

DEBTOR AND CREDITOR RELATIONSHIPS

CHAPTER 105

SENATE BILL NO. 2124

(Judiciary Committee)

(At the request of the Department of Financial Institutions)

AN ACT to create and enact two new subsections to section 13-04.1-01.1, sections 13-04.1-04.1 and 13-04.1-04.2, and four new sections to chapter 13-04.1 of the North Dakota Century Code, relating to the definition of a net branch and net branching arrangement, surety bond requirements, minimum net worth requirements, confidentiality, notice regarding change of name and address, call reports, and commissioner reporting to nationwide mortgage licensing system and registry with regard to money brokers; to amend and reenact sections 13-04.1-03, 13-04.1-04, 13-04.1-07, 13-04.1-08, 13-04.1-08.1, 13-04.1-09, 13-04.1-11, and 13-10-03 and subsection 6 of section 13-10-16 of the North Dakota Century Code, relating to application for branch offices, maintenance of records, revocation of license, suspension and removal of agency officers and employees, prohibited acts and practices, investigation and examination authority of money brokers, and licensing and registration of mortgage loan originators; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Two new subsections to section 13-04.1-01.1 of the North Dakota Century Code are created and enacted as follows:

"Net branch" means an office at which a licensed money broker allows a separate person that does not hold a valid North Dakota money brokers license to originate loans under the license of the money broker.

"Net branch arrangement" means an arrangement under which a licensed money broker enters an agreement whereby its designated branch manager has the appearance of ownership of the licensee by, among other things, sharing in the profits or losses, establishing, leasing, or renting the branch premises, entering other contractual relationships with vendors such as for telephones, utilities, and advertising, having control of a corporate checkbook, or exercising control of personnel through the power to hire or fire such individuals. A person may be considered to be utilizing a net branch if the net branch agreement requires the branch manager to indemnify the licensee for damages from any apparent, express, or implied agency representation by or through the branch's actions or if the agreement requires the branch manager to issue a personal check to cover operating expenses whether or not funds are available from an operating account of the licensee.

SECTION 2. AMENDMENT. Section 13-04.1-03 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-03. Application for money broker license.

Every application for a money broker license or branch registration, or for a renewal thereof, must be made upon forms designed and furnished by the department of financial institutions and must contain any information which the department shall deem necessary and proper. A branch registration that constitutes a net branch or net branching arrangement is prohibited. The department may further require any application to provide additional information which is not requested on the application form. The applicant must register with the North Dakota secretary of state if so required.

SECTION 3. AMENDMENT. Section 13-04.1-04 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-04. Fee ~~and bond~~ to accompany application for money broker license.

The application for license must be in writing, under oath, and in the form prescribed by the commissioner. The application must give the location where the business is to be conducted and must contain any further information the commissioner requires, including the names and addresses of the partners, officers, directors, trustees, and the principal owners or members, as will provide the basis for the investigation and findings contemplated by section 13-04.1-03. At the time of making such application, the applicant shall include payment in the sum of four hundred dollars, which is not subject to refund, as a fee for investigating the application, and the sum of four hundred dollars for the annual license fee, ~~and provide a surety bond in the sum of twenty five thousand dollars.~~ In addition, the applicant must pay a fifty dollar annual fee for each branch location within the state. Fees must be deposited in the financial institutions regulatory fund.

SECTION 4. Section 13-04.1-04.1 of the North Dakota Century Code is created and enacted as follows:

13-04.1-04.1. Surety bond required.

1. Each licensee shall maintain a surety bond in an amount not less than twenty-five thousand dollars. The surety bond must be in a form prescribed by the commissioner.
2. When an action is commenced on a licensee's bond, the commissioner may require the filing of a new bond.
3. Immediately upon recovery upon any action on the bond, the licensee shall file a new bond.

SECTION 5. Section 13-04.1-04.2 of the North Dakota Century Code is created and enacted as follows:

13-04.1-04.2. Minimum net worth required.

A minimum net worth must be continuously maintained by every licensee in accordance with this section.

1. Minimum net worth must be maintained in the amount of twenty-five thousand dollars.
2. If the net worth of a licensee falls below the minimum net worth set forth in subsection 1, the licensee shall provide a plan, subject to the approval of the commissioner, to increase the licensee's net worth to an amount in conformance with this section. Submission of a plan under this section must be made within twenty business days of a notice from the commissioner which states the licensee is not in compliance with subsection 1. If the licensee does not submit a plan under this section, fails to comply with an approved plan, or has repeated violations of subsection 1, the commissioner may revoke the license.

SECTION 6. AMENDMENT. Section 13-04.1-07 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-07. Manner in which records to be kept.

Every money broker licensed under this chapter shall keep a record of all sums collected by them and of all loans and leases completed as a result of their efforts for a period of six years from the date of last entry thereon. The records of a licensee may be maintained electronically provided they can be reproduced upon request by the department of financial institutions and within the required statutory time period provided in this section. When a licensee ceases operations for any reason, the licensee shall inform the department of the location of the records. In addition, the licensee shall provide the name of the individual responsible for maintenance of the records. The licensee shall notify the department within ten business days of the change of the location of the records or the change of the individual responsible for maintenance of the records.

SECTION 7. AMENDMENT. Section 13-04.1-08 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-08. Revocation of license - Suspension of license - Surrender of license.

1. ~~The department of financial institutions commissioner may, if it has reason to believe that grounds for revocation of a license exist, send by registered or certified mail to the licensee, a notice of hearing stating the contemplated action and in general the grounds thereof and setting the time and place for a hearing thereon. Such hearing must be held in accordance with chapter 28-32 as must any appeal therefrom.~~ issue and serve upon any licensee an order suspending or revoking a licensee's license if the commissioner finds that:
 - a. The licensee has failed to pay the annual license fee under this chapter or any examination fee imposed by the commissioner under the authority of this chapter.
 - b. The licensee, either knowingly or without the exercise of due care to prevent the same, has violated any provision of this chapter or any regulation or order lawfully made pursuant to and within the authority of this chapter.
 - c. Any fact or condition existing at the time of the original application for such license which clearly would have warranted the department of financial institutions in refusing originally to issue such license.

- d. The licensee has failed to maintain the required bond.
- e. The licensee has failed to maintain registration with the secretary of state if so required.
- 2. The order must contain a notice of opportunity for hearing pursuant to chapter 28-32.
- 3. If no hearing is requested within twenty days of the date the order is served upon the licensee, or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter a final order suspending or revoking the license.
- 2-4. If the ~~department of financial institutions~~ commissioner finds that probable cause for revocation of any license exists and that enforcement of the chapter requires immediate suspension of such license pending investigation, it may, upon written notice, enter an order suspending such license for a period not exceeding ~~thirty~~ sixty days, pending the holding of a hearing as prescribed in this chapter.
- 3-5. Any licensee may surrender the licensee's license by delivering it to the department of financial institutions with written notice of its surrender, but such surrender does not affect the licensee's civil or criminal liability for acts committed prior thereto.

SECTION 8. AMENDMENT. Section 13-04.1-08.1 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-08.1. Suspension and removal of money broker officers and employees.

1. The commissioner of financial institutions may issue and serve upon a current or former money broker officer or employee and upon the licensee involved a complaint order stating ~~the basis for the commissioner's belief that the:~~
 - a. That the current or former officer or employee is willfully engaging or has willfully engaged in any of the following conduct:
 - a- (1) Violating a law, rule, order, or written agreement with the commissioner;
 - b- (2) Engaging in harassment or abuse, the making of false or misleading representations, or engaging in unfair practices involving lending activity;
 - c- (3) Performing an act of commission or omission or practice which is a breach of trust or a breach of fiduciary duty.
 - b. The term of the suspension or removal from employment and participation within the conduct or the affairs of a money broker.
2. The complaint order must contain a notice of opportunity for hearing pursuant to chapter 28-32.
3. If a hearing is not requested within twenty days of the date the complaint order is served upon the ~~officer or employee~~, or if a hearing is held and the

commissioner finds that the record so warrants, the commissioner may enter ~~a final~~ order suspending or temporarily removing the current or former employee or officer from office for a period not exceeding three years from the ~~effective date of the suspension or temporary removal~~. The current or former officer or employee may request a termination of the final order after a period of no less than three years.

4. A contested or default suspension or ~~temporary~~ removal order is effective immediately upon service of the final order on the current or former officer or employee and upon the licensee. A consent order is effective as agreed. ~~Any current or former~~ officer or employee suspended or temporarily removed from ~~office~~ employment and participation within the conduct or the affairs of a money broker pursuant to this section is not eligible, while under suspension, ~~for reinstatement to a position within a licensed money broker or removal, to be employed or otherwise participate in the affairs of any financial corporation, financial institution, credit union, or any other entity licensed by the department of financial institutions.~~
5. When ~~any current or former~~ officer or employee, or other person participating in the conduct of the affairs of a licensee is charged with a felony in state or federal court which involves dishonesty or breach of trust, the commissioner may immediately suspend the person from office or prohibit the person from further participation in the affairs of the money broker, or both. The order is effective immediately upon service of the order on the licensee and the person charged and remains in effect until the criminal charge is finally disposed of or until modified by the commissioner. If a judgment of conviction, federal pretrial diversion, or similar state order or judgment is entered, the commissioner may order that the suspension or prohibition be made permanent. A finding of not guilty or other disposition of the charge does not preclude the commissioner from pursuing administrative or civil remedies.
6. Under this section, a person engages in conduct "willfully" if the person acted intentionally in the sense that the person was aware of what the person was doing.

SECTION 9. AMENDMENT. Section 13-04.1-09 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-09. ~~Fraudulent~~ Prohibited acts and practices.

It is a ~~fraudulent practice and it is unlawful~~ violation of this chapter for a person subject to this chapter to knowingly:

1. ~~For any person knowingly to subscribe to, or make~~ Make or cause to be made, any material false statement or representation in any application or other document or statement required to be filed under any provision of this chapter, or to omit to state any material statement or fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.
2. ~~For any person, in connection with the procurement or promise of procurement of any lender or loan funds, directly~~ Directly or indirectly, to employ any device, scheme, or artifice to defraud or mislead borrowers or lenders to defraud any person.

3. ~~For any person, in connection with the procurement or promise of procurement of any lender or loan funds, directly~~ Directly or indirectly, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading in connection with the procurement or promise of procurement of any lender or loan funds.
4. Engage in any unfair or deceptive practice toward any person.
5. Obtain property by fraud or misrepresentation.
6. Solicit, advertise, or enter into a contract for specific interest rates, points, or other financing terms unless the terms are actually available at the time of soliciting, advertising, or contracting.
7. Conduct any business covered by this chapter without holding a valid license as required under this chapter, or assist or aid and abet any person in the conduct of business under this chapter without a valid license as required under this chapter.
8. Fail to make disclosures as required by this chapter and any other applicable state or federal law and regulations.
9. Fail to comply with this chapter or rules adopted under this chapter, or fail to comply with any other state or federal law, including the rules and regulations thereunder, applicable to any business authorized or conducted under this chapter.
10. Make, in any manner, any false or deceptive statement or representation, including, with regard to the rates, points, or other financing terms or conditions for a residential mortgage loan or engage in bait and switch advertising.
11. Negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or the nationwide mortgage licensing system and registry or in connection with any investigation conducted by the commissioner or another governmental agency.
12. Make any payment, threat, or promise, directly or indirectly, to any person for the purposes of influencing the independent judgment of the person in connection with a loan or make any payment, threat, or promise, directly or indirectly, to any appraiser of a property, for the purposes of influencing the independent judgment of the appraiser with respect to the value of the property.
13. Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by this chapter.
14. Cause or require a borrower to obtain property insurance coverage in an amount that exceeds the replacement cost of the improvements as established by the property insurer.
15. Fail to truthfully account for moneys belonging to a party to a loan transaction.

16. Conduct another business within the same office, suite, room, or place of business at which the licensee engages in money broker business unless the commissioner provides written authorization after a determination the other business is not contrary to the best interests of any borrower or potential borrower.

⁴¹ **SECTION 10. AMENDMENT.** Section 13-04.1-11 of the North Dakota Century Code is amended and reenacted as follows:

13-04.1-11. Investigations and, subpoenas, and examination authority.

In addition to any authority allowed under this chapter, the commissioner may conduct investigation and examinations as follows:

1. The department of financial institutions in its discretion:
 - a. May make such public or private investigation or examination within or outside this state as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder. The licensee shall pay an investigation or examination fee and must be charged by the department of financial institutions at an hourly rate to be set by the commissioner, sufficient to cover all reasonable expenses of the department associated with the visitation provided for by this section. Fees must be paid to the state treasurer and deposited in the financial institutions regulatory fund.
 - b. May require or permit any person to file a statement in writing, under oath or otherwise as the department determines, as to all the facts and circumstances concerning the matter to be investigated or examined.
 - c. May publish information concerning any violation of this chapter or any rule or order hereunder.
2. For the purpose of any investigation, examination, or proceeding under this chapter, the department of financial institutions may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the department deems relevant or material to the inquiry.
3. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the district court, upon application by the department of financial institutions, may issue to the person an order requiring such person to appear before the department, there to produce documentary evidence if so ordered or to give evidence touching the matter in question under investigation or ~~in question~~ examination. Failure to obey the order of the court may be punished by the court as a contempt of court.
4. No person is excused from attending and testifying or from producing any document or record before the department of financial institutions, or in obedience to the subpoena of the department, or in any proceeding instituted by the department, on the grounds that the testimony or evidence,

⁴¹ Section 13-04.1-11 was also amended by section 2 of Senate Bill No. 2104, chapter 75.

documentary or otherwise, required of such person may tend to incriminate such person or subject such person to a penalty forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such person is compelled, after claiming the privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

5. For purposes of initial licensing, license renewal, license suspension, license conditioning, license revocation or termination, or general or specific inquiry or investigation to determine compliance with this chapter, the commissioner may access, receive, and use any books, accounts, records, files, documents, information, or evidence, including:
 - a. Criminal, civil, and administrative history information, including nonconviction data;
 - b. Personal history and experience information, including independent credit reports obtained from a consumer reporting agency described in section 603(p) of the Fair Credit Reporting Act; and
 - c. Any other documents, information, or evidence the commissioner deems relevant to the inquiry or investigation regardless of the location, possession, control, or custody of such documents, information, or evidence.
6. For purposes of investigating violations or complaints arising under this chapter, or for purposes of examination, the commissioner may review, investigate, or examine any licensee or person subject to this chapter, as often as necessary in order to carry out the purposes of this chapter.
7. Each licensee or person subject to this chapter shall make available to the commissioner upon request the books and records relating to the operations of such licensee or person subject to this chapter. The commissioner shall have access to such books and records and interview the officers, principals, mortgage loan originators, employees, independent contractors, agents, and customers of the licensee or person subject to this chapter concerning their business.
8. Each licensee or person subject to this chapter shall make or compile reports or prepare other information as directed by the commissioner in order to carry out the purposes of this section, including:
 - a. Accounting compilations;
 - b. Information lists and data concerning loan transactions in a format prescribed by the commissioner; or
 - c. Such other information deemed necessary to carry out the purposes of this section.
9. In making any investigation or examination authorized by this chapter, the commissioner may control access to any documents and records of the licensee or person under investigation or examination. The commissioner may

take possession of the documents and records or place a person in exclusive charge of the documents and records in the place where they are usually kept. During the period of control, a person may not remove or attempt to remove any of the documents and records except pursuant to a court order or with the consent of the commissioner. Unless the commissioner has reasonable grounds to believe the documents or records of the licensee have been, or are at risk of being altered or destroyed for purposes of concealing a violation of this chapter, the licensee or owner of the documents and records may have access to the documents or records as necessary to conduct its ordinary business affairs.

10. In order to carry out the purposes of this section, the commissioner may:
 - a. Retain accountants, or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations;
 - b. Enter into agreements or relationships with other government officials or regulatory associations in order to improve efficiencies and reduce regulatory burden by sharing resources, standardized or uniform methods or procedures, and documents, records, information, or evidence obtained under this section;
 - c. Use, hire, contract, or employ publicly or privately available analytical systems, methods, or software to examine or investigate the licensee, individual, or person subject to this chapter;
 - d. Accept and rely on examination or investigation reports made by other government officials, within or without this state; and
 - e. Accept audit reports made by an independent certified public accountant for the licensee or person subject to this chapter in the course of that part of the examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation, or other writing of the commissioner.
11. The authority of this section remains in effect, whether such a licensee or person subject to this chapter acts or claims to act under any licensing or registration law of this state or claims to act without such authority.
12. A licensee or person subject to investigation or examination under this section may not knowingly withhold, abstract, remove, mutilate, destroy, or secrete any books, records, computer records, or other information.

SECTION 11. A new section to chapter 13-04.1 of the North Dakota Century Code is created and enacted as follows:

Confidentiality.

To promote more effective regulation and reduce regulatory burden through supervisory information sharing:

1. Except as otherwise provided in Public Law 110-289, section 1512, the requirements under any federal law, chapter 44-04, or section 6-01-07.1, regarding the privacy or confidentiality of any information or material provided to the nationwide mortgage licensing system and registry, and any privilege

arising under federal or state law, including the rules of any federal or state court, with respect to such information or material, continue to apply to such information or material after the information or material has been disclosed to the nationwide mortgage licensing system and registry. Such information and material may be shared with all state and federal regulatory officials with mortgage industry oversight authority without the loss of privilege or the loss of confidentiality protections provided by federal law, chapter 44-04, or section 6-01-07.1.

2. For these purposes, the commissioner may enter agreements or sharing arrangements with other governmental agencies, the conference of state bank supervisors, the American association of residential mortgage regulators, or other associations representing governmental agencies.
3. Information or material that is subject to a privilege or confidentiality under subsection 1 is not subject to:
 - a. Disclosure under any federal or state law governing the disclosure to the public of information held by an officer or an agency of the federal government or the respective state; or
 - b. Subpoena or discovery, or admission into evidence, in any administrative process, unless with respect to any privilege held by the nationwide mortgage licensing system and registry with respect to such information or material, the person to whom such information or material pertains waives, in whole or in part, in the discretion of such person, that privilege.
4. The commissioner shall take all necessary steps, under any applicable law or rule, to protect the disclosure of information or material that is subject to a privilege or confidentiality under subsection 1. Records subject to a privilege or confidentiality under subsection 1 may be required to be disclosed only pursuant to an order of the court. The court ordering the disclosure shall issue a protective order to protect the confidential nature of the records.
5. Application of chapter 44-04 or section 6-01-07.1, relating to the disclosure of confidential supervisory information or any information or material described in subsection 1 which is inconsistent with subsection 1, is superseded by the requirements of this section.

SECTION 12. A new section to chapter 13-04.1 of the North Dakota Century Code is created and enacted as follows:

Change of name or address.

A licensee is required to submit within twenty business days of the date of change notification of a change of name or change of address. The notification must be in the form prescribed by the commissioner. In addition, the licensee shall submit the original license certificate for reissue.

SECTION 13. A new section to chapter 13-04.1 of the North Dakota Century Code is created and enacted as follows:

Call reports.

Each licensee shall submit to the nationwide mortgage licensing system and registry reports of condition which must be in such form and must contain such information as the nationwide mortgage licensing system and registry may require.

SECTION 14. A new section to chapter 13-04.1 of the North Dakota Century Code is created and enacted as follows:

Report to nationwide mortgage licensing system and registry.

Notwithstanding state privacy law, the commissioner shall report regularly violations of this chapter, as well as enforcement actions and other relevant information, to the nationwide mortgage licensing system and registry subject to the provisions contained in section 13-10-15.

SECTION 15. AMENDMENT. Section 13-10-03 of the North Dakota Century Code is amended and reenacted as follows:

13-10-03. License and registration required.

1. An individual, unless specifically exempted from this chapter under subsection 3, shall not engage in the business of a mortgage loan originator with respect to any dwelling located in this state without first obtaining and maintaining annually a license under this chapter. Each licensed mortgage loan originator must register with and maintain a valid unique identifier issued by the nationwide mortgage licensing system and registry.
2. ~~To facilitate an orderly transition to licensing and minimize disruption in the mortgage marketplace, the effective date for subsection 1 is August 1, 2009, or such later date approved by the secretary of the United States department of housing and urban development, pursuant to the authority granted under Public Law 110-289, section 1508(a). All persons subject to licensing under this section, who are currently licensed under chapter 13-04.1, shall continue to be subject to licensure under chapter 13-04.1 until January 1, 2010, when they shall be required to be licensed under this chapter. If at any point before January 1, 2010, a person subject to licensing under this section fails to be licensed under chapter 13-04.1, that person shall be required to be licensed under this chapter.~~
3. The following are exempt from this chapter:
 - a. Registered mortgage loan originators, when acting for an entity described in subdivision a of subsection 11 of section 13-10-02 are exempt from this chapter.
 - b. Any individual who offers or negotiates terms of a residential mortgage loan with or on behalf of an immediate family member of the individual.
 - c. Any individual who offers or negotiates terms of a residential mortgage loan secured by a dwelling that served as the individual's residence.
 - d. A licensed attorney who negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a

lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other mortgage loan originator.

- 4-3. A loan processor or underwriter who is an independent contractor may not engage in the activities of a loan processor or underwriter unless such independent contractor loan processor or underwriter obtains and maintains a license under subsection 1. Each independent contractor loan processor or underwriter licensed as a mortgage loan originator must have and maintain a valid unique identifier issued by the nationwide mortgage licensing system and registry.
- 5-4. To implement an orderly and efficient licensing process, the commissioner may establish licensing rules or regulations and interim procedures for licensing and acceptance of applications. For previously registered or licensed individuals, the commissioner may establish expedited review and licensing procedures.

SECTION 16. AMENDMENT. Subsection 6 of section 13-10-16 of the North Dakota Century Code is amended and reenacted as follows:

6. In order to carry out the purposes of this section, the commissioner may:
- a. Retain ~~attorneys~~, accountants, or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations;
 - b. Enter into agreements or relationships with other government officials or regulatory associations in order to improve efficiencies and reduce regulatory burden by sharing resources, standardized or uniform methods or procedures, and documents, records, information, or evidence obtained under this section;
 - c. Use, hire, contract, or employ publicly or privately available analytical systems, methods, or software to examine or investigate the licensee, individual, or person subject to this chapter;
 - d. Accept and rely on examination or investigation reports made by other government officials, within or without this state; or
 - e. Accept audit reports made by an independent certified public accountant for the licensee, individual, or person subject to this chapter in the course of that part of the examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation, or other writing of the commissioner.

Approved April 19, 2011
Filed April 19, 2011

CHAPTER 106

HOUSE BILL NO. 1080

(Industry, Business and Labor Committee)
(At the request of the Department of Financial Institutions)

AN ACT to create and enact sections 13-05-04.1, 13-05-04.2, 13-05-05.1, and 13-05-06.3 of the North Dakota Century Code, relating to surety bonds, minimum net worth, notice regarding change of name and address, and prohibited acts and practices of licensed collection agencies; to amend and reenact subsection 2 of section 6-08-16 and sections 13-05-01.1, 13-05-02.1, 13-05-02.3, 13-05-03, 13-05-04, 13-05-06, 13-05-06.1, 13-05-06.2, 13-05-07, and 13-05-08 of the North Dakota Century Code, relating to the definitions of creditor and insolvent, branch offices, entities exempt from licensing, forms for application for licensing, powers of the department of financial institutions, suspension and removal of agency officers and employees, investigations and subpoenas, agency recordkeeping, and revocation of licenses for collection agencies.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

⁴² **SECTION 1. AMENDMENT.** Subsection 2 of section 6-08-16 of the North Dakota Century Code is amended and reenacted as follows:

2. The grade of an offense under this section may be determined by individual or aggregate totals of insufficient funds checks, drafts, electronic funds transfer authorizations, or orders. The person is also liable for collection fees or costs, not in excess of thirty dollars, which are recoverable by the holder, or its agent or representative, of the check, draft, electronic funds transfer authorization, or order. If the holder of the check, draft, electronic funds transfer authorization, or order or the holder's agent or representative uses the automated clearinghouse network to collect the collection fees or costs, that person shall comply with the network's rules and requirements. A collection agency shall reimburse the original holder of the check, draft, electronic funds transfer authorization, or order any additional charges assessed by the depository bank of the check, draft, electronic funds transfer authorization, or order ~~not in excess of two dollars~~ if recovered by the collection agency. If the person does not pay the instrument in full and any collection fees or costs not in excess of thirty dollars within ten days from receipt of the notice of dishonor provided for in subsection 4, a civil penalty is also recoverable by civil action by the holder, or its agent or representative, of the check, draft, electronic funds transfer authorization, or order. The civil penalty consists of payment to the holder, or its agent or representative, of the instrument of the lesser of two hundred dollars or three times the amount of the instrument. The court may order an individual convicted under this section to undergo an evaluation by a licensed gaming, alcohol, or drug addiction counselor.

SECTION 2. AMENDMENT. Section 13-05-01.1 of the North Dakota Century Code is amended and reenacted as follows:

⁴² Section 6-08-16 was also amended by section 1 of Senate Bill No. 2158, chapter 77.

13-05-01.1. Definitions.

As used in this chapter, unless the context or subject matter otherwise requires:

1. "Collection agency" means a person or entity who, in the ordinary course of business, engages in debt collection.
2. "Commissioner" means the commissioner of financial institutions.
3. "Communication" means the conveyance or receipt of information regarding or facilitating the collection of a debt, directly or indirectly, to or from any person through any medium.
4. "Creditor" means a person who offers or extends credit creating a debt or to whom a debt is owed, but that term does not include a person to the extent that that person receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of that debt ~~for another~~.
5. "Debt" means an obligation or alleged obligation to pay money arising out of a transaction, whether or not the obligation has been reduced to a judgment.
6. "Debt collection" means the act of collecting or attempting to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. As used in this chapter, this term also includes solicitation of debts for the purpose of collection and accepting assignment of debts for the purpose of collection.
7. "Insolvent" means the point at which a licensed entity's liabilities exceed the entity's tangible assets. For the purpose of this definition, tangible assets only include assets that have a physical existence and are capable of being assigned a value.
8. "Mortgage servicing company" means a company performing the required duties of a mortgage seller, such as collecting payments, releasing the lien on full payment, and confirming that taxes are paid and insurance is in force.

SECTION 3. AMENDMENT. Section 13-05-02.1 of the North Dakota Century Code is amended and reenacted as follows:

13-05-02.1. Branch offices.

~~A collection agency licensed under this chapter is permitted to operate and maintain branch offices provided the collection agency license was issued in a North Dakota location. Branch offices are permitted without limitations or restrictions as to number or geographic location. The commissioner may grant approval for each branch office which must be submitted by an application. When used in this chapter, "branch office" means a physical location where collection activity is carried out, other than the location where the collection agency license was granted and where a collection agency collects or receives payments within a building site, but does not include a virtual office. As used in this chapter, "virtual office" means a remote location from which employees can work under the full control and monitoring of the collection agency through telecommunications and computer links. Records may not be maintained at a virtual office and a virtual office may not be held open to the public as a place of business.~~

SECTION 4. AMENDMENT. Section 13-05-02.3 of the North Dakota Century Code is amended and reenacted as follows:

13-05-02.3. Entities exempt from licensing requirements.

This chapter does not apply to:

1. Attorneys at law who are licensed to practice in the state of North Dakota. This exemption is limited to the actions of the licensed attorney and does not extend to persons either employed by the attorney or acting on behalf of the attorney;
2. Licensed real estate brokers;
3. Banks;
4. Trust companies;
5. Building and loan associations;
6. Credit unions;
7. Agencies of a state or of the federal government;
8. Abstract companies doing an escrow business;
9. Creditors collecting their own debts;
10. Mortgage servicing company;
11. Individuals or firms who purchase or take accounts receivable for collateral purposes;
12. Individuals employed in the capacity of creditmen upon the staff of an employer not engaged in the business of a collection agency; or
13. A public officer, receiver, or trustee acting under the order of a court; ~~or~~
14. ~~A person whose activities are limited to collecting debts from debtors located in this state by means of interstate communications, including telephone, mail, or facsimile transmission from the person's location in another state if the person is licensed and bonded in that state and that state has enacted similar legislation.~~

SECTION 5. AMENDMENT. Section 13-05-03 of the North Dakota Century Code is amended and reenacted as follows:

13-05-03. Application for a collection agency license.

Every application for a collection agency license, or for a renewal thereof, must be made upon ~~blank forms~~ furnished by the department of financial institutions and must contain the following information:

1. The full name and proposed business name of the applicant.
2. The address where the business is to be conducted.
3. The names and addresses of the applicant and those associated with the applicant. If the applicant is a corporation, the application must contain the

names of the officers of the corporation. If the applicant is a limited liability company, the application must contain the names of the managers of the limited liability company. The applicant must register with the North Dakota secretary of state if so required.

4. Such additional information which the department of financial institutions shall require.

SECTION 6. AMENDMENT. Section 13-05-04 of the North Dakota Century Code is amended and reenacted as follows:

13-05-04. Application requirements - Fee and ~~bond~~ to accompany application for collection agency license.

The application for a collection agency license must be in writing, under oath, and in the form prescribed by the commissioner. The application must give the location where the business is to be conducted and must contain any further information the commissioner requires, including the names and addresses of the partners, officers, directors, trustees, and the principal owners or members as will provide the basis for the investigation and findings contemplated by section 13-05-03. At the time of making such application, the applicant shall include payment in the sum of four hundred dollars, which is not subject to refund, as a fee for investigating the application, and the sum of three hundred dollars for the annual license fee, ~~and provide a surety bond in the sum of twenty thousand dollars.~~ In addition, the applicant shall pay a fifty dollar annual fee for each branch location. Fees must be deposited in the financial institutions regulatory fund.

SECTION 7. Section 13-05-04.1 of the North Dakota Century Code is created and enacted as follows:

13-05-04.1. Surety bond required.

1. Each licensee shall maintain a surety bond in the amount of twenty thousand dollars.
2. The surety bond must be in a form as prescribed by the commissioner.
3. When an action is commenced on a licensee's bond, the commissioner may require the filing of a new bond.
4. Immediately upon recovery upon any action on the bond, the licensee shall file a new bond.

SECTION 8. Section 13-05-04.2 of the North Dakota Century Code is created and enacted as follows:

13-05-04.2. Minimum net worth required.

A minimum net worth must be continuously maintained by every licensee in accordance with this section.

1. Minimum net worth must be maintained in the amount of twenty-five thousand dollars.
2. If the net worth of a licensee falls below the minimum net worth as set forth in subsection 1, the licensee shall provide a plan, subject to the approval of the

commissioner, to increase the licensee's net worth to an amount in conformance with this section. Submission of a plan under this section must be made within twenty business days of a notice from the commissioner that the licensee is not in compliance with subsection 1. If the licensee does not submit a plan under this section, fails to comply with an approved plan, or has repeated violations of subsection 1, the commissioner may revoke the license.

SECTION 9. Section 13-05-05.1 of the North Dakota Century Code is created and enacted as follows:

13-05-05.1. Change of name or address.

A licensee is required to submit within twenty business days of the date of change, notification of a change of name or change of address. The notification must be in the form prescribed by the commissioner. In addition, the licensee shall submit the original license certificate for reissue.

SECTION 10. AMENDMENT. Section 13-05-06 of the North Dakota Century Code is amended and reenacted as follows:

13-05-06. Powers of the department of financial institutions.

Insofar as consistent with other provisions of law, the department of financial institutions has the power to:

1. Determine the qualifications of all applicants based on financial responsibility, financial condition, business experience, character, and general fitness which most reasonably warrant the belief that the applicant's business will be conducted lawfully and fairly. In determining whether this qualification is met, and for the purpose of investigating compliance with this chapter, the commissioner may review and consider the relevant business records and capital adequacy of the applicant and the competence, experience, integrity, and financial ability of a person who is a member, partner, director, officer, or twenty-five percent or more shareholder of the applicant.
2. Conduct investigations and make an examination of any licensee or licensee's place of business, including all records of such business, and to subpoena witnesses anytime it has reason to believe such is necessary to ensure and enforce compliance with state and federal rules and regulations. The licensee shall pay an examination or visitation fee and must be charged by the department of financial institutions at an hourly rate to be set by the commissioner, sufficient to cover all reasonable expenses of the department associated with the examination or visitation provided for by this section. Fees must be paid to the state treasurer and deposited in the financial institutions regulatory fund.
3. Establish codes of ethical conduct for licensees.
4. Adopt any and all rules and regulations necessary to carry out the purpose of this chapter.
5. Issue and serve upon any person or licensed collection agency an order to cease and desist to take corrective action when the department has reason to believe the person or agency is violating, has violated, or is about to violate the provisions of this chapter. An interested party may appeal issuance of a

cease and desist order under the provisions of chapter 28-32 by filing written notice of appeal within twenty days after service of the order.

6. If the commissioner determines a licensee is insolvent, or the license has expired or terminated for any reason, the commissioner, on determining such action necessary to protect the public interest, may apply to the district court for the county in which the main office of such licensee is located for appointment of a receiver to receive the assets of the licensee for the purpose of liquidating its business or for such other relief as the nature of the case and the interest of the claimants may require. The reasonable and necessary expenses of the receivership shall constitute the first claim on the bond.

SECTION 11. AMENDMENT. Section 13-05-06.1 of the North Dakota Century Code is amended and reenacted as follows:

13-05-06.1. Suspension and removal of collection agency officers or employees.

1. The commissioner of financial institutions may issue and serve upon any current or former collection agency officer or employee and upon the collection agency involved ~~a complainant order~~ stating ~~the basis for the commissioner's belief that the:~~
 - a. ~~That the current or former~~ officer or employee is willfully engaging or has willfully engaged in any of the following conduct:
 - ~~a.~~(1) Violating any law, rule, order, or written agreement with the commissioner;
 - ~~b.~~(2) Engaging in any harassment or abuse, the making of false or misleading representations, or engaging in unfair practices involving collection activity;
 - ~~e.~~(3) Performing any act of commission or omission or practice which is a breach of trust or a breach of fiduciary duty.
 - b. The term of the suspension or removal from employment and participation within the conduct or the affairs of a collection agency.
2. ~~The complaint order~~ must contain a notice of opportunity for hearing pursuant to chapter 28-32.
3. If no hearing is requested within twenty business days of the date the ~~complaint order~~ is served ~~upon the officer or employee~~, or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter ~~an a final~~ order suspending or temporarily removing the current or former officer or employee ~~or officer from office for a period not exceeding three years from the effective date of the suspension or temporary removal. The current or former officer or employee shall have the opportunity to request a termination of the final order after a period of no less than three years.~~
4. A contested or default suspension or ~~temporary~~ removal order is effective immediately upon service of the final order on the current or former officer or employee and upon the collection agency. A consent order is effective as agreed. ~~Any current or former~~ officer or employee suspended or temporarily removed from ~~office~~ employment and participation within the conduct or the

affairs of a collection agency pursuant to this section is not eligible, while under suspension, ~~for reinstatement to any position within a licensed collection agency or removal, to be employed or otherwise participate in the affairs of any financial corporation, financial institution, credit union, or any other entity licensed by the department of financial institutions.~~

5. When ~~any~~ any current or former officer or employee, or other person participating in the conduct of the affairs of a collection agency is charged with a felony in state or federal court which involves dishonesty or breach of trust, the commissioner may immediately suspend the person from office or prohibit the person from any further participation in the collection agency's affairs, or both. The order is effective immediately upon service of the order on the collection agency and the person charged and remains in effect until the criminal charge is finally disposed of or until modified by the commissioner. If a judgment of conviction, federal pretrial diversion, or similar state order or judgment is entered, the commissioner may order that the suspension or prohibition be made permanent. A finding of not guilty or other disposition of the charge does not preclude the commissioner from pursuing administrative or civil remedies.
6. Under this section, a person engages in conduct "willfully" if the person acted intentionally in the sense that the person was aware of what the person was doing.

SECTION 12. AMENDMENT. Section 13-05-06.2 of the North Dakota Century Code is amended and reenacted as follows:

13-05-06.2. Investigations and subpoenas.

1. The department of financial institutions may:
 - a. Make such public or private investigation within or outside this state as it deems necessary to determine whether a person has violated or is about to violate a provision of this chapter or a rule or order under this chapter, or to aid in the enforcement of this chapter or in the adopting of rules and forms under this chapter.
 - b. Require or permit a person to file a statement in writing, under oath or otherwise as the department determines, as to all the facts and circumstances concerning the matter to be investigated.
 - c. Publish information concerning a violation of this chapter or a rule or order under this chapter.
2. For the purpose of an investigation or proceeding under this chapter, the department of financial institutions may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records which the department deems relevant or material to the inquiry.
3. In case of contumacy by, or refusal to obey a subpoena issued to, a person, the district court, upon application by the department of financial institutions, may issue to the person an order requiring the person to appear before the department, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to

obey the order of the court may be punished by the court as a contempt of court.

4. A person is not excused from attending and testifying or from producing a document or record before the department of financial institutions, or in obedience of the subpoena of the department or in a proceeding instituted by the department, on the grounds that the testimony or evidence, documentary or otherwise, required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture; but an individual may not be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter, or thing concerning which the person is compelled, after claiming the privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.
5. In making any examination or investigation authorized by this chapter, the commissioner may control access to any documents and records of the licensee or person under examination or investigation. The commissioner may take possession of the documents and records or place a person in exclusive charge of the documents and records in the place where they are usually kept. During the period of control, no individual or person shall remove or attempt to remove any of the documents and records except pursuant to a court order or with the consent of the commissioner. Unless the commissioner has reasonable grounds to believe any of the documents and records of the licensee have been, or are at risk of being altered or destroyed for purposes of concealing a violation of this chapter, the licensee or owner of the documents and records shall have access to the documents and records as necessary to conduct its ordinary business affairs. All records controlled by the commissioner under the authority of this subsection shall be exempt under the open records law.
6. In order to carry out the purposes of this section, the commissioner may:
 - a. Retain accountants or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations; and
 - b. Use, hire, contract, or employ publicly or privately available analytical systems, methods, or software to examine or investigate the licensee, individual, or person subject to this chapter.
7. The authority of this section remains in effect, whether such a licensee, individual, or person subject to this chapter acts or claims to act under any licensing or registration law of this state or claims to act without such authority.

SECTION 13. Section 13-05-06.3 of the North Dakota Century Code is created and enacted as follows:

13-05-06.3. Prohibited acts and practices.

It is a violation of this chapter for a person or individual subject to this chapter to:

1. Negligently make any false statement or knowingly make any omission of material fact in connection with any information, reports, or applications filed with the department or another governmental agency.

2. Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by this chapter.
3. Fail to truthfully account for moneys belonging to or collected from another.

SECTION 14. AMENDMENT. Section 13-05-07 of the North Dakota Century Code is amended and reenacted as follows:

13-05-07. Manner in which records and funds to be kept by collection agency.

1. Every collection agency licensed under this chapter shall keep a record of all sums collected by it and of all disbursements made by it for a period of six years from the date of last entry thereon. The records of a licensee may be maintained electronically provided they can be reproduced upon request of the department of financial institutions and within the required statutory time period provided in this section.
2. When a licensee ceases operations for any reason, the licensee shall be required to inform the department of the location of the records required to be maintained in accordance with section 13-05-07. In addition, the licensee shall provide the name of the individual responsible for maintenance of the records. The licensee shall notify the department within ten business days of the change of the location of the records or the change of the individual responsible for maintenance of the records.
3. No collection agency, or any employees thereof, licensee, individual, or person subject to investigation or examination under this section may intentionally make any false entry in any such collection agency record or intentionally knowingly withhold, abstract, secrete, remove, mutilate, destroy, or otherwise dispose of any such record, books, records, computer records, or other information within the time limit provided in this section.
4. No licensee under this chapter may commingle the money of collection agency customers with other than collection funds and shall maintain a separate bank account for such customer's funds and shall keep such funds in the bank account until disbursed to the customer.

SECTION 15. AMENDMENT. Section 13-05-08 of the North Dakota Century Code is amended and reenacted as follows:

13-05-08. Revocation of license - Suspension of license - Surrender of license - Preexisting contracts.

1. The department of financial institutions commissioner may, if it has reason to believe that grounds for revocation of a license exist, send by registered or certified mail to the licensee, a notice of hearing stating the contemplated action and in general the grounds thereof and setting the time and place for a hearing thereon. Such hearing may not be held less than ten nor more than thirty days from the date of mailing such notice. Within ten days after such hearing, the department of financial institutions shall issue a written order either dismissing the charges or suspending or revoking the license and the grounds therefor. A copy of such written order must be sent to the licensee. A license may be revoked for one or more of the following reasons issue and serve upon any licensee an order suspending or revoking a licensee's license if the commissioner finds that:

- a. The licensee has failed to pay the annual license fee under this chapter or any examination fee imposed by the commissioner under the authority of this chapter.
 - b. The licensee, either knowingly or without the exercise of due care to prevent the same, has violated any provision of this chapter or any regulation or order lawfully made pursuant to and within the authority of this chapter.
 - c. Any fact or condition existing at the time of the original application for such license which clearly would have warranted the department of financial institutions in refusing originally to issue such license.
 - d. The licensee has failed to maintain the required bond.
 - e. The licensee has failed to maintain registration with the North Dakota secretary of state if so required.
2. The order must contain a notice of opportunity for hearing pursuant to chapter 28-32.
 3. If no hearing is requested within twenty business days of the date the order is served upon the licensee, or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter a final order suspending or revoking the license.
- ~~2.4.~~ If the ~~department of financial institutions~~ commissioner finds that probable cause for revocation of any license exists and that enforcement of the chapter requires immediate suspension of such license pending investigation, it may, upon written notice, enter an order suspending such license for a period not exceeding ~~thirty~~ sixty days, pending the holding of a hearing as prescribed in this chapter.
 - ~~3.5.~~ Any licensee may surrender the licensee's license by delivering it to the department of financial institutions with written notice of its surrender, but such surrender does not affect the licensee's civil or criminal liability for acts committed prior thereto.

Approved April 19, 2011
Filed April 19, 2011

CHAPTER 107

HOUSE BILL NO. 1130

(Industry, Business and Labor Committee)
(At the request of the Department of Financial Institutions)

AN ACT to create and enact section 13-08-05.1 and two new sections to chapter 13-09 of the North Dakota Century Code, relating to notice regarding change of name and address of licensed deferred presentment service providers and money transmitters and prohibited acts and practices of licensed money transmitters; to amend and reenact sections 13-08-02 and 13-08-11, subsection 6 of section 13-08-12, sections 13-08-14 and 13-08-14.1, subsection 7 of section 13-09-02, subsection 3 of section 13-09-14, and section 13-09-17 of the North Dakota Century Code, relating to license requirements, retention of records, licensee transaction procedures, suspension and revocation of license, suspension and removal of agency officers and employees, definition of electronic instruments regarding deferred presentment service providers, and money transmitters; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 13-08-02 of the North Dakota Century Code is amended and reenacted as follows:

13-08-02. License requirements.

A person may not engage in the business of deferred presentment service without a license issued under this chapter. A separate license is required for each location from which the business of deferred presentment service is conducted. A person is considered to be engaging in the business of deferred presentment service if the customer is located in this state.

SECTION 2. Section 13-08-05.1 of the North Dakota Century Code is created and enacted as follows:

13-08-05.1. Change of name or address.

A licensee shall submit within twenty business days of the date of change, notification of a change of name or change of address. The notification must be in the form prescribed by the commissioner. In addition, the licensee shall submit the original license certificate for reissue.

SECTION 3. AMENDMENT. Section 13-08-11 of the North Dakota Century Code is amended and reenacted as follows:

13-08-11. Retention of records.

Each licensee shall keep and use in the licensee's business any books, accounts, and records the commissioner may require to carry into effect the provisions of this chapter and the rules issued under this chapter. Every licensee shall preserve required books, accounts, and records for at least six years. The records of a licensee may be maintained electronically provided they can be reproduced upon request by

the department of financial institutions and within the required statutory time period provided in this section. When a licensee ceases operations for any reason, the licensee shall inform the department of the location of the records. In addition, the licensee shall provide the name of the individual responsible for maintenance of the records. The licensee shall notify the department within ten business days of the change of the location of the records or the change of the individual responsible for maintenance of the records.

SECTION 4. AMENDMENT. Subsection 6 of section 13-08-12 of the North Dakota Century Code is amended and reenacted as follows:

6. Each deferred presentment service transaction, including a renewal, must be documented by a written agreement signed or similarly authenticated by the customer. The original agreement must contain the name of the licensee; the transaction date; the amount of the obligation; ~~and~~ a statement of the total amount of fees charged, expressed as a dollar amount and as an annual percentage rate; the name and signature of the individual who signs the agreement on behalf of the licensee; the name and address of the check maker; the transaction number assigned by the database; the date of negotiation of the check; the signature of the check maker; a statement that a licensee may not renew a transaction more than once; a statement that the renewal fee may not exceed twenty percent of the amount being renewed; the maximum term of the transaction, including a statement that the renewal may not exceed sixty business days; a statement that the term of the renewal period may not be less than fifteen business days; and a statement containing the right of rescission printed immediately above the signature line of the written agreement in a minimum of ten-point font and providing a space for the check maker to initial that the notice to the right of rescission was received. The original agreement may not include a hold harmless clause; a confession of judgment clause; any assignment of or order for payment of wages or other compensation for services; a provision in which the check maker agrees not to assert any claim or defense arising out of the agreement; a waiver of any provision of this chapter; any representation from the check maker as to the sufficiency of funds regarding any past deferred presentment service transactions; or any statement regarding criminal prosecution with respect to the agreement. A renewal agreement must be contained in a separate section, as part of the original written agreement or in other form as approved by the commissioner. The renewal agreement must restate the original transaction date, the renewal transaction date, the amount of the check paid to the check maker, the fee charged in dollars, and the maturity date. The agreement must authorize the licensee to defer presentment or negotiation of the check, or electronic debit of the customer's account, until a specified date. The maker of a check may redeem the check from the licensee at any time before the negotiation or presentment of the check by making payment to the licensee. A customer agreeing to an electronic deferred presentment service transaction may repay the obligation at any time before the agreed-upon date. A customer may rescind any transaction by the close of the business day following the day on which the customer receives payment from the licensee at no cost. If a customer agreeing to an electronic deferred presentment service transaction rescinds the transaction, the licensee must facilitate the repayment of the funds through the same electronic means the licensee used to deliver the funds to the customer.

SECTION 5. AMENDMENT. Section 13-08-14 of the North Dakota Century Code is amended and reenacted as follows:

13-08-14. Suspension - Revocation.

1. ~~After notice and hearing, the~~The commissioner may ~~suspend or revoke~~issue ~~and serve upon any licensee an order suspending or revoking~~ a license if the commissioner finds that the licensee or any principal of the licensee has been convicted of a felony or that the licensee knowingly or through lack of due care:
 - a. Failed to pay the annual license fee imposed under this chapter or any examination fee imposed by the commissioner under the authority of this chapter;
 - b. Committed any fraud, engaged in any dishonest activities, or made any misrepresentations;
 - c. Violated this chapter or any rule adopted under this chapter or violated any other law in the course of the licensee's business activities as a licensee;
 - d. Made false statements in the application for the license; or
 - e. Engaged in any unfair or deceptive acts, practices, or advertising in the conduct of a deferred presentment service business;
 - f. Failed to maintain the required bond; or
 - g. Failed to maintain registration with the secretary of state if so required.
2. ~~Written notice must be given at least twenty days before the date of a hearing under this chapter. The order must contain a notice of opportunity for hearing pursuant to chapter 28-32.~~
3. If a hearing is not requested within twenty business days of the date the order is served upon the licensee or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter a final order suspending or revoking the license.
4. If the commissioner finds that probable cause for revocation of any license exists and that enforcement of the chapter requires immediate suspension of such license pending investigation, it may upon written notice enter an order temporarily suspending such license for a period not exceeding sixty days, pending the holding of a hearing as prescribed in this chapter.

SECTION 6. AMENDMENT. Section 13-08-14.1 of the North Dakota Century Code is amended and reenacted as follows:

13-08-14.1. Suspension and removal of deferred presentment service provider officers and employees.

1. The commissioner of financial institutions may issue and serve upon ~~any current or former~~ deferred presentment service provider officer or employee and upon the licensee involved ~~a complainant order~~ stating the basis for the commissioner's belief that the:
 - a. That the current or former officer or employee is willfully engaging or has willfully engaged in any of the following conduct:

- a. (1) Violating a law, rule, order, or written agreement with the commissioner;
 - b. (2) Engaging in harassment or abuse, the making of false or misleading representations, or engaging in unfair practices involving lending activity;
 - c. (3) Performing an act of commission or omission or practice, which is a breach of trust or a breach of fiduciary duty.
- b. The term of suspension or removal from employment and participation within the conduct or the affairs of a deferred presentment service provider.
2. The complaint order must contain a notice of opportunity for hearing pursuant to chapter 28-32.
 3. If a hearing is not requested within twenty business days of the date the complaint order is served upon the officer or employee, or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter an a final order suspending or temporarily removing the current or former employee or officer from office for a period not exceeding three years from the effective date of the suspension or temporary removal. The current or former officer or employee may request a termination of the final order after a period of no less than three years.
 4. A contested or default suspension or temporary removal order is effective immediately upon service of the final order on the current or former officer or employee and upon the licensee. A consent order is effective as agreed. Any current or former officer or employee suspended or temporarily removed from office employment and participation within the conduct or the affairs of a deferred presentment service provider pursuant to this section is not eligible, while under suspension, for reinstatement to a position within a licensed deferred presentment service provider or removal, to be employed or otherwise participate in the affairs of any financial corporation, financial institution, credit union, or any other entity licensed by the department of financial institutions.
 5. When any current or former officer or employee or other person participating in the conduct of the affairs of a licensee is charged with a felony in state or federal court which involves dishonesty or breach of trust, the commissioner may immediately suspend the person from office or prohibit the person from further participation in the deferred presentment service provider affairs, or both. The order is effective immediately upon service of the order on the licensee and the person charged and remains in effect until the criminal charge is finally disposed of or until modified by the commissioner. If a judgment of conviction, federal pretrial diversion, or similar state order or judgment is entered, the commissioner may order that the suspension or prohibition be made permanent. A finding of not guilty or other disposition of the charge does not preclude the commissioner from pursuing administrative or civil remedies.
 6. Under this section, a person engages in conduct "willfully" if the person acted intentionally in the sense that the person was aware of what the person was doing.

SECTION 7. AMENDMENT. Subsection 7 of section 13-09-02 of the North Dakota Century Code is amended and reenacted as follows:

7. "Electronic instrument" means a card or other tangible object for the transmission or payment of money that contains a microprocessor chip, magnetic strip, or other means for the storage of information, that is prefunded and for which the value is decremented upon each use, but does not include a card or other tangible object that is redeemable by the issuer in goods or services provided by the issuer or its affiliates.

SECTION 8. AMENDMENT. Subsection 3 of section 13-09-14 of the North Dakota Century Code is amended and reenacted as follows:

3. Records may be maintained at a location other than within this state so long as the records are made accessible to the commissioner on seven business days' written notice. When a licensee ceases operations for any reason, the licensee shall inform the department of the location of the records. In addition, the licensee shall provide the name of the individual responsible for maintenance of the records. The licensee shall notify the department within ten business days of the change of the location of the records or the change of the individual responsible for maintenance of the records.

SECTION 9. AMENDMENT. Section 13-09-17 of the North Dakota Century Code is amended and reenacted as follows:

13-09-17. Suspension or revocation of licenses.

1. The commissioner may ~~suspend or revoke~~ issue and serve upon any licensee an order suspending or revoking a licensee's license if the commissioner finds that:
 1. a. Any fact or condition exists that, if it had existed at the time when the licensee applied for its license, would have been grounds for denying such application;
 2. b. The licensee's net worth becomes inadequate and the licensee, after ten days' written notice from the commissioner, fails to take such steps as the commissioner deems necessary to remedy such deficiency;
 3. c. The licensee knowingly violates any material provision of this chapter or any rule or order validly adopted by the commissioner under authority of this title;
 4. d. The licensee is conducting its business in an unsafe or unsound manner;
 5. e. The licensee is insolvent;
 6. f. The licensee has suspended payment of its obligations, made an assignment for the benefit of its creditors, or admitted in writing its inability to pay its debts as they become due;
 7. g. The licensee has applied for an adjudication of bankruptcy, reorganization, arrangement, or other relief under any bankruptcy;
 8. h. The licensee refuses to permit the commissioner to make any examination authorized by this chapter; ~~or~~

9.
 - i. The licensee willfully fails to make any report required by this chapter;
 - j. The licensee has failed to pay the annual license fee imposed under this chapter or any examination fee imposed by the commissioner under the authority of this chapter;
 - k. The licensee has failed to maintain the required bond or other security device; or
 - l. The licensee has failed to maintain registration with the secretary of state if so required.
2. The order must contain a notice of opportunity for hearing pursuant to chapter 28-32.
3. If a hearing is not requested within twenty business days of the date the order is served upon the licensee or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter a final order suspending or revoking the license.
4. If the commissioner finds that probable cause for revocation of any license exists and that enforcement of the chapter requires immediate suspension of such license pending investigation, it may upon written notice enter an order temporarily suspending such license for a period not exceeding sixty days, pending the holding of a hearing as prescribed in this chapter.

SECTION 10. A new section to chapter 13-09 of the North Dakota Century Code is created and enacted as follows:

Change of name or address.

A licensee is required to submit within twenty business days of the date of change notification of a change of name or change of address. The notification must be in the form prescribed by the commissioner. In addition, the licensee shall submit the original license certificate for reissue.

SECTION 11. A new section to chapter 13-09 of the North Dakota Century Code is created and enacted as follows:

Prohibited acts and practices.

It is a violation of this chapter for a person or individual subject to this chapter to knowingly:

1. Subscribe to, or make or cause to be made, any material false statement or representation in any application or other document or statement required to be filed under any provision of this chapter, or to omit to state any material statement or fact necessary in order to make the statements made, in light of the circumstances under which the statements are made, not misleading.
2. Directly or indirectly, employ any device, scheme, or artifice to defraud or mislead any person.
3. Directly or indirectly, make any untrue statement of a material fact or to omit to state a material fact.

4. Engage in any unfair or deceptive practice toward any person.
5. Conduct or solicit any business covered by this chapter without holding a valid license as required under this chapter or assist or aid and abet any person in the conduct of business under this chapter without a valid license as required under this chapter.
6. Fail to make disclosures as required by this chapter and any other applicable state or federal law and regulations.
7. Fail to comply with this chapter or rules adopted under this chapter or fail to comply with any other state or federal law, including the rules and regulations thereunder, applicable to any business authorized or conducted under this chapter.
8. Make, in any manner, any false or deceptive statement or representation.
9. Negligently make any false statement or knowingly and willfully make any omission of material fact in connection with any information or reports filed with a governmental agency or in connection with any investigation conducted by the commissioner or another governmental agency.
10. Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by this chapter.
11. Fail to truthfully account for moneys belonging to or collected from another.

Approved April 11, 2011
Filed April 11, 2011

CHAPTER 108

HOUSE BILL NO. 1038

(Legislative Management)
(Judiciary Committee)

AN ACT to create and enact chapter 13-11 of the North Dakota Century Code, relating to the regulation of debt-settlement providers; to amend and reenact subsection 1 of section 6-01-01.1 and section 13-07-01 of the North Dakota Century Code, relating to the financial institutions regulatory fund and the definition of consumer credit counseling service; to repeal chapter 13-06 of the North Dakota Century Code, relating to regulation of debt adjusters; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 1 of section 6-01-01.1 of the North Dakota Century Code is amended and reenacted as follows:

1. There is hereby created a special fund designated as the financial institutions regulatory fund. The amounts received under the following chapters, and any other moneys received by the department of financial institutions, must be deposited into this fund: chapters 6-01, 6-03, 6-05, 6-06, 6-10, 13-04.1, 13-05, 13-08, 13-09, and 13-10, and 13-11.

SECTION 2. AMENDMENT. Section 13-07-01 of the North Dakota Century Code is amended and reenacted as follows:

13-07-01. Consumer credit counseling service - Definition.

As used in this chapter, "consumer credit counseling service" means a nonprofit corporation ~~engaged in the business of debt adjusting as defined in section 13-06-04 whose agreements contemplate that a debtor will liquidate the debtor's debts by structured installments or that a creditor will reduce finance charges or fees for late payments, default, or delinquency.~~ For purposes of this chapter, a nonprofit corporation means an entity that is:

1. Organized and properly operating as a nonprofit entity under the laws of the state in which it was formed;
2. Exempt from taxation under the federal Internal Revenue Code [26 U.S.C. 501]; and
3. Not owned, operated, managed by, or affiliated with a for-profit entity.

SECTION 3. Chapter 13-11 of the North Dakota Century Code is created and enacted as follows:

13-11-01. Definitions.

For the purposes of this chapter:

1. "Affiliate":

a. With respect to an individual, means:

- (1) The spouse of the individual;
- (2) A sibling of the individual or the spouse of a sibling;
- (3) An individual or the spouse of an individual who is a lineal ancestor or lineal descendant of the individual or the individual's spouse;
- (4) An aunt, uncle, great aunt, great uncle, first cousin, niece, nephew, grandniece, or grandnephew, whether related by the whole or the half blood or adoption, or the spouse of any of them; or
- (5) Any other individual occupying the residence of the individual; and

b. With respect to an entity, means:

- (1) A person that directly or indirectly controls, is controlled by, or is under common control with the entity;
 - (2) An officer of, or an individual who performs similar functions with respect to, the entity;
 - (3) A director of, or an individual who performs similar functions with respect to, the entity;
 - (4) A person that receives or received more than twenty-five thousand dollars from the entity in either the current year or the preceding year or a person that owns more than ten percent of, or an individual who is employed by or is a director of, a person that receives or received more than twenty-five thousand dollars from the entity in either the current year or the preceding year;
 - (5) An officer or director of, or an individual performing similar functions with respect to, a person described in paragraph 1;
 - (6) The spouse of, or an individual occupying the residence of, an individual described in paragraphs 1 through 5; or
 - (7) An individual who has the relationship specified in paragraph 4 of subdivision a to an individual or the spouse of an individual described in paragraphs 1 through 5.
2. "Commissioner" means the commissioner of the department of financial institutions.
3. "Consumer" means any person who purchases or contracts for the purchase of debt-settlement services.
4. "Consumer settlement account" means any account or other means or device in which payments, deposits, or other transfers from a consumer are arranged, held, or transferred by or to a debt-settlement provider for the accumulation of the consumer's funds in anticipation of proffering an

adjustment or settlement of a debt or obligation of the consumer to a creditor on behalf of the consumer.

5. "Contract" means a contract or other legally binding agreement between a provider and an individual for the performance of debt-management services.
6. "Debt-settlement provider" means any person engaging in, or holding itself out as engaging in, the business of providing debt-settlement service in exchange for any fee or compensation, or any person who solicits for or acts on behalf of any person engaging in, or holding itself out as engaging in, the business of providing debt-settlement service in exchange for any fee or compensation. "Debt-settlement provider" does not include:
 - a. An attorney licensed or otherwise authorized to practice in this state who is engaged in the practice of law;
 - b. An escrow agent, accountant, broker-dealer in securities, or investment advisor in securities, when acting in the ordinary practice of the person's profession and through the entity used in the ordinary practice of the person's profession;
 - c. Any bank, agent of a bank, operating subsidiary of a bank, affiliate of a bank, trust company, savings and loan association, savings bank, credit union, farm credit system institution, crop credit association, development credit corporation, industrial development corporation, title insurance company, title insurance agent, independent escrowee or insurance company operating or organized under the laws of a state or the United States, or any other person authorized to make loans under state law while acting in the ordinary practice of that business;
 - d. Any person who performs credit services for that person's employer while receiving a regular salary or wage when the employer is not engaged in the business of offering or providing debt-settlement service;
 - e. A collection agency licensed pursuant to chapter 13-05 which is collecting a debt on the collection agency's own behalf or on behalf of a third party;
 - f. A public officer while acting in the officer's official capacity and any person acting under court order;
 - g. Any person while performing services incidental to the dissolution, winding up, or liquidating of a partnership, corporation, or other business enterprise; or
 - h. Any person currently licensed under any chapter administered by the department of financial institutions or registered with the attorney general's office when acting in the ordinary practice of that person's profession and not holding oneself out as a debt-settlement provider.
7. a. "Debt-settlement service" means:
 - (1) Offering to provide advice or service, or acting as an intermediary between or on behalf of a consumer and one or more of a consumer's creditors, where the primary purpose of the advice, service, or action is to obtain a settlement, adjustment, or satisfaction of the consumer's

unsecured debt to a creditor in an amount less than the full amount of the principal amount of the debt or in an amount less than the current outstanding balance of the debt;

(2) Offering to provide services related to or providing services advising, encouraging, assisting, or counseling a consumer to accumulate funds for the primary purpose of proposing or obtaining or seeking to obtain a settlement, adjustment, or satisfaction of the consumer's unsecured debt to a creditor in an amount less than the full amount of the principal amount of the debt or in an amount less than the current outstanding balance of the debt; or

(3) Offering to provide advice or service, or acting as an intermediary between or on behalf of a person and a state or federal government agency where the primary purpose of the advice, service, or action is to obtain a settlement, adjustment, or satisfaction of the person's tax obligation to the government agency in an amount less than the current outstanding balance of the tax obligation.

b. "Debt-settlement service" does not include:

(1) Legal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice law in this state;

(2) Accounting services provided in an accountant-client relationship by a certified public accountant licensed to provide accounting services in this state;

(3) Financial planning services provided in a financial planner-client relationship by a member of a financial planning profession whose members the commissioner, by rule, determines are:

(a) Licensed by this state;

(b) Subject to a disciplinary mechanism;

(c) Subject to a code of professional responsibility; and

(d) Subject to a continuing education requirement; or

(4) A nonprofit corporation engaged in consumer credit counseling services under chapter 13-07.

8. "Enrollment or setup fee" means any fee, obligation, or compensation paid or to be paid by the consumer to a debt-settlement provider in consideration of or in connection with establishing a contract or other agreement with a consumer related to the provision of debt-settlement service.

9. "Maintenance fee" means any fee, obligation, or compensation paid or to be paid by the consumer on a periodic basis to a debt-settlement provider in consideration of maintaining the relationship and services to be provided by a debt-settlement provider in accordance with a contract with a consumer related to the provision of debt-settlement service.

10. "Person" means an individual, corporation, limited liability company, partnership, trust, firm, association, or other legal entity. The term does not include a public corporation, government, or governmental subdivision, agency, or instrumentality.
11. "Principal amount of the debt" means the total amount or outstanding balance owed by a consumer to one or more creditors for a debt that is included in a contract for debt-settlement service at the time when the consumer enters a contract for debt-settlement service.
12. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
13. "Savings" means the difference between the principal amount of the debt and the amount paid by the debt-settlement provider to the creditor or negotiated by the debt-settlement provider and paid by the consumer to the creditor pursuant to a settlement negotiated by the debt-settlement provider on behalf of the consumer as full and complete satisfaction of the creditor's claim with regard to that debt.
14. "Settlement fee" means any fee, obligation, or compensation paid or to be paid by the consumer to a debt-settlement provider in consideration of or in connection with a completed agreement or other arrangement on the part of a creditor to accept less than the principal amount of the debt as satisfaction of the creditor's claim against the consumer.
15. "Willfully" means the person acted intentionally in the sense that the person was aware of what the person was doing.

13-11-02. License required.

It is unlawful for any person to act as a debt-settlement provider except as authorized by this chapter and without first having obtained a license under this chapter. A person that engages in debt settlement is deemed to engage in debt settlement in this state if the debtor resides in this state.

13-11-03. Application for license.

Every application for a debt-settlement provider license, or for a renewal thereof, must be made upon forms designed and furnished by the commissioner and must contain any information which the commissioner determines necessary and proper. The commissioner may require any application to provide additional information that is not requested on the application form. The applicant must register with the secretary of state if so required.

13-11-04. Fee and bond to accompany application for debt-settlement license.

The application for license must be in writing, under oath, and in the form prescribed by the commissioner. The application must give the location where the business is to be conducted and must contain any further information the commissioner requires, including the names and addresses of the partners, officers, directors, trustees, and the principal owners or members, as will provide the basis for the investigation and findings contemplated by section 13-11-03. At the time of making the application, the applicant shall include payment in the sum of four hundred dollars, which is not subject to refund, as a fee for investigating the

application; the sum of four hundred dollars for the annual license fee; and provide a surety bond in the sum of fifty thousand dollars or an additional amount as required by the commissioner by rule. In addition, the applicant shall pay a fifty dollar annual fee for each branch location. Fees must be deposited in the financial institutions regulatory fund as provided under section 6-01-01.1.

13-11-05. Qualifications for license.

1. Upon the filing of the application, the approval of the bond, and the payment of the specified fees, the commissioner may issue a license if the commissioner finds all of the following:
 - a. The financial responsibility, experience, character, and general fitness of the applicant, managers, partners, officers, and directors are such as to command the confidence of the community and to warrant belief that the business will be operated fairly, honestly, and efficiently within the purposes of this chapter.
 - b. The applicant, managers, partners, officers, and directors:
 - (1) Have not been convicted of a felony;
 - (2) Have not been convicted of a misdemeanor involving dishonesty or untrustworthiness; or
 - (3) Have not been the subject of an adverse finding or adjudication in a license disciplinary or other administrative proceeding concerning allegations involving dishonesty or untrustworthiness.
 - c. The applicant, managers, partners, officers, and directors have not had a record of having defaulted in the payment of money collected for others, including the discharge of those debts through bankruptcy proceedings.
 - d. The applicant or any managers, partners, officers, and directors previously have not violated any provision of this chapter or any rule adopted by the commissioner unless the commissioner determines the violation is not material.
 - e. The applicant has not made any false statement or representation to the commissioner in applying for a license under this chapter.
2. The commissioner shall deliver a license to the applicant to operate as a debt-settlement provider in accordance with this chapter at the location specified in the application. The license remains in full force and effect until it is surrendered by the debt-settlement provider or revoked by the commissioner as provided in this chapter; provided, however, that each license expires by its terms on December thirty-first next following its issuance unless renewed as provided in this chapter. A license may not be surrendered without the approval of the commissioner.

13-11-06. Expiration and renewal of license.

All licenses required under this chapter expire on December thirty-first of each year and may be renewed. Renewals are effective the succeeding January first. Applications for renewal must be submitted at least thirty days before the expiration of the license and must be accompanied by the required annual fees, which are not

subject to refund. The form and content of renewal applications must be determined by the commissioner, and a renewal application may be denied upon the same grounds as would justify denial of an initial application. If a licensee has been delinquent in renewing the licensee's license, the commissioner may charge an additional fee of fifty dollars for the renewal of the license. A debt-settlement provider license is not transferable. If the commissioner determines that an ownership change has occurred in a sole proprietorship, partnership, limited liability partnership, corporation, or limited liability corporation that was previously granted a debt-settlement provider license, the commissioner may require a new application from the purchaser. The application must be filed at least thirty days before the date on which the change of ownership is consummated.

13-11-07. Applicant's obligation to update information.

An applicant or licensed provider shall notify the commissioner within ten days after a change in the information provided within the application.

13-11-08. Records - Annual reports.

1. Every licensee shall maintain records in conformity with generally accepted accounting principles and practices in a manner that will enable the commissioner to determine whether the licensee is complying with this chapter. The records of a licensee may be maintained electronically provided all records can be reproduced upon request of the commissioner and within the required statutory timeframe outlined in this section.
2. Before August first of each year, the parent company of each licensee shall file with the commissioner a composite annual report in the form prescribed by the commissioner relating to services provided by licensees.

13-11-09. Approval or denial of a license.

Any complete application for a license must be approved or denied within sixty days after the filing of the complete application with the commissioner.

13-11-10. Revocation of license - Suspension of license - Surrender of license.

1. If the commissioner has reason to believe that grounds for revocation of a license exist, the commissioner may send by certified mail to the licensee a notice of hearing stating the contemplated action and in general the grounds thereof and setting the time and place for a hearing thereon. Grounds for revocation of a license include:
 - a. Any debt-settlement provider has failed to pay the annual license fee or to maintain in effect the bond required under this chapter;
 - b. The debt-settlement provider has violated this chapter or any rule lawfully made by the commissioner implementing this chapter;
 - c. Any fact or condition exists that, if it had existed at the time of the original application for a license, would have warranted the commissioner in refusing its issuance; or
 - d. Any applicant has made any false statement or representation to the commissioner in applying for a license under this chapter.

2. If the commissioner finds that probable cause for revocation of any license exists and that enforcement of the chapter requires immediate suspension of that license pending investigation, the commissioner, upon written notice, may enter an order suspending that license for a period not exceeding thirty days, pending the holding of a hearing as prescribed in this chapter.
3. Any licensee may surrender the licensee's license by delivering the license to the commissioner with written notice of its surrender; however, surrender of the license does not affect the licensee's civil or criminal liability for acts committed before the surrender of the license.

13-11-11. Suspension and removal of debt-settlement provider officers and employees.

1. The commissioner may issue and serve upon a debt-settlement provider officer or employee, and upon the licensee involved, a complaint stating the basis for the commissioner's belief that the officer or employee is willfully engaging or has willfully engaged in any of the following conduct:
 - a. Violating a law, rule, order, or written agreement with the commissioner;
 - b. Engaging in harassment or abuse, the making of false or misleading representations, engaging in unfair practices involving debt settlement, or engaging in prohibited acts and practices under section 13-11-23; or
 - c. Performing an act of commission or omission or practice that is a breach of trust or a breach of fiduciary duty.
2. The complaint must contain a notice of opportunity for hearing.
3. If a hearing is not requested within twenty days of the date the complaint is served upon the officer or employee, or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter an order suspending or temporarily removing the employee or officer from office for a period not exceeding three years from the effective date of the suspension or temporary removal.
4. A contested or default suspension or temporary removal order is effective immediately upon service of the order on the officer or employee and upon the licensee. A consent order is effective as agreed. An officer or employee suspended or temporarily removed from office pursuant to this section is not eligible, while under suspension, for reinstatement to a position with a debt-settlement provider.
5. When an officer or employee, or other person participating in the conduct of the affairs of a licensee, is charged with a felony in state or federal court which involves dishonesty or breach of trust, the commissioner immediately may suspend the person from office or prohibit the person from further participation in the affairs of the debt-settlement provider, or both. The order is effective immediately upon service of the order on the licensee and the person charged and remains in effect until the criminal charge is finally disposed of or until modified by the commissioner. If a judgment of conviction, federal pretrial diversion, or similar state order or judgment is entered, the commissioner may order that the suspension or prohibition be made permanent. A finding of not

guilty or other disposition of the charge does not preclude the commissioner from pursuing administrative or civil remedies.

13-11-12. Advertising and marketing practices.

1. A debt-settlement provider may not represent, expressly or by implication, any results or outcomes of its debt-settlement services in any advertising, marketing, or other communication to consumers unless the debt-settlement provider possesses substantiation for the representation at the time the representation is made.
2. A debt-settlement provider may not make, expressly or by implication, any unfair or deceptive representations, or any omissions of material facts, in any of its advertising or marketing communications concerning debt-settlement services.
3. All advertising and marketing communications concerning debt-settlement services must disclose the following material information clearly and conspicuously: Debt-settlement services are not appropriate for everyone. Failure to pay your monthly bills in a timely manner will result in increased balances and will harm your credit rating. Not all creditors may agree to reduce principal balance, and they may pursue collection, including lawsuits.

13-11-13. Contracts, books, and records.

1. Upon request, each debt-settlement provider shall furnish to the commissioner a copy of the contract entered between the debt-settlement provider and the debtor. The debt-settlement provider shall furnish the debtor with a copy of the written contract at the time of execution which sets forth the charges, if any, agreed upon for the services of the debt-settlement provider.
2. Each debt-settlement provider shall maintain records and accounts that will enable any debtor contracting with the debt-settlement provider, at any reasonable time, to ascertain the status of all the debtor's accounts with the debt-settlement service provider, including the amount of any fees paid by the debtor, amount held in trust, if applicable, settlement offers made and received on each of the debtor's accounts, and legally enforceable settlements reached with the debtor's creditors. Within seven days after a request for that information by the debtor, the debt-settlement provider shall furnish a statement showing the total amount received and the total disbursements to each creditor to any individual. Each debt-settlement provider shall issue a receipt for each payment made by the debtor at a debt-settlement provider office. Each debt-settlement provider shall prepare and retain in the file of each debtor a written analysis of the debtor's income and expenses to substantiate that the plan of payment is feasible and practical.

13-11-14. Trust funds - Requirements and restrictions.

1. All funds received by a debt-settlement provider or the provider's agent from and for the purpose of paying bills, invoices, or accounts of a debtor constitute trust funds owned by and belonging to the debtor from whom the funds were received. All such funds received by the debt-settlement provider must be separated from the funds of the debt-settlement provider not later than the end of the business day following receipt by the debt-settlement provider. All such funds must be kept separate and apart at all times from funds belonging to the

debt-settlement provider or any of its officers, employees, or agents and may be used for no purpose other than paying bills, invoices, or accounts of the debtor. On or before the close of the business day following receipt, all such trust funds received at the main or branch offices of a debt-settlement provider must be deposited in a bank in an account in the name of the debt-settlement provider-designated trust account, or by some other appropriate name indicating that the funds are not the funds of the debt-settlement provider or its officers, employees, or agents.

2. At least once every month, the debt-settlement provider shall render an accounting to the debtor that itemizes the total amount received from the debtor, the total amount paid each creditor, the amount of charges deducted, and any amount held in reserve, if applicable, and the status of each of the debtor's enrolled accounts. In addition, a debt-settlement provider shall provide such an accounting to a debtor within seven days after written demand, but not more than three times per six-month period.
3. This chapter does not require the establishment of a trust account if no consumer funds other than earned settlement fees are held or controlled by a debt-settlement provider.

13-11-15. Requirement of good faith.

A provider shall act in good faith in all matters under this chapter.

13-11-16. Customer service.

A provider that is required to be registered under this chapter shall maintain a toll-free communication system, staffed at a level that reasonably permits an individual to speak to a certified counselor or customer service representative, as appropriate, during ordinary business hours.

13-11-17. Required presale consumer disclosures and warnings.

1. Before the consumer signs a contract, the debt-settlement provider shall provide an oral and written notice to the consumer that clearly and conspicuously discloses all of the following:
 - a. Debt-settlement services may not be suitable for all consumers.
 - b. Using a debt-settlement service likely will harm the consumer's credit history and credit score.
 - c. Using a debt-settlement service does not stop creditor collection activity, including creditor lawsuits and garnishments.
 - d. Not all creditors may accept a reduction in the balance, interest rate, or fees a consumer owes.
 - e. The consumer should inquire about other means of dealing with debt, including nonprofit credit counseling and bankruptcy.
 - f. The consumer remains obligated to make periodic or scheduled payments to creditors while participating in a debt-settlement plan, and that the debt-settlement provider will not make any periodic or scheduled payments to creditors on behalf of the consumer.

- g. The failure to make periodic or scheduled payments to a creditor is likely to:
- (1) Harm the consumer's credit history, credit rating, or credit score;
 - (2) Lead the creditor to increase lawful collection activity, including litigation, garnishment of the consumer's wages, and judgment liens on the consumer's property; and
 - (3) Lead to the imposition by the creditor of interest charges, late fees, and other penalty fees, increasing the principal amount of the debt.
- h. The amount of time estimated to be necessary to achieve the represented results.
- i. The estimated amount of money or the percentage of debt the consumer must accumulate before a settlement offer will be made to each of the consumer's creditors.
- j. A statement indicating that debt-settlement providers are licensed and regulated by the North Dakota department of financial institutions and any complaints regarding the services of a debt-settlement provider should be directed to the North Dakota department of financial institutions, Bismarck, North Dakota.
2. The consumer shall sign and date an acknowledgment form entitled "Consumer Notice and Rights Form" that states: "I, the debtor, have received from the debt-settlement provider a copy of the form entitled "Consumer Notice and Rights Form". The debt-settlement provider or its representative also shall sign and date the acknowledgment form, which includes the name and address of the debt-settlement services provider. The acknowledgment form must be in duplicate and incorporated into the "Consumer Notice and Rights Form". The original acknowledgment form must be retained by the debt-settlement provider, and the duplicate copy must be retained within the form by the consumer. If the acknowledgment form is in electronic form, then the acknowledgment form must contain the consumer disclosures required by section 101(c) of the federal Electronic Signatures in Global and National Commerce Act [15 U.S.C. 7001(c)].
3. The requirements of this section are satisfied if the provider provides the following warning verbatim, both orally and in writing, with the caption "CONSUMER NOTICE AND RIGHTS FORM" in at least twenty-eight-point font and the remaining portion in at least fourteen-point font to a consumer before the consumer signs a contract for the debt-settlement provider's services:

"CONSUMER NOTICE AND RIGHTS FORM

CAUTION

We CANNOT GUARANTEE that you successfully will reduce or eliminate your debt. If you stop paying your creditors, there is a strong likelihood some or all of the following may happen:

- CREDITORS MAY STILL CONTACT YOU AND TRY TO COLLECT.
- CREDITORS MAY STILL SUE YOU FOR THE MONEY YOU OWE.

- YOUR WAGES OR BANK ACCOUNTS STILL MAY BE GARNISHED.
- YOUR CREDIT RATING AND CREDIT SCORE LIKELY WILL BE HARMED.
- NOT ALL CREDITORS MAY AGREE TO ACCEPT A BALANCE REDUCTION.
- YOU SHOULD CONSIDER ALL YOUR OPTIONS FOR ADDRESSING YOUR DEBT, SUCH AS CREDIT COUNSELING AND BANKRUPTCY FILING.
- THE AMOUNT OF MONEY YOU OWE MAY INCREASE DUE TO CREDITOR IMPOSITION OF INTEREST CHARGES, LATE FEES, AND OTHER PENALTY FEES.
- EVEN IF WE DO SETTLE YOUR DEBT, YOU MAY STILL BE REQUIRED TO PAY TAXES ON THE AMOUNT FORGIVEN.

YOUR RIGHT TO CANCEL

If you sign a contract with a debt-settlement provider, you have the right to cancel at any time and receive a full refund of all unearned fees you have paid to the provider and all funds placed in your settlement fund that have not been paid to any creditors.

IF YOU ARE DISSATISFIED OR YOU HAVE QUESTIONS

If you are dissatisfied with a debt-settlement provider or have any questions, please bring it to the attention of the North Dakota Department of Financial Institutions, Bismarck, North Dakota.

I, the debtor, have received from the debt-settlement provider a copy of the form entitled Consumer Notice and Rights Form.

Signed: _____

Printed name: _____ "

13-11-18. Individualized financial analysis.

1. Before entering a written contract with a consumer, a debt-settlement provider shall prepare and provide to the consumer in writing and retain a copy of:
 - a. An individualized financial analysis, including the individual's income, expenses, and debts; and
 - b. A statement containing a good-faith estimate of the length of time it will take to complete the debt-settlement program, the total amount of debt owed to each creditor included in the debt-settlement program, the total savings estimated to be necessary to complete the debt-settlement program, and the monthly targeted savings amount estimated to be necessary to complete the debt-settlement program.

2. A debt-settlement provider may not enter a written contract with a consumer unless the debt-settlement provider makes written determinations, supported by the financial analysis, that:
 - a. The consumer can reasonably meet the requirements of the proposed debt-settlement program, including the fees and the periodic savings amounts set forth in the savings goals; and
 - b. The debt-settlement program is suitable for the consumer at the time the contract is to be signed.

13-11-19. Debt-settlement contract.

1. A debt-settlement provider may not provide debt-settlement service to a consumer without a written contract signed and dated by both the consumer and the debt-settlement provider.
2. Any contract for the provision of debt-settlement service entered in violation of this section is voidable.
3. A contract between a debt-settlement provider and a consumer for the provision of debt-settlement service must disclose all of the following clearly and conspicuously:
 - a. The name and address of the consumer.
 - b. The date of execution of the contract.
 - c. The legal name of the debt-settlement provider, including any other business names used by the debt-settlement provider.
 - d. The corporate address and regular business address, including a street address, of the debt-settlement provider.
 - e. The telephone number at which the consumer may speak with a representative of the debt-settlement provider during normal business hours.
 - f. A complete list of the consumer's accounts, debts, and obligations to be included in the provision of debt-settlement service, including the name of each creditor and principal amount of each debt.
 - g. A description of the services to be provided by the debt-settlement provider, including the expected timeframe for settlement for each account, debt, or obligation included in subdivision f.
 - h. An itemized list of all fees to be paid by the consumer to the debt-settlement provider, and the date, approximate date, or circumstances under which each fee will become due.
 - i. A good-faith estimate of the total amount of all fees and compensation, not to exceed the amounts specified in section 13-11-21, to be collected by the debt-settlement provider from the consumer for the provision of debt-settlement service contemplated by the contract.

- j. A statement of the proposed savings goals for the consumer, stating the amount to be saved per month or other period, time period over which savings goals extend, and the total amount of the savings expected to be paid by the consumer pursuant to the terms of the contract.
- k. The amount of money or the percentage of debt the consumer must accumulate before a settlement offer will be made to each of the consumer's creditors.
- l. The written individualized financial analysis required by section 13-11-18.
- m. The contents of the "Consumer Notice and Rights Form" provided in section 13-11-17.
- n. A written notice to the consumer that the consumer may cancel the contract at any time until after the debt-settlement provider has fully performed each service the debt-settlement provider contracted to perform or represented that the debt-settlement provider would perform, and upon that event:
 - (1) The consumer is entitled to a full refund of all unearned fees and compensation paid by the consumer to the debt-settlement provider, and a full refund of all funds provided by the consumer to the debt-settlement provider for a consumer settlement account, except for funds actually paid to a creditor on behalf of the consumer, under the terms of the contract for debt-settlement service; and
 - (2) All powers of attorney granted to the debt-settlement provider by the consumer must be considered revoked and voided.
- o. A form the consumer may use to cancel the contract pursuant to the provisions of section 13-11-20. The form must include the name and mailing address of the debt-settlement provider and shall disclose clearly and conspicuously how the consumer can cancel the contract, including applicable addresses, telephone numbers, facsimile numbers, and electronic mail addresses the consumer can use to cancel the contract.
- 4. If a debt-settlement provider communicates with a consumer primarily in a language other than English, then the debt-settlement provider shall furnish to the consumer a translation of all the disclosures and documents required by this chapter in that other language.

13-11-20. Cancellation of contract and right to fee and settlement fund refunds.

- 1. A consumer may cancel a contract with a debt-settlement provider at any time before the debt-settlement provider has performed fully each service the debt-settlement provider contracted to perform or represented that the debt-settlement provider would perform.
- 2. If a consumer cancels a contract with a debt-settlement provider, or at any time upon a material violation of this chapter on the part of the debt-settlement provider, the debt-settlement provider shall refund all fees and compensation, with the exception of the application fee and any earned settlement fee, as well as all funds paid by the consumer to the debt-settlement provider that

have accumulated in a consumer settlement account and that the debt-settlement provider has not disbursed to creditors. Upon cancellation, all powers of attorney and direct debit authorizations granted to the debt-settlement provider by the consumer are considered revoked and voided.

3. A debt-settlement provider shall make any refund required under this section within seven days after the notice of cancellation and shall include with the refund a full statement of account showing fees received, fees refunded, savings held, payments to creditors, settlement fees earned, if any, and savings refunded.
4. Upon the cancellation of a contract under this section, the debt-settlement provider shall provide timely notice of the cancellation of the contract to each of the creditors with whom the debt-settlement provider has had any prior communication on behalf of the consumer in connection with the provision of any debt-settlement service.

13-11-21. Fees.

1. A debt-settlement provider may not charge fees of any type or receive compensation from a consumer in a type, amount, or timing other than fees or compensation permitted in this section.
2. A debt-settlement provider may not charge or receive from a consumer any enrollment fee, setup fee, upfront fee of any kind, or any maintenance fee.
3. A debt-settlement provider may charge a settlement fee that may not exceed an amount greater than thirty percent of the savings. If the amount paid by the debt-settlement provider to the creditor or negotiated by the debt-settlement provider and paid by the consumer to the creditor pursuant to a settlement negotiated by the debt-settlement provider on behalf of the consumer as full and complete satisfaction of the creditor's claim with regard to that debt is greater than the principal amount of the debt, the debt-settlement provider is not entitled to any settlement fee.
4. A debt-settlement provider may not collect any settlement fee from a consumer until a creditor enters into a legally enforceable agreement to accept funds in a specific dollar amount as full and complete satisfaction of the creditor's claim with regard to that debt and those funds are provided by the debt-settlement provider on behalf of the consumer or are provided directly by the consumer to the creditor pursuant to a settlement negotiated by the debt-settlement provider.

13-11-22. Voluntary contributions.

A provider may not solicit a voluntary contribution from an individual or an affiliate of the individual for any service provided to the individual.

13-11-23. Prohibited acts and practices.

1. A provider directly or indirectly may not:
 - a. Misappropriate or misapply money held in trust:

- b. Settle a debt on behalf of an individual for more than fifty percent of the principal amount of the debt owed a creditor, unless the individual assents to the settlement after the creditor has assented;
- c. Take a power of attorney that authorizes the provider to settle a debt;
- d. Exercise or attempt to exercise a power of attorney after an individual has terminated a contract;
- e. Initiate a transfer from an individual's account at a bank or with another person unless the transfer is:
 - (1) A return of money to the individual; or
 - (2) Before termination of a contract, properly authorized by the contract and this chapter, and for:
 - (a) Payment to one or more creditors pursuant to a plan; or
 - (b) Payment of a fee;
- f. Offer a gift or bonus, premium, reward, or other compensation to an individual for executing a contract;
- g. Offer, pay, or give a gift or bonus, premium, reward, or other compensation to a person for referring a prospective customer, if the person making the referral has a financial interest in the outcome of debt-management services provided to the customer, unless neither the provider nor the person making the referral communicates to the prospective customer the identity of the source of the referral;
- h. Receive a bonus, commission, or other benefit for referring an individual to a person;
- i. Structure a plan in a manner that would result in a negative amortization of any of an individual's debts, unless a creditor that is owed a negatively amortizing debt agrees to refund or waive the finance charge upon payment of the principal amount of the debt;
- j. Compensate the provider's employees on the basis of a formula that incorporates the number of individuals the employee induces to enter contracts;
- k. Settle a debt or lead an individual to believe that a payment to a creditor is in settlement of a debt to the creditor unless, at the time of settlement, the individual receives a certification by the creditor that the payment is in full settlement of the debt or is part of a payment plan, the terms of which are included in the certification, that upon completion, will lead to full settlement of the debt;
- l. Make a representation that:
 - (1) The provider will furnish money to pay bills or prevent attachments;

- (2) Payment of a certain amount will permit satisfaction of a certain amount or range of indebtedness; or
 - (3) Participation in a plan will or may prevent litigation, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment;
 - m. Misrepresent that the provider is authorized or competent to furnish legal advice or perform legal services;
 - n. Represent that it is a not-for-profit entity unless the provider is organized and properly operating as a not-for-profit under the law of the state in which it was formed or that it is a tax-exempt entity unless the provider has received certification of tax-exempt status from the internal revenue service;
 - o. Take a confession of judgment or power of attorney to confess judgment against an individual; or
 - p. Employ an unfair, unconscionable, or deceptive act or practice, including the knowing omission of any material information.
- 2. If a provider furnishes debt-management services to an individual, the provider may not, directly or indirectly:
 - a. Purchase a debt or obligation of the individual;
 - b. Receive from or on behalf of the individual:
 - (1) A promissory note or other negotiable instrument other than a check or a demand draft; or
 - (2) A postdated check or demand draft;
 - c. Lend money or provide credit to the individual, except as a deferral of a settlement fee at no additional expense to the individual;
 - d. Obtain a mortgage or other security interest from any person in connection with the services provided to the individual;
 - e. Except as permitted by federal law, disclose the identity or identifying information of the individual or the identity of the individual's creditors, except to:
 - (1) The commissioner, upon proper demand;
 - (2) A creditor of the individual, to the extent necessary to secure the cooperation of the creditor in a plan; or
 - (3) The extent necessary to administer the plan;
 - f. Except as otherwise provided in section 13-11-21, provide the individual less than the full benefit of a compromise of a debt arranged by the provider;

- g. Charge the individual for or provide credit or other insurance, coupons for goods or services, membership in a club, access to computers or the internet, or any other matter not directly related to debt-management services or educational services concerning personal finance; or
 - h. Furnish legal advice or perform legal services, unless the person furnishing that advice to or performing those services for the individual is licensed to practice law in this state.
 - 3. This chapter does not authorize any person to engage in the practice of law.
 - 4. A provider may not receive a gift or bonus, premium, reward, or other compensation, directly or indirectly, for advising, arranging, or assisting an individual in connection with obtaining an extension of credit or other service from a lender or service provider, except for educational or counseling services required in connection with a government-sponsored program.
 - 5. Unless a person supplies goods, services, or facilities generally and supplies them to the provider at a cost no greater than the cost the person generally charges to others, a provider may not purchase goods, services, or facilities from the person if an employee or a person that the provider should reasonably know is an affiliate of the provider:
 - a. Owns more than ten percent of the person; or
 - b. Is an employee or affiliate of the person.

13-11-24. Notice of litigation.

Within thirty days after a provider has been served with notice of a civil action for violation of this chapter by or on behalf of an individual who resides in this state at either the time of a contract or the time the notice is served, the provider shall notify the commissioner in a record that it has been sued.

13-11-25. Liability for the conduct of other persons.

If a provider delegates any of its duties or obligations under a contract or this chapter to another person, including an independent contractor, the provider is liable for conduct of the person which, if done by the provider, would violate the contract or this chapter.

13-11-26. Powers of the commissioner.

Insofar as consistent with other provisions of law, the commissioner may:

1. Determine the qualifications of all applicants based on financial responsibility, financial condition, business experience, character, and general fitness which must reasonably warrant the belief that the applicant's business will be conducted lawfully and fairly. In determining whether this qualification is met, and for the purpose of investigating compliance with this chapter, the commissioner may review and consider the relevant business records and capital adequacy of the applicant and the competence, experience, integrity, and financial ability of a person who is a member, partner, director, officer, or twenty-five percent or more shareholder of the applicant.

2. Conduct investigations and make an examination of any person, whether licensed or not, who is engaged in the debt-settlement services business, including all records of such business, and to subpoena witnesses anytime the commissioner has reason to believe such is necessary. The licensee shall pay an examination or visitation fee and must be charged by the commissioner at an hourly rate to be set by the commissioner, sufficient to cover all reasonable expenses of the department associated with the examination or visitation provided for by this section. Fees must be deposited in the financial institutions regulatory fund.
3. Issue and serve upon any person or licensed debt-settlement provider an order to cease and desist to take corrective action when the commissioner has reason to believe the person or agency is violating, has violated, or is about to violate the provisions of this chapter. An interested party may appeal issuance of a cease and desist order under chapter 28-32 by filing written notice of appeal within twenty days after service of the order.
4. Deny, suspend, revoke, condition, or decline to renew a license for a violation of this chapter, rules or regulations issued under this chapter, or an order or directive entered under this chapter.
5. Deny, suspend, revoke, condition, or decline to renew a license if an applicant or licensee withholds information or makes a material misstatement in an application for a license or renewal of a license.

13-11-27. Enforcement authorities, violations, and penalties.

1. Any person that violates this chapter is guilty of a class C felony.
2. The commissioner may impose a civil money penalty not to exceed five thousand dollars per violation upon a person or agency that willfully violates a law, rule, written agreement, or order under this chapter. An interested party may appeal the assessment of a civil money penalty under chapter 28-32 by filing a written notice of appeal within twenty days after service of the assessment of civil money penalties. A civil money penalty collected under this section must be paid to the state treasurer and deposited in the financial institutions regulatory fund.
3. The attorney general also may enforce this chapter. The attorney general, in enforcing this chapter, has all the powers provided in this chapter or chapter 51-15 and may seek all remedies in this chapter or chapter 51-15. A violation of this chapter is deemed a violation of chapter 51-15. The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties under chapter 51-15, or otherwise provided by law.

13-11-28. Void contracts.

1. If a provider imposes a fee or other charge or receives money or other payments not authorized by sections 13-11-21 and 13-11-22, the contract is void and the individual may recover as provided in section 13-11-20.
2. If a provider is not licensed as required by this chapter when an individual assents to a contract, the contract is void.

3. For a void contract under subsection 2, the provider does not have a claim against the individual for breach of contract or for restitution.

13-11-29. Private enforcement.

Any person that is aggrieved by a violation of this chapter may bring an action to enjoin the violation, or for restitution, or both. The court may award the plaintiff the plaintiff's actual restitution or a sum up to two thousand dollars, whichever is greater. The court may award the plaintiff costs, expenses, and reasonable attorney's fees. This section does not limit any other claims the person may have against the debt-settlement provider or any third party subject to this chapter.

SECTION 4. REPEAL. Chapter 13-06 of the North Dakota Century Code is repealed.

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