares of that class of securities of the issuer; however, subdivision 6 of this subsection shall apply only if the firm is a market maker at the time of the solicitation.

c. Conducting sales contests in a particular security.

d. After a solicited purchase by a customer, failing or refusing, in connection with a principal transaction, to promptly execute sell orders.

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

f. 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 device or contrivance including but not limited to the use of boiler room tactics or use of fictitious or nominee accounts.

8. Failing to comply with any prospectus delivery requirements promulgated under federal law or the Act.

9. In connection with the solicitation of a sale or purchase of an OTC unlisted non-NASDAQ security, failing to promptly provide the most current prospectus or the most recently filed periodic report filed under § 13 of the Securities Exchange Act when requested to do so by a customer.

10. Marking any order tickets or confirmations as unsolicited when in fact the transaction was solicited.

11. For any month in which activity has occurred in a customer's account, but in no event less than every three months, failing to provide each customer with a statement of account with respect to all OTC non-NASDAQ equity securities in the account, containing a value for each such security based on the closing market bid on a date certain; however, this subdivision shall apply only if the firm has been a market maker in the security at any time during the month in which the monthly or quarterly statement is issued.

12. Failing to comply with any applicable provision of the FINRA Rules or any applicable fair practice or ethical standard promulgated by the SEC or by a self-regulatory organization approved by the SEC.

13. In connection with the solicitation of a purchase or sale of a designated security:

a. Failing to disclose to the customer the bid and ask price, at which the broker-dealer effects transactions with individual, retail customers, of the designated security as well as its

spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents; or

b. Failing to include with the confirmation, the notice disclosure contained under 21VAC 5-20-285, except the following shall be exempt from this requirement:

(1) Transactions in which the price of the designated security is \$5.00 or more, exclusive of costs or charges; however, if the designated security is a unit composed of one 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 \$5.00 or more, and any component of the unit that is a warrant, option, right, or similar securities, or a convertible security must have an exercise price or conversion price of \$5.00 or more.

(2) Transactions that are not recommended by the broker-dealer or agent.

(3) Transactions by a broker-dealer: (i) whose commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the preceding three months, and during 11 or more of the preceding 12 months, did not exceed 5.0% of its total commissions, commission-equivalents, and mark-ups from transactions in securities during those months; and (ii) who has not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the preceding 12 months.

(4) Any transaction or transactions that, upon prior written request or upon its own motion, the commission conditionally or unconditionally exempts as not encompassed within the purposes of this section.

c. For purposes of this section, the term "designated security" means any equity security other than a security:

(1) Registered, or approved for registration upon notice of issuance, on a national securities exchange and makes transaction reports available pursuant to 17 CFR 11Aa3-1 under the Securities Exchange Act of 1934;

(2) Authorized, or approved for authorization upon notice of issuance, for quotation in the NASDAQ system;

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

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

(5) Whose issuer has net tangible assets in excess of \$4,000,000 as demonstrated by financial statements dated within no less than 15 months that the broker-dealer has reviewed and has a reasonable basis to believe are true and complete in relation to the date of the transaction with the person, and

(a) In the event the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2-02 under the Securities Exchange Act of 1934; 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 SEC; furnished to the SEC pursuant to 17 CFR 240.12g3-2(b) under the Securities Exchange Act of 1934; 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.

**21VAC5-20-285. Customer notice for designated securities.**

A. Broker-dealers that solicit the purchase and sale of designated securities shall provide the following notice to customers:

**IMPORTANT CUSTOMER NOTICE-READ CAREFULLY**

You have just entered into a solicited transaction involving a security which may not trade on an active national market. The following should help you understand this transaction and be better able to follow and protect your investment.

Q. What is meant by the BID and ASK price and the spread?

A. The BID is the price at which you could sell your securities at this time. The ASK is the price at which you bought. Both are noted on your confirmation. The difference between these prices is the "spread," which is also noted on the confirmation, in both a dollar amount and a percentage relative to the ASK price.

Q. How can I follow the price of my security?

A. For the most part, you are dependent on broker-dealers that trade *in your security* for all price information. You may be able to find a quote in the newspaper, but you should keep in mind that the quote you see will be for dealer-to-dealer transactions (essentially wholesale prices and will not necessarily be the prices at which you could buy or sell).

Q. How does the spread relate to my investments?

A. The spread represents the profit made by your broker-dealer and is the amount by which your investment must increase (the BID must rise) for you to break even. Generally, a greater spread indicates a higher risk.

Q. How do I compute the spread?

A. If you bought 100 shares at an ASK price of \$1.00, you would pay \$100 (100 shares X \$1.00 = \$100). If the BID price at the time you purchased your stock was \$.50, you could sell the stock back to the broker-dealer for \$50 (100 shares X \$.50 = \$50). In this example, if you sold at the BID price, you would suffer a loss of 50%.

Q. Can I sell at any time?

A. Maybe. Some securities are not easy to sell because there are few buyers, or because there are no broker-dealers who buy or sell them on a regular basis.

Q. Why did I receive this notice?

A. The laws of some states require your broker-dealer or sales agent to disclose the BID and ASK price on your confirmation and include this notice in some instances. If the BID and ASK were not explained to you at the time you discussed this investment with your broker, you may have further rights and remedies under both state and federal law.

Q. Where do I go if I have a problem?

A. If you cannot work the problem out with your broker-dealer, you may contact the Virginia State Corporation Commission or the securities commissioner in the state in which you reside, the United States Securities and Exchange Commission, or FINRA.

B. For the purpose of this section, the term "designated security" shall be defined as ~~in~~ subdivision A-15 m-3 under 21VAC5-20-280 D 13 c.