

EFFECT OF REFERRAL OF SENATE BILL NO. 2191

INTRODUCTION

This memorandum addresses:

1. The history of Senate Bill No. 2191, including the state of the law before and after the effective date of the bill; and
2. The law relating to referrals of measures, including the effect of approval and the effect of rejection of the measure and including the impact of a subsequent act.

HISTORY

Senate Bill No. 2191 amends North Dakota Century Code (NDCC) Section 6-08.1-01, creates a new subsection to Section 6-08.1-02, and creates a new section to Chapter 6-08.1. The bill was declared an emergency measure and became effective on July 1, 2001. In a letter dated June 28, 2001, the Federal Trade Commission notified the commissioner of the Department of Financial Institutions that North Dakota's disclosure of customer information law under Chapter 6-08.1 is not inconsistent with the provisions of the federal Gramm-Leach-Bliley Act. Petitions for referral of Senate Bill No. 2191 were submitted to the Secretary of State on July 18, 2001. A copy of Senate Bill No. 2191 is attached as Appendix A, and a copy of the Federal Trade Commission letter is attached as Appendix B.

North Dakota Century Code Chapter 6-08.1 was enacted in 1985 and addresses the disclosure of customer information by banking financial institutions, including banks, savings banks, trust companies, savings and loan associations, and credit unions. Senate Bill No. 2191 made the following changes:

1. Section 1 of the bill amends NDCC Section 6-08.1-01, as that section pertains to the definitions of "customer" and "customer information."
 - a. Before July 1, 2001, the term customer meant any person that transacted business with the institution, used the services of the institution, or for which the institution acted as a fiduciary with respect to trust property. Under the definitions of Section 6-08.1-01, a person means any individual, partnership, corporation, limited liability company, association, trust, or other legal entity.
 - b. After June 30, 2001, the term customer means any individual or authorized representative of an individual to whom the institution provides a product or service for

- personal, family, or household use. Under Section 1-01-49, an individual means a human being.
 2. Section 2 of the bill creates a new subsection 12 to NDCC Section 6-08.1-02. Section 6-08.1-02 provides a list of situations under which Chapter 6-08.1 does not apply.
 - a. Before July 1, 2001, the chapter applied to the disclosure of customer information by an institution to any person, governmental agency, or law enforcement agency, with certain exceptions.
 - b. After June 30, 2001, a new exclusion provides that the chapter does not apply to the disclosure of customer information by an institution to a nonaffiliated third party if the disclosure is subject to federal law and the institution complies with the federal law.
3. Section 3 of the bill creates a new NDCC Section 6-08.1-03.1. The new section addresses an institution's disclosure requirements as they apply to agricultural and to commercial customers.
 - a. Before July 1, 2001, an institution's disclosure requirements for agricultural and for commercial customers were the same as for nonagricultural and for noncommercial customers.
 - b. After June 30, 2001, the disclosure requirements for agricultural and commercial customers differ from the disclosure of nonagricultural and of noncommercial customers. The new definition of customer under Section 6-08.1-01(1) appears to conflict with the use of the term in this new section because the use of the term customer in this new section refers to agricultural and commercial customers, and the definition of the term in Section 6-08.1-01 limits customers to individuals who receive products or services for personal, family, or household use. Not only does the definition and use of the term customer bring into question the allowable uses of the products and services, but this conflict raises the question of whether an agricultural customer and a commercial customer must be a human being or whether the agricultural or commercial customer could be a legal

entity such as a partnership or corporation.

- (1) An institution's disclosure requirements for agricultural and for commercial customers appear to require that a customer be able to opt out of disclosure by the institution of nonpublic information to nonaffiliated third parties. The exceptions of NDCC Section 6-08.1-02 and of Section 502(b)(2) of the Gramm-Leach-Bliley Act apply to these disclosure requirements. Section 502(b)(2) of the Gramm-Leach-Bliley Act provides specific exceptions for the disclosure of nonpublic personal information to nonaffiliated third parties to perform services for or functions on behalf of the institution.
- (2) An institution's disclosure requirements for customers who receive products or services for personal, family, or household use appear to require that a customer be able to opt in to disclosure by the institution of nonpublic information to nonaffiliated third parties; however, to the extent federal law is applicable, the federal law applies.
- (3) It appears an institution's disclosure practices are not regulated under NDCC Chapter 6-08.1 if the customer is not an individual and if the customer is an individual who is not receiving products or services for personal, family, or household use, to the extent this customer is not an agricultural or a commercial customer.
- (4) Effective August 1, 2003, Chapter 6-08.1 will not regulate the disclosure by institutions of information of agricultural and of commercial customers.

REFERRAL

Article III of the Constitution of North Dakota addresses the powers reserved to the people of the state. Article III, Section 1, of the Constitution of North Dakota provides, in part, that "the people reserve the power . . . to approve or reject legislative Acts, or parts thereof, by the referendum. . . ." Specifically, Article III, Section 8, of the Constitution of North Dakota provides:

If a majority of votes cast upon an initiated or a referred measure are affirmative, it shall be deemed enacted. An initiated or referred measure which is approved shall become

law thirty days after the election, and a referred measure which is rejected shall be void immediately. If conflicting measures are approved, the one receiving the highest number of affirmative votes shall be law. A measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house.

Vote

Article III, Section 5, of the Constitution of North Dakota provides:

An initiative petition shall be submitted not less than ninety days before the statewide election at which the measure is to be voted upon. A referendum petition may be submitted only within ninety days after the filing of the measure with the secretary of state. The submission of a petition shall suspend the operation of any measure enacted by the legislative assembly except emergency measures and appropriation measures for the support and maintenance of state departments and institutions. The submission of a petition against one or more items or parts of any measure shall not prevent the remainder from going into effect. A referred measure may be voted upon at a statewide election or at a special election called by the governor.

Because Senate Bill No. 2191 is an emergency measure, the submittal of the petitions for referral did not suspend the operation of the bill. The referred measure will be on the ballot at the June 11, 2002, primary election unless the Governor calls for a special election.

Approval of Measure

If the referred measure is approved by the electors, Senate Bill No. 2191 will remain in effect. As provided for under Article III, Section 8, of the Constitution of North Dakota, future legislative repeal or amendment of the measure provisions contained in Senate Bill No. 2191 will require a two-thirds vote of the members elected to each house until July 1, 2008.

Rejection of Measure

If the referred measure is rejected by the electors, Senate Bill No. 2191 becomes void immediately, with the practical effect of returning to the version of NDCC Chapter 6-08.1 in effect before July 1, 2001. The Constitution of North Dakota states that only measures "approved" by the electors are subject to the two-thirds vote requirement. In *State ex rel. Wefald v. Meier*, 347

N.W.2d 562 (1984), the North Dakota Supreme Court addressed the issue of what constitutes an approved measure. The language of *Wefald* clearly supports the conclusion that a measure is approved if voters agree with the actions of the Legislative Assembly; therefore, if the electors disagree with the actions of the Legislative Assembly and reject the referred measure, the two-thirds vote requirement does not apply.

Subsequent Acts

It is not clear whether if the Governor calls for a special session or if the Legislative Assembly reconvenes before the 2003 legislative session, the Legislative Assembly has the authority to enact a measure that addresses the same subject matter as Senate Bill No. 2191 after the submittal of the referral petitions and before the referral is voted on by the electors. States are split on this matter. The scope of the power of the Legislative Assembly to enact a measure on a subject that is being referred to the vote of the people is not specifically addressed in the North Dakota Constitution or the North Dakota Century Code and has not been decided by the North Dakota Supreme Court. However, the North Dakota Attorney General, in an opinion to the commissioner of higher education, dated May 2, 1975, addressed the question of whether during a special session of the Legislative Assembly called by the Governor, the Legislative Assembly could enact a measure after the filing of valid petitions but before a referral election. The Attorney General stated:

We adhere to the position that the Legislature may not take action to intentionally evade a referendum petition by repealing and reenacting it, or by making changes in the enactment, not in good faith, but only to accomplish the evasion thereof. However, we do believe the Legislature could enact appropriation measures which are temporary in nature. . . .

The measure at issue in 1975 was a biennial appropriation that expired automatically, and the Attorney General recognized that because this appropriation "did not become a part of the laws of this state," the "Legislature has somewhat greater flexibility in dealing with the matter than it might with respect to a substantive statute which was the subject of the referral action."

Following the 1975 Attorney General's opinion, the tests to determine whether the Legislative Assembly may enact measures relating to the subject matter of a referral may be whether the Legislative Assembly's actions are done in good faith and without the intent to evade a referendum and whether the measure is temporary in nature. In this 1975 opinion, the Attorney General considered the analysis on this matter found in *American Jurisprudence 2d*, Initiative and Referendum, Section 57 (copyright 1969).

Although the North Dakota Constitution has been renumbered since 1975, the referral provisions of the old Section 25 remain essentially the same in Article III, Sections 1-10. Additionally, although *American Jurisprudence 2d*, Initiative and Referendum, has been updated since the 1975 opinion, the substance of Section 51 of the Initiative and Referendum portion (copyright 2000) supports the general rule provided in the 1975 opinion. *American Jurisprudence 2d*, Initiative and Referendum, Section 51 (copyright 2000) provides:

Depending on the applicable provisions, while referendum proceedings are pending a legislative body may have no power to amend or repeal an enactment, may continue to have jurisdiction of the enactment's subject but have no power to repeal the referred statute, or may be permitted to repeal the statute.

Generally, the right of the voters to pass upon a referred act cannot be abridged by legislative action before the election. (footnotes omitted)

Although the North Dakota Supreme Court said in *State v. Hogue*, 205 N.W.2d 17 (N.D. 1925), that the Legislative Assembly and the people are coordinate legislative bodies and that a law enacted by one has no superior position over one enacted by the other, it should be noted that the courts appear to tread lightly when dealing with the power of the people. In *Hernett v. Meier*, 173 N.W.2d 907 (N.D. 1970), the North Dakota Supreme Court found that any "legislation which the Legislative Assembly might enact which governs or affects the powers so reserved to the people must be for the sole purpose of facilitating the exercise of the powers of initiative and referendum, which are reserved to the people by the Constitution, and no law may be enacted which in any way will hamper or impair the powers so reserved." This position is supported by the decision in *Husebye v. Jaeger*, 534 N.W.2d 811 (N.D. 1995), 1995 N.D. Lexis 138, in which the North Dakota Supreme Court found "we are guided by the principle that referendum provisions in the constitution must be liberally construed, and any doubt should be resolved in favor of the exercise of this right by the people."

Abiding by what appears to be the general rule that the right of the voters to pass upon a referred act may not be abridged by legislative action before the election, the ability of the Legislative Assembly to enact legislation addressing the subject matter of Senate Bill No. 2191 before the vote on the referral may hinge upon a determination of whether:

1. The Legislative Assembly's actions are done in good faith;
2. The Legislative Assembly's actions are done without the intent to evade a referendum; and

3. The measure is temporary in nature.

The determination of whether an act is done in good faith would be a finding of fact based on the unique circumstances of the situation. A common definition of good faith in the North Dakota Century Code is "honesty in fact," whereas the definition of good faith as provided by *Black's Law Dictionary* provides:

Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious.

The determination of whether an action is done without intent to evade a referendum would again be a finding of fact and would be based on the unique circumstances of the situation. However, one factor that would likely be considered is whether the action actually resulted in evasion of the referendum.

Finally, the determination of whether the measure is temporary in nature would likely focus on the effect of any measure enacted. For example, a biennial appropriation would likely be determined to be temporary in nature because it expires at the end of the biennium,

and therefore, the effect of the measure would be of limited duration. Another method of limiting the effect of an enacted measure might be to incorporate conditions into the measure. For example, in the case of Senate Bill No. 2191, which is already in effect as the result of a successful emergency measure, a measure amending the law addressed in Senate Bill No. 2191 might contain a provision conditioning the implementation of the measure on the outcome of the referral vote, such that if the referred measure is approved, the new changes to Senate Bill No. 2191 would take effect.

CONCLUSION

If the referred measure is approved by the electors, Senate Bill No. 2191 will remain in effect and future repeal or amendment of the measure will require a two-thirds vote of the members elected to each house until July 1, 2008. If the referred measure is rejected by the electors, Senate Bill No. 2191 becomes void immediately, and the version of NDCC Chapter 6-08.1 in effect before July 1, 2001, becomes effective.

North Dakota Supreme Court decisions and a 1975 Attorney General's opinion support the general rule that the right of the voters to pass upon a referred measure may not be abridged by legislative action after the petitions have been filed but before the election. The test to determine whether the Legislative Assembly may enact legislation addressing the subject matter of Senate Bill No. 2191 before the vote on the referral may hinge upon a determination of whether:

1. The Legislative Assembly's actions are done in good faith;
2. The Legislative Assembly's actions are done without the intent to evade a referendum; and
3. The measure is temporary in nature.

ATTACH:2