

# UNIFORM COMMERCIAL CODE

## CHAPTER 358

### SENATE BILL NO. 2098

(Judiciary Committee)

(At the request of the Commission on Uniform State Laws)

### LETTERS OF CREDIT

AN ACT to create and enact chapter 41-05 and a new subsection to section 41-09-04 of the North Dakota Century Code, relating to the Uniform Commercial Code revised article 5 pertaining to letters of credit; to amend and reenact subsection 2 of section 41-01-05, subsection 1 of section 41-02-60, subsection 1 of section 41-09-03, subsection 3 of section 41-09-05, sections 41-09-06, 41-09-25, and 41-09-26 of the North Dakota Century Code, relating to adoption of the revised article 5; and to repeal the present chapter 41-05 of the North Dakota Century Code, relating to the Uniform Commercial Code revised article 5 pertaining to letters of credit.

#### **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

<sup>1</sup> **SECTION 1. AMENDMENT.** Subsection 2 of section 41-01-05 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

2. Where one of the following provisions of this title specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:
  - a. Rights of creditors against sold goods. Section 41-02-47.
  - b. Applicability of the chapter on leases. Sections 41-02.1-05 and 41-02.1-06.
  - c. Applicability of the chapter on bank deposits and collections. Section 41-04-02.
  - d. Governing law in the chapter on funds transfers. Section 41-04.1-38.
  - e. Letters of credit. Section 41-05-16.
  - f. Applicability of the chapter on investment securities. Section 41-08-06.

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<sup>1</sup> Section 41-01-05 was also amended by section 3 of Senate Bill No. 2099, chapter 362.

- f. g. Perfection provisions of the chapter on secured transactions. Section 41-09-03.

**SECTION 2. AMENDMENT.** Subsection 1 of section 41-02-60 of the North Dakota Century Code is amended and reenacted as follows:

1. Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless:
  - a. The nonconformity appears without inspection; or
  - b. Despite tender of the required documents the circumstances would justify injunction against honor under ~~the provisions of~~ this title (section ~~41-05-14~~ 41-05-09).

<sup>2</sup> **SECTION 3.** Chapter 41-05 of the North Dakota Century Code is created and enacted as follows:

**41-05-01. (5-101) Short title.** This chapter may be cited as the Uniform Commercial Code - Letters of Credit.

**41-05-02. (5-102) Definitions.**

1. In this chapter:

- a. "Adviser" means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.
- b. "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.
- c. "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.
- d. "Confirmer" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.
- e. "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.

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<sup>2</sup> Section 41-05-14 was also amended by section 6 of Senate Bill No. 2099, chapter 362.

- f. "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion:
- (1) Which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in subsection 1 of section 41-05-08; and
  - (2) Which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.
- g. "Good faith" means honesty in fact in the conduct or transaction concerned.
- h. "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, "honor" occurs:
- (1) Upon payment;
  - (2) If the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment; or
  - (3) If the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.
- i. "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.
- j. "Letter of credit" means a definite undertaking that satisfies the requirements of section 41-05-04 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.
- k. "Nominated person" means a person whom the issuer:
- (1) Designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit; and
  - (2) Undertakes by agreement or custom and practice to reimburse.
- l. "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.
- m. "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

- n. "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.
  - o. "Successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.
- 2. Definitions in other chapters applying to this chapter and the sections in which they appear are:
    - a. "Accept" or "Acceptance". Section 41-03-46.
    - b. "Value". Sections 41-03-29 and 41-04-23.
  - 3. Chapter 41-01 contains certain additional general definitions and principles of construction and interpretation applicable throughout this chapter.

**41-05-03. (5-103) Scope.**

- 1. This chapter applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.
- 2. The statement of a rule in this chapter does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this chapter.
- 3. With the exception of this subsection, subsections 1 and 4 of this section, subdivisions i and j of subsection 1 of section 41-05-02, subsection 4 of section 41-05-06, and subsection 4 of section 41-05-14, and except to the extent prohibited in subsection 3 of section 41-01-02 and subsection 4 of section 41-05-17, the effect of this chapter may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this chapter.
- 4. Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

**41-05-04. (5-104) Formal requirements.** A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated:

- 1. By a signature; or
- 2. In accordance with the agreement of the parties or the standard practice referred to in subsection 5 of section 41-05-08.

**41-05-05. (5-105) Consideration.** Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

**41-05-06. (5-106) Issuance - Amendment - Cancellation - Duration.**

1. A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.
2. After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.
3. If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, after the date on which it is issued.
4. A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.

**41-05-07. (5-107) Confirmer - Nominated person - Adviser.**

1. A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.
2. A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.
3. A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.
4. A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection 3. The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies.

**41-05-08. (5-108) Issuer's rights and obligations.**

1. Except as otherwise provided in section 41-05-09, an issuer shall honor a presentation that, as determined by the standard practice referred to in

- subsection 5, appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in section 41-05-13 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.
2. An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:
    - a. To honor;
    - b. If the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligation; or
    - c. To give notice to the presenter of discrepancies in the presentation.
  3. Except as otherwise provided in subsection 4, an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.
  4. Failure to give the notice specified in subsection 2 or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in subsection 1 of section 41-05-09 or expiration of the letter of credit before presentation.
  5. An issuer shall observe the standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.
  6. An issuer is not responsible for:
    - a. The performance or nonperformance of the underlying contract, arrangement, or transaction;
    - b. An act or omission of others; or
    - c. Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection 5.
  7. If an undertaking constituting a letter of credit under subdivision j of subsection 1 of section 41-05-02 contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.
  8. An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.
  9. An issuer that has honored a presentation as permitted or required by this chapter:

- a. Is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;
- b. Takes the documents free of claims of the beneficiary or presenter;
- c. Is precluded from asserting a right of recourse on a draft under sections 41-03-51 and 41-03-52;
- d. Except as otherwise provided in sections 41-05-10 and 41-05-17, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and
- e. Is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

**41-05-09. (5-109) Fraud - Forgery.**

1. If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:
  - a. The issuer shall honor the presentation, if honor is demanded by:
    - (1) A nominated person who has given value in good faith and without notice of forgery or material fraud;
    - (2) A confirmer who has honored its confirmation in good faith;
    - (3) A holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person; or
    - (4) An assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and
  - b. The issuer, acting in good faith, may honor or dishonor the presentation in any other case.
2. If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction, temporarily or permanently, may enjoin the issuer from honoring a presentation or may grant similar relief against the issuer or other persons only if the court finds that:
  - a. The relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;

- b. A beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;
- c. All of the conditions to entitle a person to the relief under the law of this state have been met; and
- d. On the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subdivision a of subsection 1.

**41-05-10. (5-110) Warranties.**

1. If its presentation is honored, the beneficiary warrants:
  - a. To the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in subsection 1 of section 41-05-09; and
  - b. To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.
2. The warranties in subsection 1 are in addition to warranties arising under chapters 41-03, 41-04, 41-07, and 41-08 because of the presentation or transfer of documents covered by any of those chapters.

**41-05-11. (5-111) Remedies.**

1. If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.
2. If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.
3. If an adviser or nominated person other than a confirmer breaches an obligation under this chapter or an issuer breaches an obligation not covered in subsection 1 or 2, a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but

not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections 1 and 2.

4. An issuer, nominated person, or adviser who is found liable under subsection 1, 2, or 3 shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.
5. Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this chapter.
6. Damages that would otherwise be payable by a party for breach of an obligation under this chapter may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

**41-05-12. (5-112) Transfer of letter of credit.**

1. Except as otherwise provided in section 41-05-13, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.
2. Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:
  - a. The transfer would violate applicable law; or
  - b. The transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in subsection 5 of section 41-05-08 or is otherwise reasonable under the circumstances.

**41-05-13. (5-113) Transfer by operation of law.**

1. A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.
2. A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection 5, an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in subsection 5 of section 41-05-08 or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.
3. An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

4. Honor of a purported successor's apparently complying presentation under subsection 1 or 2 has the consequences specified in subsection 9 of section 41-05-08 even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of section 41-05-09.
5. An issuer whose rights of reimbursement are not covered by subsection 4 or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection 2.
6. A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

**41-05-14. (5-114) Assignment of proceeds.**

1. In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.
2. A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.
3. An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.
4. An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.
5. Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.
6. Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by chapter 41-09 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by chapter 41-09 or other law.

**41-05-15. (5-115) Statute of limitations.** An action to enforce a right or obligation arising under this chapter must be commenced within one year after the expiration date of the relevant letter of credit or one year after the claim for relief accrues, whichever occurs later. A claim for relief accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

**41-05-16. (5-116) Choice of law and forum.**

1. The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in section 41-05-04 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.
2. Unless subsection 1 applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.
3. Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the uniform customs and practice for documentary credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If:
  - a. This chapter would govern the liability of an issuer, nominated person, or adviser under subsection 1 or 2;
  - b. The relevant undertaking incorporates rules of custom or practice; and
  - c. There is conflict between this chapter and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in subsection 3 of section 41-05-03.
4. If there is conflict between this chapter and chapter 41-03, 41-04, 41-04.1, or 41-09, this chapter governs.
5. The forum for settling disputes arising out of an undertaking within this chapter may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection 1.

**41-05-17. (5-117) Subrogation of issuer, applicant, and nominated person.**

1. An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a

- secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.
2. An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection 1.
  3. A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:
    - a. The issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;
    - b. The beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and
    - c. The applicant to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.
  4. Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections 1 and 2 do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection 3 do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

<sup>3</sup> **SECTION 4. AMENDMENT.** Subsection 1 of section 41-09-03 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Documents, instruments, letters of credit, and ordinary goods:
  - a. This subsection applies to documents ~~and~~, instruments, rights to proceeds of written letters of credit, and ~~to~~ goods other than those covered by a certificate of title described in subsection 2, mobile goods described in subsection 3, and minerals described in subsection 5.
  - b. Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

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<sup>3</sup> Section 41-09-03 was also amended by section 8 of Senate Bill No. 2099, chapter 362.

- c. If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.
- d. When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by part 3 of this chapter to perfect the security interest:
  - (1) If the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal.
  - (2) If the action is taken before the expiration of the period specified in paragraph 1, the security interest continues perfected thereafter.
  - (3) For the purpose of priority over a buyer of consumer goods (subsection 2 of section 41-09-28), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in paragraphs 1 and 2.

**SECTION 5.** A new subsection to section 41-09-04 of the 1995 Supplement to the North Dakota Century Code is created and enacted as follows:

To a transfer of an interest in a letter of credit other than the rights to proceeds of a written letter of credit.

<sup>4</sup> **SECTION 6. AMENDMENT.** Subsection 3 of section 41-09-05 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. The following definitions in other chapters apply to this chapter:
  - a. "Check". Section 41-03-04.
  - b. "Contract for sale". Section 41-02-06.

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<sup>4</sup> Section 41-09-05 was also amended by section 1 of Senate Bill No. 2142, chapter 360, and section 9 of Senate Bill No. 2099, chapter 362.

- c. "Holder in due course". Section 41-03-28.
- d. "Letter of credit". Section 41-05-02.
- e. "Note". Section 41-03-04.
- e- f. "Sale". Section 41-02-06.

<sup>5</sup> **SECTION 7. AMENDMENT.** Section 41-09-06 of the North Dakota Century Code is amended and reenacted as follows:

**41-09-06. (9-106) "Account" and "general intangibles" defined.** "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, rights to proceeds of written letters of credit, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

<sup>6</sup> **SECTION 8. AMENDMENT.** Section 41-09-25 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-25. (9-304) Perfection of security interest in instruments, documents, proceeds of a written letter of credit, and goods covered by documents - Perfection by permissive filing - Temporary perfection without filing or transfer of possession.**

1. A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in the rights to proceeds of a written letter of credit can be perfected only by the secured party's taking possession of the letter of credit. A security interest in money or instruments, other than certificated securities or instruments that constitute part of chattel paper, can be perfected only by the secured party's taking possession, except as provided in subsections 4 and 5 of this section and subsections 2 and 3 of section 41-09-27.
2. During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during that period is subject thereto.
3. A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

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<sup>5</sup> Section 41-09-06 was also amended by section 10 of Senate Bill No. 2099, chapter 362.

<sup>6</sup> Section 41-09-25 was also amended by section 2 of Senate Bill No. 2142, chapter 360, and section 18 of Senate Bill No. 2099, chapter 362.

4. A security interest in a negotiable document or an instrument other than a certificated security is perfected without filing or the taking of possession for a period of twenty-one days after it attaches to the extent that it arises for new value given under a written security agreement.
5. A security interest remains perfected for a period of twenty-one days without filing if a secured party having a perfected security interest in a negotiable document, an instrument other than a certificated security, or goods in possession of a bailee other than one who has issued a negotiable document therefor:
  - a. Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection 3 of section 41-09-33; or
  - b. Delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.
6. After the twenty-one-day period in subsections 4 and 5, perfection depends upon compliance with applicable provisions of this chapter.

<sup>7</sup> **SECTION 9. AMENDMENT.** Section 41-09-26 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-26. (9-305) When possession by secured party perfects security interest without filing.** A security interest ~~in letters of credit and advices of credit (subdivision a of subsection 2 of section 41-05-16)~~, goods, instruments other than certificated securities, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. A security interest in the right to proceeds of a written letter of credit may be perfected by the secured party's taking possession of the letter of credit. If the collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

**SECTION 10. REPEAL.** Chapter 41-05 of the North Dakota Century Code is repealed.

Approved March 20, 1997  
Filed March 20, 1997

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<sup>7</sup> Section 41-09-26 was also amended by section 3 of Senate Bill No. 2142, chapter 360, and section 19 of Senate Bill No. 2099, chapter 362.

## CHAPTER 359

### SENATE BILL NO. 2171 (Senators Traynor, Krebsbach, Redlin) (Representatives Berg, Nicholas)

## UNAUTHORIZED DEMAND DRAFT PAYMENT LIABILITY

AN ACT to amend and reenact sections 41-03-03, 41-03-04, 41-03-53, 41-03-54, 41-04-19, and 41-04-20 of the North Dakota Century Code, relating to the liability for paying an unauthorized demand draft.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Section 41-03-03 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

#### **41-03-03. (3-103) Definitions.**

1. In this chapter:
  - a. "Acceptor" means a drawee that has accepted a draft.
  - b. "Drawee" means a person ordered in a draft to make payment.
  - c. "Drawer" means a person ~~that~~ who signs or is identified in a draft as a person ordering payment.
  - d. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
  - e. "Maker" means a person ~~that~~ who signs or is identified in a note as promisor of payment.
  - f. "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.
  - g. "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards prevailing in the area in which that person is located with respect to the business in which that person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 41-04.

- h. "Party" means a party to an instrument.
  - i. "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.
  - j. "Prove" with respect to a fact means to meet the burden of establishing the fact (subsection 8 of section 41-01-11).
  - k. "Remitter" means a person ~~that~~ who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.
2. Other definitions applying to this chapter and the sections in which they appear are:
- a. "Acceptance". Section 41-03-46.
  - b. "Accommodated party". Section 41-03-56.
  - c. "Accommodation party". Section 41-03-56.
  - d. "Alteration". Section 41-03-44.
  - e. "Anomalous endorsement". Section 41-03-24.
  - f. "Blank endorsement". Section 41-03-24.
  - g. "Cashier's check". Section 41-03-04.
  - h. "Certificate of deposit". Section 41-03-04.
  - i. "Certified check". Section 41-03-46.
  - j. "Check". Section 41-03-04.
  - k. "Consideration". Section 41-03-29.
  - l. ~~"Draft"~~ "Demand draft". Section 41-03-04.
  - m. "Draft". Section 41-03-04.
  - n. "Endorsement". Section 41-03-23.
  - ~~n.~~ o. "Endorser". Section 41-03-23.
  - ~~o.~~ p. "Fiduciary". Section 41-03-33.
  - ~~p.~~ q. "Holder in due course". Section 41-03-28.
  - ~~q.~~ r. "Incomplete instrument". Section 41-03-15.
  - ~~r.~~ s. "Instrument". Section 41-03-04.
  - ~~s.~~ t. "Issue". Section 41-03-05.

- ~~t.~~ u. "Issuer". Section 41-03-05.
  - ~~u.~~ v. "Negotiable instrument". Section 41-03-04.
  - ~~v.~~ w. "Negotiation". Section 41-03-20.
  - ~~w.~~ x. "Note". Section 41-03-04.
  - ~~x.~~ y. "Payable at a definite time". Section 41-03-08.
  - ~~y.~~ z. "Payable on demand". Section 41-03-08.
  - ~~z.~~ aa. "Payable to bearer". Section 41-03-09.
  - ~~aa.~~ bb. "Payable to order". Section 41-03-09.
  - ~~bb.~~ cc. "Payment". Section 41-03-64.
  - ~~cc.~~ dd. "Person entitled to enforce". Section 41-03-27.
  - ~~dd.~~ ee. "Presentment". Section 41-03-58.
  - ~~ee.~~ ff. "Reacquisition". Section 41-03-26.
  - ~~ff.~~ gg. "Represented person". Section 41-03-33.
  - ~~gg.~~ hh. "Special endorsement". Section 41-03-24.
  - ~~hh.~~ ii. "Teller's check". Section 41-03-04.
  - ~~ii.~~ jj. "Transfer of instrument". Section 41-03-22.
  - ~~jj.~~ kk. "Traveler's check". Section 41-03-04.
  - ~~kk.~~ ll. "Value". Section 41-03-29.
3. The following definitions in other chapters apply to this chapter:
- a. "Bank". Section 41-04-05.
  - b. "Banking day". Section 41-04-04.
  - c. "Clearinghouse". Section 41-04-04.
  - d. "Collecting bank". Section 41-04-05.
  - e. "Customer". Section 41-04-04.
  - f. "Depository bank". Section 41-04-05.
  - g. "Documentary draft". Section 41-04-04.
  - h. "Intermediary bank". Section 41-04-05.
  - i. "Item". Section 41-04-04.

- j. "Payor bank". Section 41-04-05.
  - k. "Suspends payments". Section 41-04-04.
4. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

**SECTION 2. AMENDMENT.** Section 41-03-04 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-03-04. (3-104) Negotiable instrument.**

1. "Negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
  - a. Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
  - b. Is payable on demand or at a definite time; and
  - c. Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, except that the promise or order may contain an undertaking or power to give, maintain, or protect collateral to secure payment, an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or a waiver of the benefit of any law intended for the advantage or protection of any obligor.
2. "Instrument" means a negotiable instrument.
3. An order that meets all of the requirements of subsection 1 except subdivision a and otherwise falls within the definition of "check" in subsection 6 is a negotiable instrument and a check.
4. Notwithstanding subsection 1, a promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.
5. An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft", the person entitled to enforce the instrument may treat it as either.
6. "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank or a cashier's check or teller's check, or demand draft. An instrument may be a check even though it is described on its face by another term such as "money order".
7. "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

8. "Teller's check" means a draft drawn by a bank on another bank or payable at or through a bank.
9. "Traveler's check" means an instrument that is payable on demand, is drawn on or payable at or through a bank, is designated by the term "traveler's check" or by a substantially similar term, and requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.
10. "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.
11. "Demand draft" means a writing not signed by a customer that is created by a third party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft must contain the customer's account number and may contain any or all of the following:
  - a. The customer's printed or typewritten name.
  - b. A notation that the customer authorized the draft.
  - c. The statement "No Signature Required" or words to that effect.

A demand draft may not include a check purportedly drawn by and bearing the signature of a fiduciary.

**SECTION 3. AMENDMENT.** Section 41-03-53 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-03-53. (3-416) Transfer warranties.**

1. A person ~~that~~ who transfers an instrument for consideration warrants to the transferee and, if the transfer is by endorsement, to any subsequent transferee that:
  - a. The warrantor is a person entitled to enforce the instrument.
  - b. All signatures on the instrument are authentic and authorized.
  - c. The instrument has not been altered.
  - d. The instrument is not subject to a defense or claim in recoupment (subsection 1 of section 41-03-31) of any party which can be asserted against the warrantor.
  - e. The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.
  - f. If the instrument is a demand draft, creation of the instrument according to the terms on its face was authorized by the person identified as drawer.

2. A person to whom the warranties under subsection 1 are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.
3. The warranties stated in subsection 1 may not be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection 2 is discharged to the extent of any loss caused by the delay in giving notice of the claim.
4. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.
5. If the warranty in subdivision f of subsection 1 is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.

**SECTION 4. AMENDMENT.** Section 41-03-54 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-03-54. (3-417) Presentment warranties.**

1. If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:
  - a. The warrantor is or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft.
  - b. The draft has not been altered.
  - c. The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.
  - d. If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer.
2. A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any

warrantor for breach of warranty the amounts stated in the first two sentences of this subsection.

3. If a drawee asserts a claim for breach of warranty under subsection 1 based on an unauthorized endorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the endorsement is effective under section 41-03-41 or 41-03-42 or the drawer is precluded under section 41-03-43 or 41-04-37 from asserting against the drawee the unauthorized endorsement or alteration.
4. If a dishonored draft is presented for payment to the drawer or an endorser or any other instrument is presented for payment to a party obliged to pay the instrument, and payment is received, the following rules apply:
  - a. The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.
  - b. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.
5. The warranties stated in subsections 1 and 4 cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection 2 or 4 is discharged to the extent of any loss caused by the delay in giving notice of the claim.
6. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.
7. A demand draft is a check, as provided in subsection 6 of section 41-03-04.
8. If the warranty in subdivision d of subsection 1 is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.

**SECTION 5. AMENDMENT.** Section 41-04-19 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-04-19. (4-207) Transfer warranties.**

1. A customer or collecting bank that transfers an item and receives a settlement or other consideration warrants to the transferee and to any subsequent collecting bank that:
  - a. The warrantor is a person entitled to enforce the item.
  - b. All signatures on the item are authentic and authorized.

- c. The item has not been altered.
  - d. The item is not subject to a defense or claim in recoupment (subsection 1 of section 41-03-31) of any party that can be asserted against the warrantor.
  - e. The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.
  - f. If the item is a demand draft, creation of the item according to the terms on its face was authorized by the person identified as drawer.
2. If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item according to the terms of the item at the time it was transferred, or, if the transfer was of an incomplete item, according to its terms when completed as stated in sections 41-03-15 and 41-03-44. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith. A transferor may not disclaim its obligation under this subsection by an endorsement stating that it is made "without recourse" or otherwise disclaiming liability.
  3. A person to whom the warranties under subsection 1 are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.
  4. The warranties stated in subsection 1 cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.
  5. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.
  6. If the warranty in subdivision f of subsection 1 is not given by a transferor or collecting bank under applicable conflict of law rules, the warranty is not given to that transferor when that transferor is a transferee nor to any prior collecting bank of that transferee.

**SECTION 6. AMENDMENT.** Section 41-04-20 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-04-20. (4-208) Presentment warranties.**

1. If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, the person obtaining payment or acceptance, at the time of presentment, and a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that:

- a. The warrantor is, or was at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft.
  - b. The draft has not been altered.
  - c. The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.
  - d. If the draft is a demand draft, creation of the demand draft according to the terms on its face was authorized by the person identified as drawer.
2. A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor and, if the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in the first two sentences of this subsection.
3. If a drawee asserts a claim for breach of warranty under subsection 1 based on an unauthorized endorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the endorsement is effective under section 41-03-41 or 41-03-42 or the drawer is precluded under section 41-03-43 or 41-04-37 from asserting against the drawee the unauthorized endorsement or alteration.
4. This subsection applies if a dishonored draft is presented for payment to the drawer or an endorser or if any other item is presented for payment to a party obliged to pay the item, and the item is paid. The person obtaining payment and a prior transferor of the item warrant to the person making payment in good faith that the warrantor is or was at the time the warrantor transferred the item a person entitled to enforce the item or authorized to obtain payment on behalf of a person entitled to enforce the item. The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.
5. The warranties stated in subsections 1 and 4 may not be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim.
6. A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

7. A demand draft is a check as provided in subsection 6 of section 41-03-04.
8. If the warranty in subdivision d of subsection 1 is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee.

Approved March 21, 1997  
Filed March 21, 1997

## CHAPTER 360

### SENATE BILL NO. 2142

(Senators Watne, Andrist)  
(Representatives Kretschmar, Maragos)

## CERTIFICATES OF DEPOSIT AND SECURITY INTERESTS

AN ACT to amend and reenact sections 41-09-05, 41-09-25, and 41-09-26 of the North Dakota Century Code, relating to definition of certificate of deposit, perfection of security interests by filing, and perfection of security interests in certificates of deposit by possession.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>8</sup> **SECTION 1. AMENDMENT.** Section 41-09-05 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

#### **41-09-05. (9-105) Definitions and index of definitions.**

1. In this chapter unless the context otherwise requires:
  - a. "Account debtor" means the person who is obligated on an account, chattel paper, or general intangible.
  - b. "Certificate of deposit" means a written acknowledgement by a bank that a sum of money has been received by the bank and a promise made by the bank to repay the sum of money. A certificate of deposit may be either negotiable or non-negotiable.
  - c. "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods; but a charter or other contract involving the use or hire of a vessel is not a chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.
  - d. "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold.
  - e. "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not ~~he~~ that person owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with

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<sup>8</sup> Section 41-09-05 was also amended by section 6 of Senate Bill No. 2098, chapter 358, and section 9 of Senate Bill No. 2099, chapter 362.

the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

- e- f. "Deposit account" means a demand, time, savings, passbook, or like account maintained with a bank, savings and loan association, credit union, or like organization, other than an account evidenced by a certificate of deposit.
- f- g. "Document" means document of title as defined in the general definitions of chapter 41-01 (section 41-01-11), and a receipt of the kind described in subsection 2 of section 41-07-07.
- g- h. "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.
- h- i. "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (section 41-09-34), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also ~~include~~ includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops.
- i- j. "Instrument" means a negotiable instrument (defined in section 41-03-04), a certificated security (defined in section 41-08-02), or any other writing that evidences a right to the payment of money and is not itself a security agreement or lease and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment.
- j- k. "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like.
- k- l. An advance is made "pursuant to commitment" if the secured party ~~has is~~ is bound ~~himself~~ to make it, whether or not a subsequent event of default or other event not within ~~his~~ the party's control has relieved or may relieve ~~him~~ the party from ~~his the~~ the obligation.
- l- m. "Secured party" means a lender, seller, or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement, or the like are represented by a trustee or other person, the representative is the secured party.
- m- n. "Security agreement" means an agreement which creates or provides for a security interest.
- n- o. "Transmitting utility" means any person primarily engaged in the railroad, or street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.

2. Other definitions applying to this chapter and the sections in which they appear are:
  - a. "Account". Section 41-09-06.
  - b. "Attach". Section 41-09-16.
  - c. "Construction mortgage". Subsection 1 of section 41-09-34.
  - d. "Consumer goods". Subsection 1 of section 41-09-09.
  - e. "Equipment". Subsection 2 of section 41-09-09.
  - f. "Farm products". Subsection 3 of section 41-09-09.
  - g. "Fixture filing". Section 41-09-34.
  - h. "Fixtures". Section 41-09-34.
  - i. "General intangibles". Section 41-09-06.
  - j. "Inventory". Subsection 4 of section 41-09-09.
  - k. "Lien creditor". Subsection 3 of section 41-09-22.
  - l. "Proceeds". Subsection 1 of section 41-09-27.
  - m. "Purchase money security interest". Section 41-09-07.
  - n. "Real estate interest". Section 41-09-34.
  - o. "United States". Section 41-09-03.
  
3. The following definitions in other chapters apply to this chapter:
  - a. "Check". Section 41-03-04.
  - b. "Contract for sale". Section 41-02-06.
  - c. "Holder in due course". Section 41-03-28.
  - d. "Note". Section 41-03-04.
  - e. "Sale". Section 41-02-06.
  
4. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

<sup>9</sup> **SECTION 2. AMENDMENT.** Section 41-09-25 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-25. (9-304) Perfection of security interest in instruments, documents, and goods covered by documents - Perfection by permissive filing - Temporary perfection without filing or transfer of possession.**

1. A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments, other than certificated securities or instruments that constitute part of chattel paper, and certificates of deposit can be perfected only by the secured party's taking possession, except as provided in subsections 4 and 5 of this section and subsections 2 and 3 of section 41-09-27.
2. During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during that period is subject thereto.

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<sup>9</sup> Section 41-09-25 was also amended by section 8 of Senate Bill No. 2098, chapter 358, and section 18 of Senate Bill No. 2099, chapter 362.

3. A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.
4. A security interest in a negotiable document, certificate of deposit, or an instrument other than a certificated security is perfected without filing or the taking of possession for a period of twenty-one days after it attaches to the extent that it arises for new value given under a written security agreement.
5. A security interest remains perfected for a period of twenty-one days without filing if a secured party having a perfected security interest in a negotiable document, certificate of deposit, an instrument other than a certificated security, or goods in possession of a bailee other than one who has issued a negotiable document therefor:
  - a. Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection 3 of section 41-09-33; or
  - b. Delivers the instrument or certificate of deposit to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.
6. After the twenty-one-day period in subsections 4 and 5, perfection depends upon compliance with applicable provisions of this chapter.

<sup>10</sup> **SECTION 3. AMENDMENT.** Section 41-09-26 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-26. (9-305) When possession by secured party perfects security interest without filing.** A security interest in letters of credit and advices of credit (subdivision a of subsection 2 of section 41-05-16), goods, certificates of deposit, instruments other than certificated securities, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. If the collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

Approved March 19, 1997  
Filed March 19, 1997

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<sup>10</sup> Section 41-09-26 was also amended by section 9 of Senate Bill No. 2098, chapter 358, and section 19 of Senate Bill No. 2099, chapter 362.

## CHAPTER 361

### SENATE BILL NO. 2295

(Senators Wanzek, Klein)  
(Representatives D. Johnson, Nicholas)

## CROP FINANCING STATEMENT DESCRIPTIONS

AN ACT to amend and reenact subsection 1 of section 41-09-16 and section 41-09-41 of the North Dakota Century Code, relating to real estate descriptions in financing statements covering crops.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

<sup>11</sup> **SECTION 1. AMENDMENT.** Subsection 1 of section 41-09-16 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Subject to the provisions of section 41-04-22 on the security interest of the collecting bank, section 41-08-36.1 on security interests in securities, and section 41-09-13 on a security interest arising under the chapters on sales and leases, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless all of the following take place:
  - a. The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement that contains a description of the collateral and, in addition, if the security interest covers ~~crops growing or to be grown~~ or timber to be cut, a description of the land concerned.
  - b. Value has been given.
  - c. The debtor has rights in the collateral.

**SECTION 2. AMENDMENT.** Section 41-09-41 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-41. (9-402) Formal requisites of financing statement - Amendments - Mortgage as financing statement.**

1. A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral; except a financing statement that is to be filed to gain protection under the central notice system must include a reasonable description of the

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<sup>11</sup> Section 41-09-16 was also amended by section 13 of Senate Bill No. 2099, chapter 362, and section 14 of Senate Bill No. 2099, chapter 362.

property, including the county in which the property is located, and any other additional information required by the Food Security Act of 1985 [Pub. L. 99-198; 99 Stat. 1535; 7 U.S.C. 1631], as prescribed by the secretary of state. The secretary of state shall prescribe one form that can be used to perfect a security interest in farm products or gain protection under the central notice system, or both. In addition, to be sufficient a financing statement filed after July 1, 1987, must include either the social security number or federal tax identification number of the debtor. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. ~~When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned.~~ When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection 5 of section 41-09-03, or when the financing statement is filed as a fixture filing (section 41-09-34), and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection 5. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic, or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.

2. A financing statement that otherwise complies with subsection 1 is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in:
  - a. Collateral already subject to a security interest in another jurisdiction when it is brought into this state, or when the debtor's location is changed to this state. The financing statement must state that the collateral was brought into this state or that the debtor's location was changed to this state under such circumstances;
  - b. Proceeds under section 41-09-27 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral;
  - c. Collateral as to which the filing has lapsed; or
  - d. Collateral acquired after a change of name, identity, or corporate structure of the debtor (subsection 7).
  
3. A form substantially as follows is sufficient to comply with subsection 1:
 

Name of debtor (or assignor) \_\_\_\_\_  
 Address \_\_\_\_\_  
 Debtor's social security number or federal tax  
 identification number \_\_\_\_\_  
 Name of secured party (or assignee) \_\_\_\_\_  
 Address \_\_\_\_\_

  - a. This financing statement covers the following types (or items) of property:  
 (Describe) \_\_\_\_\_
  - b. ~~(If collateral is crops) The above described crops are growing or are to be grown on:~~

(Describe real estate) \_\_\_\_\_

- e. (If applicable) The above goods are to become fixtures on:  
(Describe real estate) \_\_\_\_\_

and this financing statement is to be filed for record in the real estate records. (If the debtor does not have an interest of record.)  
The name of a record owner is \_\_\_\_\_.

- e. c. (If products of collateral are claimed)  
Products of the collateral are also covered.  
(use ) \_\_\_\_\_  
whichever ) Signature of Debtor (or Assignor)  
is ) \_\_\_\_\_  
applicable) ) Signature of Secured Party  
(or Assignor)

4. A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this chapter, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.
5. A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to subsection 5 of section 41-09-03, or a financing statement filed as a fixture filing (section 41-09-34) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be filed for record in the real estate records, and the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.
6. A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if:
- The goods are described in the mortgage by item or type;
  - The goods are or are to become fixtures related to the real estate described in the mortgage;
  - The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and
  - The mortgage is duly recorded.

No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

7. A financing statement sufficiently shows the name of the debtor if it gives the individual, limited liability company, partnership, or corporate name

of the debtor, whether or not it adds other trade names or the names of partners. Where the debtor so changes ~~his~~ the debtor's name, or in the case of an organization, its name, identity, or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

8. A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.
9. ~~A financing statement covering crops growing or to be grown must show that it covers crops and where the debtor is not a transmitting utility the financing statement must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state.~~
10. A financing statement filed to gain protection under the central notice system must be amended within three months of a material change to reflect that change. The amended financing statement must be signed by both the debtor and secured party and filed in the same manner as the original financing statement.

Approved March 25, 1997  
Filed March 26, 1997

## CHAPTER 362

### SENATE BILL NO. 2099

(Judiciary Committee)

(At the request of the Commission on Uniform State Laws)

### INVESTMENT SECURITIES

AN ACT to create and enact chapter 41-08 and two new sections to chapter 41-09 of the North Dakota Century Code, relating to the Uniform Commercial Code revised article 8 pertaining to investment securities, investment property, and security interests arising in purchase or delivery of financial assets; to amend and reenact subsection 1 of section 10-19.1-67, subsection 3 of section 10-32-28, subdivision e of subsection 2 of section 41-01-05, subsection 2 of section 41-01-16, subdivision f of subsection 1 of section 41-04-04, subsection 2 of section 41-05-14, subsection 6 of section 41-09-03, sections 41-09-05, 41-09-06, subsections 1 and 4 of section 41-09-16, subdivision d of subsection 1 of section 41-09-22, subsection 1 of section 41-09-23, subsection 1 of section 41-09-24, sections 41-09-25, 41-09-26, subsections 1 and 3 of section 41-09-27, section 41-09-30, and subsections 1 and 7 of section 41-09-33 of the North Dakota Century Code, relating to adoption of revised article 8; and to repeal chapter 10-18.1 and the present chapter 41-08 of the North Dakota Century Code, relating to the Uniform Act for the Simplification of Fiduciary Security Transfers and investment securities.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1. AMENDMENT.** Subsection 1 of section 10-19.1-67 of the North Dakota Century Code is amended and reenacted as follows:

1. A new share certificate may be issued pursuant to section ~~41-08-41~~ 41-08-38 in place of one that is alleged to have been lost, stolen, or destroyed.

<sup>12</sup> **SECTION 2. AMENDMENT.** Subsection 3 of section 10-32-28 of the North Dakota Century Code is amended and reenacted as follows:

3. Notwithstanding any other provision of law, for the purpose of any law relating to security interests, a membership interest, governance rights, and financial rights are each a general intangible, as defined in section 41-09-06, and not a certificated security as defined in ~~subdivision a of subsection 4 of section 41-08-02~~, an uncertificated security as defined in ~~subdivision b of subsection 4 of section 41-08-02~~, chattel paper as defined in ~~subdivision b of subsection 4 of section 41-09-05~~, an instrument as defined in ~~subdivision i of subsection 4 of section 41-09-05~~, or an account as defined in section 41-09-06.

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<sup>12</sup> Section 10-32-28 was also amended by section 112 of Senate Bill No. 2344, chapter 103.

<sup>13</sup> **SECTION 3. AMENDMENT.** Subdivision e of subsection 2 of section 41-01-05 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- e. Applicability of the chapter on investment securities. Section ~~41-08-06~~ 41-08-10.

**SECTION 4. AMENDMENT.** Subsection 2 of section 41-01-16 of the North Dakota Century Code is amended and reenacted as follows:

2. Subsection 1 does not apply to contracts for the sale of goods (section 41-02-08) nor of securities (section ~~41-08-35~~ 41-08-13) nor to security agreements (section 41-09-16).

**SECTION 5. AMENDMENT.** Subdivision f of subsection 1 of section 41-04-04 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- f. "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (section 41-08-02), or instructions for uncertificated securities (section ~~41-08-24~~ 41-08-02), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft.

<sup>14</sup> **SECTION 6. AMENDMENT.** Subsection 2 of section 41-05-14 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

2. Unless otherwise agreed, when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (section 41-07-36) or of a certificated security (section ~~41-08-22~~ 41-08-08) or is forged or fraudulent or there is fraud in the transaction:
  - a. The issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances that would make it a holder in due course (section 41-03-28) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (section 41-07-31) or a bona fide purchaser of a certificated security (section 41-08-18); and
  - b. In all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery, or other defect not

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<sup>13</sup> Section 41-01-05 was also amended by section 1 of Senate Bill No. 2098, chapter 358.

<sup>14</sup> Section 41-05-14 was also amended by section 3 of Senate Bill No. 2098, chapter 358.

apparent on the face of the documents, but a court of appropriate jurisdiction may enjoin the honor.

**SECTION 7.** Chapter 41-08 of the North Dakota Century Code is created and enacted as follows:

**41-08-01. (8-101) Short title.** This chapter may be cited as Uniform Commercial Code - Investment Securities.

**41-08-02. (8-102) Definitions.**

**1. In this chapter:**

- a. "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.**
- b. "Bearer form", as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an endorsement.**
- c. "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.**
- d. "Certificated security" means a security that is represented by a certificate.**
- e. "Clearing corporation" means:**
  - (1) A person registered as a "clearing agency" under the federal securities laws;**
  - (2) A federal reserve bank; or**
  - (3) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.**
- f. "Communicate" means to:**
  - (1) Send a signed writing; or**
  - (2) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.**
- g. "Endorsement" means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.**

- h. "Entitlement holder" means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of subdivision b or c of subsection 2 of section 41-08-41, that person is the entitlement holder.
- i. "Entitlement order" means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.
- j. "Financial asset", except as otherwise provided in section 41-08-03, means:
- (1) A security;
  - (2) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
  - (3) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter.

As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

- k. "Good faith", for purposes of the obligation of good faith in the performance or enforcement of contracts or duties within this chapter, means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- l. "Instruction" means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.
- m. "Registered form", as applied to a certificated security, means a form in which:
- (1) The security certificate specifies a person entitled to the security; and
  - (2) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.
- n. "Securities intermediary" means:
- (1) A clearing corporation; or

- (2) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.
  - o. "Security", except as otherwise provided in section 41-08-03, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:
      - (1) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;
      - (2) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and
      - (3) Which:
        - (a) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or
        - (b) Is a medium for investment and by its terms expressly provides that it is a security governed by this chapter.
  - p. "Security certificate" means a certificate representing a security.
  - q. "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset specified in sections 41-08-41 through 41-08-51.
  - r. "Uncertificated security" means a security that is not represented by a certificate.
2. Other definitions applying to this chapter and the sections in which they appear are:
- a. "Appropriate person". Section 41-08-07.
  - b. "Control". Section 41-08-06.
  - c. "Delivery". Section 41-08-24.
  - d. "Investment company security". Section 41-08-03.
  - e. "Issuer". Section 41-08-17.
  - f. "Overissue". Section 41-08-26.
  - g. "Protected purchaser". Section 41-08-29.
  - h. "Securities account". Section 41-08-41.
3. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

4. The characterization of a person, business, or transaction for purposes of this chapter does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule.

**41-08-03. (8-103) Rules for determining whether certain obligations and interests are securities or financial assets. In this chapter:**

1. A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.
2. An "investment company security" is a security. "Investment company security" means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. "Investment company security" does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.
3. An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this chapter, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.
4. A writing that is a security certificate is governed by this chapter and not by chapter 41-03, even though it also meets the requirements of that chapter. However, a negotiable instrument governed by chapter 41-03 is a financial asset if it is held in a securities account.
5. An option or similar obligation issued by a clearing corporation to its participants is not a security but is a financial asset.
6. A commodity contract, as defined in section 11 of this Act, is not a security or a financial asset.

**41-08-04. (8-104) Acquisition of security or financial asset or interest therein.**

1. A person acquires a security or an interest therein, under this chapter, if:
  - a. The person is a purchaser to whom a security is delivered pursuant to section 41-08-27; or
  - b. The person acquires a security entitlement to the security pursuant to section 41-08-41.
2. A person acquires a financial asset, other than a security, or an interest therein, under this chapter, if the person acquires a security entitlement to the financial asset.
3. A person who acquires a security entitlement to a security or other financial asset has the rights specified in sections 41-08-41 through 41-08-51, but is a purchaser of any security, security entitlement, or

other financial asset held by the securities intermediary only to the extent provided in section 41-08-43.

4. Unless the context shows that a different meaning is intended, a person who is required by other law, regulation, rule, or agreement to transfer, deliver, present, surrender, exchange, or otherwise put in the possession of another person a security or financial asset satisfies that requirement by causing the other person to acquire an interest in the security or financial asset pursuant to subsection 1 or 2.

**41-08-05. (8-105) Notice of adverse claim.**

1. A person has notice of an adverse claim if:
  - a. The person knows of the adverse claim;
  - b. The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or
  - c. The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation required would establish the existence of the adverse claim.
2. Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.
3. An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:
  - a. One year after a date set for presentment or surrender for redemption or exchange; or
  - b. Six months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.
4. A purchaser of a certificated security has notice of an adverse claim if the security certificate:
  - a. Whether in bearer or registered form, has been endorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or
  - b. Is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

5. Filing of a financing statement under chapter 41-09 is not notice of an adverse claim to a financial asset.

**41-08-06. (8-106) Control.**

1. A purchaser has "control" of a certificated security in bearer form if the certificated security is delivered to the purchaser.
2. A purchaser has "control" of a certificated security in registered form if the certificated security is delivered to the purchaser, and:
  - a. The certificate is endorsed to the purchaser or in blank by an effective endorsement; or
  - b. The certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.
3. A purchaser has "control" of an uncertificated security if:
  - a. The uncertificated security is delivered to the purchaser; or
  - b. The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.
4. A purchaser has "control" of a security entitlement if:
  - a. The purchaser becomes the entitlement holder; or
  - b. The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder.
5. If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary, the securities intermediary has control.
6. A purchaser who has satisfied the requirements of subdivision b of subsection 3 or subdivision b of subsection 4 has control even if the registered owner in the case of subdivision b of subsection 3 or the entitlement holder in the case of subdivision b of subsection 4 retains the right to make substitutions for the uncertificated security or security entitlement, to originate instructions or entitlement orders to the issuer or securities intermediary, or otherwise to deal with the uncertificated security or security entitlement.
7. An issuer or a securities intermediary may not enter into an agreement of the kind described in subdivision b of subsection 3 or subdivision b of subsection 4 without the consent of the registered owner or entitlement holder, but an issuer or a securities intermediary is not required to enter into such an agreement even though the registered owner or entitlement holder so directs. An issuer or securities intermediary that has entered into such an agreement is not required to confirm the existence of the agreement to another party unless requested to do so by the registered owner or entitlement holder.

**41-08-07. (8-107) Whether endorsement, instruction, or entitlement order is effective.**

1. "Appropriate person" means:

  - a. With respect to an endorsement, the person specified by a security certificate or by an effective special endorsement to be entitled to the security;
  - b. With respect to an instruction, the registered owner of an uncertificated security;
  - c. With respect to an entitlement order, the entitlement holder;
  - d. If the person designated in subdivision a, b, or c is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or
  - e. If the person designated in subdivision a, b, or c lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.
2. An endorsement, instruction, or entitlement order is effective if:

  - a. It is made by the appropriate person;
  - b. It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under subdivision b of subsection 3 or subdivision b of subsection 4 of section 41-08-06; or
  - c. The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.
3. An endorsement, instruction, or entitlement order made by a representative is effective even if:

  - a. The representative has failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction; or
  - b. The representative's action in making the endorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.
4. If a security is registered in the name of or specially endorsed to a person described as a representative, or if a securities account is maintained in the name of a person described as a representative, an endorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

5. Effectiveness of an endorsement, instruction, or entitlement order is determined as of the date the endorsement, instruction, or entitlement order is made, and an endorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

**41-08-08. (8-108) Warranties in direct holding.**

1. A person who transfers a certificated security to a purchaser for value warrants to the purchaser, and an endorser, if the transfer is by endorsement, warrants to any subsequent purchaser, that:
- a. The certificate is genuine and has not been materially altered;
  - b. The transferor or endorser does not know of any fact that might impair the validity of the security;
  - c. There is no adverse claim to the security;
  - d. The transfer does not violate any restriction on transfer;
  - e. If the transfer is by endorsement, the endorsement is made by an appropriate person, or if the endorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person; and
  - f. The transfer is otherwise effective and rightful.
2. A person who originates an instruction for registration of transfer of an uncertificated security to a purchaser for value warrants to the purchaser that:
- a. The instruction is made by an appropriate person, or if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person;
  - b. The security is valid;
  - c. There is no adverse claim to the security; and
  - d. At the time the instruction is presented to the issuer:
    - (1) The purchaser will be entitled to the registration of transfer;
    - (2) The transfer will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction;
    - (3) The transfer will not violate any restriction on transfer; and
    - (4) The requested transfer will otherwise be effective and rightful.
3. A person who transfers an uncertificated security to a purchaser for value and does not originate an instruction in connection with the transfer warrants that:
- a. The uncertificated security is valid;



- a. The entitlement order is made by an appropriate person, or if the entitlement order is by an agent, the agent has actual authority to act on behalf of the appropriate person; and
  - b. There is no adverse claim to the security entitlement.
2. A person who delivers a security certificate to a securities intermediary for credit to a securities account or originates an instruction with respect to an uncertificated security directing that the uncertificated security be credited to a securities account makes to the securities intermediary the warranties specified in subsection 1 or 2 of section 41-08-08.
3. If a securities intermediary delivers a security certificate to its entitlement holder or causes its entitlement holder to be registered as the owner of an uncertificated security, the securities intermediary makes to the entitlement holder the warranties specified in subsection 1 or 2 of section 41-08-08.

**41-08-10. (8-110) Applicability - Choice of law.**

1. The local law of the issuer's jurisdiction, as specified in subsection 4, governs:
  - a. The validity of a security;
  - b. The rights and duties of the issuer with respect to registration of transfer;
  - c. The effectiveness of registration of transfer by the issuer;
  - d. Whether the issuer owes any duties to an adverse claimant to a security; and
  - e. Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.
2. The local law of the securities intermediary's jurisdiction, as specified in subsection 5, governs:
  - a. Acquisition of a security entitlement from the securities intermediary;
  - b. The rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement;
  - c. Whether the securities intermediary owes any duties to an adverse claimant to a security entitlement; and
  - d. Whether an adverse claim can be asserted against a person who acquires a security entitlement from the securities intermediary or a person who purchases a security entitlement or interest therein from an entitlement holder.

3. The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security certificate is delivered.
4. "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this state may specify the law of another jurisdiction as the law governing the matters specified in subdivisions b through e of subsection 1.
5. The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:
  - a. If an agreement between the securities intermediary and its entitlement holder specifies that it is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.
  - b. If an agreement between the securities intermediary and its entitlement holder does not specify the governing law as provided in subdivision a, but expressly specifies that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.
  - c. If an agreement between the securities intermediary and its entitlement holder does not specify a jurisdiction as provided in subdivision a or b, the securities intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the entitlement holder's account.
  - d. If an agreement between the securities intermediary and its entitlement holder does not specify a jurisdiction as provided in subdivision a or b and an account statement does not identify an office serving the entitlement holder's account as provided in subdivision c, the securities intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the securities intermediary.
6. A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location of facilities for data processing or other recordkeeping concerning the account.

**41-08-11. (8-111) Clearing corporation rules.** A rule adopted by a clearing corporation governing rights and obligations among the clearing corporation and its participants in the clearing corporation is effective even if the rule conflicts with this Act and affects another party who does not consent to the rule.

**41-08-12. (8-112) Creditor's legal process.**

1. The interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in

- subsection 4. However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.
2. The interest of a debtor in an uncertificated security may be reached by a creditor only by legal process upon the issuer at its chief executive office in the United States, except as otherwise provided in subsection 4.
  3. The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained, except as otherwise provided in subsection 4.
  4. The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, may be reached by a creditor by legal process upon the secured party.
  5. A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process.

**41-08-13. (8-113) Statute of frauds inapplicable.** A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making.

**41-08-14. (8-114) Evidentiary rules concerning certificated securities.** The following rules apply in an action on a certificated security against the issuer:

1. Unless specifically denied in the pleadings, each signature on a security certificate or in a necessary endorsement is admitted.
2. If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized.
3. If signatures on a security certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security.
4. If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted.

**41-08-15. (8-115) Securities intermediary and others not liable to adverse claimant.** A securities intermediary that has transferred a financial asset pursuant to an effective entitlement order, or a broker or other agent or bailee that has dealt with a financial asset at the direction of its customer or principal, is not liable to a

person having an adverse claim to the financial asset, unless the securities intermediary, or broker or other agent or bailee:

1. Took the action after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or
2. Acted in collusion with the wrongdoer in violating the rights of the adverse claimant; or
3. In the case of a security certificate that has been stolen, acted with notice of the adverse claim.

**41-08-16. (8-116) Securities intermediary as purchaser for value.** A securities intermediary that receives a financial asset and establishes a security entitlement to the financial asset in favor of an entitlement holder is a purchaser for value of the financial asset. A securities intermediary that acquires a security entitlement to a financial asset from another securities intermediary acquires the security entitlement for value if the securities intermediary acquiring the security entitlement establishes a security entitlement to the financial asset in favor of an entitlement holder.

**41-08-17. (8-201) Issuer.**

1. With respect to an obligation on or a defense to a security, an "issuer" includes a person who:
  - a. Places or authorizes the placing of its name on a security certificate, other than as authenticating trustee, registrar, transfer agent, or the like, to evidence a share, participation, or other interest in its property or in an enterprise, or to evidence its duty to perform an obligation represented by the certificate;
  - b. Creates a share, participation, or other interest in its property or in an enterprise, or undertakes an obligation, that is an uncertificated security;
  - c. Directly or indirectly creates a fractional interest in its rights or property, if the fractional interest is represented by a security certificate; or
  - d. Becomes responsible for, or in place of, another person described as an issuer in this section.
2. With respect to an obligation on or defense to a security, a guarantor is an issuer to the extent of its guaranty, whether or not its obligation is noted on a security certificate.
3. With respect to a registration of a transfer, issuer means a person on whose behalf transfer books are maintained.

**41-08-18. (8-202) Issuer's responsibility and defenses - Notice of defect or defense.**

1. Even against a purchaser for value and without notice, the terms of a certificated security include terms stated on the certificate and terms made part of the security by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate. A reference under this subsection does not of itself charge a purchaser for value with notice of a defect going to the validity of the security, even if the certificate expressly states that a person accepting it admits notice. The terms of an uncertificated security include those stated in any instrument, indenture, or document or in a constitution, statute, ordinance, rule, regulation, order, or the like, pursuant to which the security is issued.
2. The following rules apply if an issuer asserts that a security is not valid:

  - a. A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.
  - b. Subdivision a applies to an issuer that is a government or governmental subdivision, agency, or instrumentality only if there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.
3. Except as otherwise provided in section 41-08-21, lack of genuineness of a certificated security is a complete defense, even against a purchaser for value and without notice.
4. All other defenses of the issuer of a security, including nondelivery and conditional delivery of a certificated security, are ineffective against a purchaser for value who has taken the certificated security without notice of the particular defense.
5. This section does not affect the right of a party to cancel a contract for a security "when, as and if issued" or "when distributed" in the event of a material change in the character of the security that is the subject of the contract or in the plan or arrangement pursuant to which the security is to be issued or distributed.
6. If a security is held by a securities intermediary against whom an entitlement holder has a security entitlement with respect to the security, the issuer may not assert any defense that the issuer could not assert if the entitlement holder held the security directly.

**41-08-19. (8-203) Staleness as notice of defect or defense.** After an act or event, other than a call that has been revoked, creating a right to immediate performance of the principal obligation represented by a certificated security or setting a date on or after which the security is to be presented or surrendered for

redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer, if the act or event:

1. Requires the payment of money, the delivery of a certificated security, the registration of transfer of an uncertificated security, or any of them on presentation or surrender of the security certificate, the money or security is available on the date set for payment or exchange, and the purchaser takes the security more than one year after that date; or
2. Is not covered by subsection 1 and the purchaser takes the security more than two years after the date set for surrender or presentation or the date on which performance became due.

**41-08-20. (8-204) Effect of issuer's restriction on transfer.** A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless:

1. The security is certificated and the restriction is noted conspicuously on the security certificate; or
2. The security is uncertificated and the registered owner has been notified of the restriction.

**41-08-21. (8-205) Effect of unauthorized signature on security certificate.** An unauthorized signature placed on a security certificate before or in the course of issue is ineffective, but the signature is effective in favor of a purchaser for value of the certificated security if the purchaser is without notice of the lack of authority and the signing has been done by:

1. An authenticating trustee, registrar, transfer agent, or other person entrusted by the issuer with the signing of the security certificate or of similar security certificates, or the immediate preparation for signing of any of them; or
2. An employee of the issuer, or of any of the persons listed in subsection 1, entrusted with responsible handling of the security certificate.

**41-08-22. (8-206) Completion or alteration of security certificate.**

1. If a security certificate contains the signatures necessary to its issue or transfer but is incomplete in any other respect:
  - a. Any person may complete it by filling in the blanks as authorized; and
  - b. Even if the blanks are incorrectly filled in, the security certificate as completed is enforceable by a purchaser who took it for value and without notice of the incorrectness.
2. A complete security certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms.

**41-08-23. (8-207) Rights and duties of issuer with respect to registered owners.**

1. Before due presentment for registration of transfer of a certificated security in registered form or of an instruction requesting registration of transfer of an uncertificated security, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all the rights and powers of an owner.
2. This chapter does not affect the liability of the registered owner of a security for a call, assessment, or the like.

**41-08-24. (8-208) Effect of signature of authenticating trustee, registrar, or transfer agent.**

1. A person signing a security certificate as authenticating trustee, registrar, transfer agent, or the like, warrants to a purchaser for value of the certificated security, if the purchaser is without notice of a particular defect, that:
  - a. The certificate is genuine;
  - b. The person's own participation in the issue of the security is within the person's capacity and within the scope of the authority received by the person from the issuer; and
  - c. The person has reasonable grounds to believe that the certificated security is in the form and within the amount the issuer is authorized to issue.
2. Unless otherwise agreed, a person signing under subsection 1 does not assume responsibility for the validity of the security in other respects.

**41-08-25. (8-209) Issuer's lien.** A lien in favor of an issuer upon a certificated security is valid against a purchaser only if the right of the issuer to the lien is noted conspicuously on the security certificate.

**41-08-26. (8-210) Overissue.**

1. In this section, "overissue" means the issue of securities in excess of the amount the issuer has corporate power to issue, but an overissue does not occur if appropriate action has cured the overissue.
2. Except as otherwise provided in subsections 3 and 4, the provisions of this chapter which validate a security or compel its issue or reissue do not apply to the extent that validation, issue, or reissue would result in overissue.
3. If an identical security not constituting an overissue is reasonably available for purchase, a person entitled to issue or validation may compel the issuer to purchase the security and deliver it if certificated or register its transfer if uncertificated against surrender of any security certificate the person holds.
4. If a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand.

**41-08-27. (8-301) Delivery.**

1. Delivery of a certificated security to a purchaser occurs when:
  - a. The purchaser acquires possession of the security certificate;
  - b. Another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or
  - c. A securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and has been specially endorsed to the purchaser by an effective endorsement.
2. Delivery of an uncertificated security to a purchaser occurs when:
  - a. The issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or
  - b. Another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser.

**41-08-28. (8-302) Rights of purchaser.**

1. Except as otherwise provided in subsections 2 and 3, upon delivery of a certificated or uncertificated security to a purchaser, the purchaser acquires all rights in the security that the transferor had or had power to transfer.
2. A purchaser of a limited interest acquires rights only to the extent of the interest purchased.
3. A purchaser of a certificated security who as a previous holder had notice of an adverse claim does not improve its position by taking from a protected purchaser.

**41-08-29. (8-303) Protected purchaser.**

1. "Protected purchaser" means a purchaser of a certificated or uncertificated security, or of an interest therein, who:
  - a. Gives value;
  - b. Does not have notice of any adverse claim to the security; and
  - c. Obtains control of the certificated or uncertificated security.
2. In addition to acquiring the rights of a purchaser, a protected purchaser also acquires its interest in the security free of any adverse claim.

**41-08-30. (8-304) Endorsement.**

1. An endorsement may be in blank or special. An endorsement in blank includes an endorsement to bearer. A special endorsement specifies to whom a security is to be transferred or who has power to transfer it. A holder may convert a blank endorsement to a special endorsement.
2. An endorsement purporting to be only of part of a security certificate representing units intended by the issuer to be separately transferable is effective to the extent of the endorsement.
3. An endorsement, whether special or in blank, does not constitute a transfer until delivery of the certificate on which it appears or, if the endorsement is on a separate document, until delivery of both the document and the certificate.
4. If a security certificate in registered form has been delivered to a purchaser without a necessary endorsement, the purchaser may become a protected purchaser only when the endorsement is supplied. However, against a transferor, a transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary endorsement supplied.
5. An endorsement of a security certificate in bearer form may give notice of an adverse claim to the certificate, but it does not otherwise affect a right to registration that the holder possesses.
6. Unless otherwise agreed, a person making an endorsement assumes only the obligations provided in section 41-08-08 and not an obligation that the security will be honored by the issuer.

**41-08-31. (8-305) Instruction.**

1. If an instruction has been originated by an appropriate person but is incomplete in any other respect, any person may complete it as authorized and the issuer may rely on it as completed, even though it has been completed incorrectly.
2. Unless otherwise agreed, a person initiating an instruction assumes only the obligations imposed by section 41-08-08 and not an obligation that the security will be honored by the issuer.

**41-08-32. (8-306) Effect of guaranteeing signature, endorsement, or instruction.**

1. A person who guarantees a signature of an endorser of a security certificate warrants that at the time of signing:
  - a. The signature was genuine;
  - b. The signer was an appropriate person to endorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person; and
  - c. The signer had legal capacity to sign.
2. A person who guarantees a signature of the originator of an instruction warrants that at the time of signing:

- a. The signature was genuine;
  - b. The signer was an appropriate person to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty; and
  - c. The signer had legal capacity to sign.
3. A person who specially guarantees the signature of an originator of an instruction makes the warranties of a signature guarantor under subsection 2 and also warrants that at the time the instruction is presented to the issuer:
    - a. The person specified in the instruction as the registered owner of the uncertificated security will be the registered owner; and
    - b. The transfer of the uncertificated security requested in the instruction will be registered by the issuer free from all liens, security interests, restrictions, and claims other than those specified in the instruction.
  4. A guarantor under subsections 1 and 2 or a special guarantor under subsection 3 does not otherwise warrant the rightfulness of the transfer.
  5. A person who guarantees an endorsement of a security certificate makes the warranties of a signature guarantor under subsection 1 and also warrants the rightfulness of the transfer in all respects.
  6. A person who guarantees an instruction requesting the transfer of an uncertificated security makes the warranties of a special signature guarantor under subsection 3 and also warrants the rightfulness of the transfer in all respects.
  7. An issuer may not require a special guaranty of signature, a guaranty of endorsement, or a guaranty of instruction as a condition to registration of transfer.
  8. The warranties under this section are made to a person taking or dealing with the security in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An endorser or originator of an instruction whose signature, endorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor.

**41-08-33. (8-307) Purchaser's right to requisites for registration of transfer.**

Unless otherwise agreed, the transferor of a security on due demand shall supply the purchaser with proof of authority to transfer or with any other requisite necessary to obtain registration of the transfer of the security, but if the transfer is not for value, a transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer.

**41-08-34. (8-401) Duty of issuer to register transfer.**

1. If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security, the issuer shall register the transfer as requested if:
  - a. Under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name;
  - b. The endorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;
  - c. Reasonable assurance is given that the endorsement or instruction is genuine and authorized (section 41-08-35);
  - d. Any applicable law relating to the collection of taxes has been complied with;
  - e. The transfer does not violate any restriction on transfer imposed by the issuer in accordance with section 41-08-20;
  - f. A demand that the issuer not register transfer has not become effective under section 41-08-36, or the issuer has complied with subsection 2 of section 41-08-36 but no legal process or indemnity bond is obtained as provided in subsection 4 of section 41-08-36; and
  - g. The transfer is in fact rightful or is to a protected purchaser.
2. If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer.

**41-08-35. (8-402) Assurance that endorsement or instruction is effective.**

1. An issuer may require the following assurance that each necessary endorsement or each instruction is genuine and authorized:
  - a. In all cases, a guaranty of the signature of the person making an endorsement or originating an instruction including, in the case of an instruction, reasonable assurance of identity;
  - b. If the endorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign;
  - c. If the endorsement is made or the instruction is originated by a fiduciary pursuant to subdivision d or e of subsection 1 of section 41-08-07, appropriate evidence of appointment or incumbency;
  - d. If there is more than one fiduciary, reasonable assurance that all who are required to sign have done so; and
  - e. If the endorsement is made or the instruction is originated by a person not covered by another provision of this subsection,

assurance appropriate to the case corresponding as nearly as may be to the provisions of this subsection.

2. An issuer may elect to require reasonable assurance beyond that specified in this section.
3. In this section:
  - a. "Appropriate evidence of appointment or incumbency" means:
    - (1) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer thereof and dated within sixty days before the date of presentation for transfer; or
    - (2) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by an issuer to be responsible or, in the absence of that document or certificate, other evidence the issuer reasonably considers appropriate.
  - b. "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the issuer to be responsible. An issuer may adopt standards with respect to responsibility if they are not manifestly unreasonable.

**41-08-36. (8-403) Demand that issuer not register transfer.**

1. A person who is an appropriate person to make an endorsement or originate an instruction may demand that the issuer not register transfer of a security by communicating to the issuer a notification that identifies the registered owner and the issue of which the security is a part and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the issuer at a time and in a manner affording the issuer reasonable opportunity to act on it.
2. If a certificated security in registered form is presented to an issuer with a request to register transfer or an instruction is presented to an issuer with a request to register transfer of an uncertificated security after a demand that the issuer not register transfer has become effective, the issuer shall promptly communicate to (a) the person who initiated the demand at the address provided in the demand and (b) the person who presented the security for registration of transfer or initiated the instruction requesting registration of transfer a notification stating that:
  - a. The certificated security has been presented for registration of transfer or the instruction for registration of transfer of the uncertificated security has been received;
  - b. A demand that the issuer not register transfer had previously been received; and
  - c. The issuer will withhold registration of transfer for a period of time stated in the notification in order to provide the person who

initiated the demand an opportunity to obtain legal process or an indemnity bond.

3. The period described in subdivision c of subsection 2 may not exceed thirty days after the date of communication of the notification. A shorter period may be specified by the issuer if it is not manifestly unreasonable.
4. An issuer is not liable to a person who initiated a demand that the issuer not register transfer for any loss the person suffers as a result of registration of a transfer pursuant to an effective endorsement or instruction if the person who initiated the demand does not, within the time stated in the issuer's communication, either:
  - a. Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the issuer from registering the transfer; or
  - b. File with the issuer an indemnity bond, sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar, or other agent of the issuer involved from any loss it or they may suffer by refusing to register the transfer.
5. This section does not relieve an issuer from liability for registering transfer pursuant to an endorsement or instruction that was not effective.

**41-08-37. (8-404) Wrongful registration.**

1. Except as otherwise provided in section 41-08-39, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered:
  - a. Pursuant to an ineffective endorsement or instruction;
  - b. After a demand that the issuer not register transfer became effective under subsection 1 of section 41-08-36 and the issuer did not comply with subsection 2 of section 41-08-36;
  - c. After the issuer had been served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, and the issuer had a reasonable opportunity to act on the injunction, restraining order, or other legal process; or
  - d. By an issuer acting in collusion with the wrongdoer.
2. An issuer that is liable for wrongful registration of transfer under subsection 1 on demand shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration. If an overissue would result, the issuer's liability to provide the person with a like security is governed by section 41-08-26.
3. Except as otherwise provided in subsection 1 or in a law relating to the collection of taxes, an issuer is not liable to an owner or other person suffering loss as a result of the registration of a transfer of a security if

registration was made pursuant to an effective endorsement or instruction.

**41-08-38. (8-405) Replacement of lost, destroyed, or wrongfully taken security certificate.**

1. If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer shall issue a new certificate if the owner:
  - a. So requests before the issuer has notice that the certificate has been acquired by a protected purchaser;
  - b. Files with the issuer a sufficient indemnity bond; and
  - c. Satisfies other reasonable requirements imposed by the issuer.
2. If, after the issue of a new security certificate, a protected purchaser of the original certificate presents it for registration of transfer, the issuer shall register the transfer unless an overissue would result. In that case, the issuer's liability is governed by section 41-08-26. In addition to any rights on the indemnity bond, an issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser.

**41-08-39. (8-406) Obligation to notify issuer of lost, destroyed, or wrongfully taken security certificate.** If a security certificate has been lost, apparently destroyed, or wrongfully taken, and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under section 41-08-37 or a claim to a new security certificate under section 41-08-38.

**41-08-40. (8-407) Authenticating trustee, transfer agent, and registrar.** A person acting as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities, or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions.

**41-08-41. (8-501) Securities account - Acquisition of security entitlement from securities intermediary.**

1. "Securities account" means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.
2. Except as otherwise provided in subsections 4 and 5, a person acquires a security entitlement if a securities intermediary:
  - a. Indicates by book entry that a financial asset has been credited to the person's securities account;



- b. The securities intermediary does not have sufficient interests in the financial asset to satisfy the security entitlements of all of its entitlement holders to that financial asset;
- c. The securities intermediary violated its obligations under section 41-08-44 by transferring the financial asset or interest therein to the purchaser; and
- d. The purchaser is not protected under subsection 5.

The trustee or other liquidator, acting on behalf of all entitlement holders having security entitlements with respect to a particular financial asset, may recover the financial asset, or interest therein, from the purchaser. If the trustee or other liquidator elects not to pursue that right, an entitlement holder whose security entitlement remains unsatisfied has the right to recover its interest in the financial asset from the purchaser.

5. An action based on the entitlement holder's property interest with respect to a particular financial asset under subsection 1, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against any purchaser of a financial asset or interest therein who gives value, obtains control, and does not act in collusion with the securities intermediary in violating the securities intermediary's obligations under section 41-08-44.

**41-08-44. (8-504) Duty of securities intermediary to maintain financial asset.**

1. A securities intermediary shall promptly obtain and thereafter maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its entitlement holders with respect to that financial asset. The securities intermediary may maintain those financial assets directly or through one or more other securities intermediaries.
2. Except to the extent otherwise agreed by its entitlement holder, a securities intermediary may not grant any security interests in a financial asset it is obligated to maintain pursuant to subsection 1.
3. A securities intermediary satisfies the duty in subsection 1 if:
  - a. The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or
  - b. In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to obtain and maintain the financial asset.
4. This section does not apply to a clearing corporation that is itself the obligor of an option or similar obligation to which its entitlement holders have security entitlements.

**41-08-45. (8-505) Duty of securities intermediary with respect to payments and distributions.**

1. A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:
  - a. The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or
  - b. In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.
2. A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

**41-08-46. (8-506) Duty of securities intermediary to exercise rights as directed by entitlement holder.** A securities intermediary shall exercise rights with respect to a financial asset if directed to do so by an entitlement holder. A securities intermediary satisfies the duty if:

1. The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or
2. In the absence of agreement, the securities intermediary either places the entitlement holder in a position to exercise the rights directly or exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

**41-08-47. (8-507) Duty of securities intermediary to comply with entitlement order.**

1. A securities intermediary shall comply with an entitlement order if the entitlement order is originated by the appropriate person, the securities intermediary has had reasonable opportunity to assure itself that the entitlement order is genuine and authorized, and the securities intermediary has had reasonable opportunity to comply with the entitlement order. A securities intermediary satisfies the duty if:
  - a. The securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or
  - b. In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to comply with the entitlement order.
2. If a securities intermediary transfers a financial asset pursuant to an ineffective entitlement order, the securities intermediary shall reestablish a security entitlement in favor of the person entitled to it, and pay or credit any payments or distributions that the person did not receive as a result of the wrongful transfer. If the securities intermediary does not reestablish a security entitlement, the securities intermediary is liable to the entitlement holder for damages.

**41-08-48. (8-508) Duty of securities intermediary to change entitlement holder's position to other form of security holding.** A securities intermediary shall act at the direction of an entitlement holder to change a security entitlement into another

available form of holding for which the entitlement holder is eligible, or to cause the financial asset to be transferred to a securities account of the entitlement holder with another securities intermediary. A securities intermediary satisfies the duty if:

1. The securities intermediary acts as agreed upon by the entitlement holder and the securities intermediary; or
2. In the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to follow the direction of the entitlement holder.

**41-08-49. (8-509) Specification of duties of securities intermediary by other statute or regulation - Manner of performance of duties of securities intermediary and exercise of rights of entitlement holder.**

1. If the substance of a duty imposed upon a securities intermediary by sections 41-08-44 through 41-08-48 is the subject of other statute, regulation, or rule, compliance with that statute, regulation, or rule satisfies the duty.
2. To the extent that specific standards for the performance of the duties of a securities intermediary or the exercise of the rights of an entitlement holder are not specified by other statute, regulation, or rule or by agreement between the securities intermediary and entitlement holder, the securities intermediary shall perform its duties and the entitlement holder shall exercise its rights in a commercially reasonable manner.
3. The obligation of a securities intermediary to perform the duties imposed by sections 41-08-44 through 41-08-48 is subject to:
  - a. Rights of the securities intermediary arising out of a security interest under a security agreement with the entitlement holder or otherwise; and
  - b. Rights of the securities intermediary under other law, regulation, rule, or agreement to withhold performance of its duties as a result of unfulfilled obligations of the entitlement holder to the securities intermediary.
4. Sections 41-08-44 through 41-08-48 do not require a securities intermediary to take any action that is prohibited by other statute, regulation, or rule.

**41-08-50. (8-510) Rights of purchaser of security entitlement from entitlement holder.**

1. An action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.
2. If an adverse claim could not have been asserted against an entitlement holder under section 41-08-42, the adverse claim cannot be asserted

against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

3. In a case not covered by the priority rules in chapter 41-09, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Purchasers who have control rank equally, except that a securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

**41-08-51. (8-511) Priority among security interests and entitlement holders.**

1. Except as otherwise provided in subsections 2 and 3, if a securities intermediary does not have sufficient interests in a particular financial asset to satisfy both its obligations to entitlement holders who have security entitlements to that financial asset and its obligation to a creditor of the securities intermediary who has a security interest in that financial asset, the claims of entitlement holders, other than the creditor, have priority over the claim of the creditor.
2. A claim of a creditor of a securities intermediary who has a security interest in a financial asset held by a securities intermediary has priority over claims of the securities intermediary's entitlement holders who have security entitlements with respect to that financial asset if the creditor has control over the financial asset.
3. If a clearing corporation does not have sufficient financial assets to satisfy both its obligations to entitlement holders who have security entitlements with respect to a financial asset and its obligation to a creditor of the clearing corporation who has a security interest in that financial asset, the claim of the creditor has priority over the claims of entitlement holders.

**41-08-52. (8-603) Savings clause.**

1. This Act does not affect an action or proceeding commenced before this Act takes effect.
2. If a security interest in a security is perfected at the date this Act takes effect and the action by which the security interest was perfected would suffice to perfect a security interest under this Act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this Act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this Act, the security interest remains perfected for a period of six months after the effective date and continues perfected thereafter if appropriate action to perfect under this Act is taken within that period. If a security interest is perfected at the date this Act takes effect and the security interest can be perfected by filing under this Act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect.

<sup>15</sup> **SECTION 8. AMENDMENT.** Subsection 6 of section 41-09-03 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

6. ~~Uncertificated securities. The law, including the conflict of laws rules, of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or nonperfection of a security interest in uncertificated securities. Investment property:~~
  - a. This subsection applies to investment property.
  - b. Except as otherwise provided in subdivision f, during the time that a security certificate is located in a jurisdiction, perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby are governed by the local law of that jurisdiction.
  - c. Except as otherwise provided in subdivision f, perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security are governed by the local law of the issuer's jurisdiction as specified in subsection 4 of section 41-08-10.
  - d. Except as otherwise provided in subdivision f, perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account are governed by the local law of the securities intermediary's jurisdiction as specified in subsection 5 of section 41-08-10.
  - e. Except as otherwise provided in subdivision f, perfection of a security interest, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account are governed by the local law of the commodity intermediary's jurisdiction. The following rules determine a "commodity intermediary's jurisdiction" for purposes of this subdivision:
    - (1) If an agreement between the commodity intermediary and commodity customer specifies that it is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.
    - (2) If an agreement between the commodity intermediary and commodity customer does not specify the governing law as provided in paragraph 1, but expressly specifies that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

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<sup>15</sup> Section 41-09-03 was also amended by section 4 of Senate Bill No. 2098, chapter 358.

- (3) If an agreement between the commodity intermediary and commodity customer does not specify a jurisdiction as provided in paragraph 1 or 2, the commodity intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the commodity customer's account.
- (4) If an agreement between the commodity intermediary and commodity customer does not specify a jurisdiction as provided in paragraph 1 or 2 and an account statement does not identify an office serving the commodity customer's account as provided in paragraph 3, the commodity intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the commodity intermediary.
- f. Perfection of a security interest by filing, automatic perfection of a security interest in investment property granted by a broker or securities intermediary, and automatic perfection of a security interest in a commodity contract or commodity account granted by a commodity intermediary are governed by the local law of the jurisdiction in which the debtor is located.

<sup>16</sup> **SECTION 9. AMENDMENT.** Section 41-09-05 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-05. (9-105) Definitions and index of definitions.**

1. In this chapter unless the context otherwise requires:
  - a. "Account debtor" means the person who is obligated on an account, chattel paper, or general intangible.
  - b. "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods;<sup>1</sup> but a charter or other contract involving the use or hire of a vessel is not a chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.
  - c. "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold.
  - d. "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not ~~he~~ the person owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with

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<sup>16</sup> Section 41-09-05 was also amended by section 1 of Senate Bill No. 2142, chapter 360, and section 6 of Senate Bill No. 2098, chapter 358.

the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

- e. "Deposit account" means a demand, time, savings, passbook, or like account maintained with a bank, savings and loan association, credit union, or like organization, other than an account evidenced by a certificate of deposit.
- f. "Document" means document of title as defined in the general definitions of chapter 41-01 (section 41-01-11), and a receipt of the kind described in subsection 2 of section 41-07-07.
- g. "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.
- h. "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (section 41-09-34), but does not include money, documents, instruments, investment property, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also include standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops.
- i. "Instrument" means a negotiable instrument (defined in section 41-03-04); ~~a certificated security (defined in section 41-08-02)~~, or any other writing that evidences a right to the payment of money and is not itself a security agreement or lease and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment. The term does not include investment property.
- j. "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like.
- k. An advance is made "pursuant to commitment" if ~~the a~~ a secured party ~~has bound himself~~ binds itself to make it, whether or not a subsequent event of default or other event not within ~~his~~ a secured party's control has relieved or may relieve ~~him~~ it from ~~his~~ its obligation.
- l. "Secured party" means a lender, seller, or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement, or the like are represented by a trustee or other person, the representative is the secured party.
- m. "Security agreement" means an agreement which creates or provides for a security interest.
- n. "Transmitting utility" means any person primarily engaged in the railroad, or street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and

transmission of electricity, steam, gas or water, or the provision of sewer service.

2. Other definitions applying to this chapter and the sections in which they appear are:

- a. "Account". Section 41-09-06.
- b. "Attach". Section 41-09-16.
- c. "Commodity contract". Section 41-09-15.
- d. "Commodity customer". Section 41-09-15.
- e. "Commodity intermediary". Section 41-09-15.
- f. "Construction mortgage". Subsection 1 of section 41-09-34.
- ~~e.~~ g. "Consumer goods". Subsection 1 of section 41-09-09.
- h. "Control". Section 41-09-15.
- ~~e.~~ i. "Equipment". Subsection 2 of section 41-09-09.
- f. j. "Farm products". Subsection 3 of section 41-09-09.
- ~~g.~~ k. "Fixture filing". Section 41-09-34.
- ~~h.~~ l. "Fixtures". Section 41-09-34.
- ~~i.~~ m. "General intangibles". Section 41-09-06.
- ~~j.~~ n. "Inventory". Subsection 4 of section 41-09-09.
- o. "Investment property". Section 41-09-15.
- ~~k.~~ p. "Lien creditor". Subsection 3 of section 41-09-22.
- ~~l.~~ q. "Proceeds". Subsection 1 of section 41-09-27.
- ~~m.~~ r. "Purchase money security interest". Section 41-09-07.
- ~~n.~~ s. "Real estate interest". Section 41-09-34.
- ~~o.~~ t. "United States". Section 41-09-03.

3. The following definitions in other chapters apply to this chapter:

- a. "Broker". Section 41-08-02.
- b. "Certificated security". Section 41-08-02.
- c. "Check". Section 41-03-04.
- d. "Clearing corporation". Section 41-08-02.

<del>b.</del>	<u>e.</u>	"Contract for sale".	Section 41-02-06.
	<u>f.</u>	"Control".	<u>Section 41-08-06.</u>
	<u>g.</u>	"Delivery".	<u>Section 41-08-27.</u>
	<u>h.</u>	"Entitlement holder".	<u>Section 41-08-02.</u>
	<u>i.</u>	"Financial asset".	<u>Section 41-08-02.</u>
<del>e.</del>	<u>j.</u>	"Holder in due course".	Section 41-03-28.
<del>e.</del>	<u>k.</u>	"Note".	Section 41-03-04.
<del>e.</del>	<u>l.</u>	"Sale".	Section 41-02-06.
	<u>m.</u>	"Securities intermediary".	<u>Section 41-08-02.</u>
	<u>n.</u>	"Security".	<u>Section 41-08-02.</u>
	<u>o.</u>	"Security certificate".	<u>Section 41-08-02.</u>
	<u>p.</u>	"Security entitlement".	<u>Section 41-08-02.</u>
	<u>q.</u>	"Uncertificated security".	<u>Section 41-08-02.</u>

4. In addition, chapter 41-01 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

<sup>17</sup> **SECTION 10. AMENDMENT.** Section 41-09-06 of the North Dakota Century Code is amended and reenacted as follows:

**41-09-06. (9-106) "Account" and "general intangibles" defined.** "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

**SECTION 11.** A new section to chapter 41-09 of the North Dakota Century Code is created and enacted as follows:

**(9-115) Investment property.**

1. In this chapter:

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<sup>17</sup> Section 41-09-06 was also amended by section 7 of Senate Bill No. 2098, chapter 358.

- a. "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.
- b. "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or other contract that, in each case, is:
- (1) Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to the federal commodities laws; or
  - (2) Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.
- c. "Commodity customer" means a person for whom a commodity intermediary carries a commodity contract on its books.
- d. "Commodity intermediary" means:
- (1) A person who is registered as a futures commission merchant under the federal commodities laws; or
  - (2) A person who in the ordinary course of business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to the federal commodities laws.
- e. "Control" with respect to a certificated security, uncertificated security, or security entitlement has the meaning specified in section 41-08-06. A secured party has control over a commodity contract if by agreement among the commodity customer, the commodity intermediary, and the secured party, the commodity intermediary has agreed that it will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer. If a commodity customer grants a security interest in a commodity contract to its own commodity intermediary, the commodity intermediary as secured party has control. A secured party has control over a securities account or commodity account if the secured party has control over all security entitlements or commodity contracts carried in the securities account or commodity account.
- f. "Investment property" means:
- (1) A security, whether certificated or uncertificated;
  - (2) A security entitlement;
  - (3) A securities account;
  - (4) A commodity contract; or
  - (5) A commodity account.

2. Attachment or perfection of a security interest in a securities account is also attachment or perfection of a security interest in all security entitlements carried in the securities account. Attachment or perfection of a security interest in a commodity account is also attachment or perfection of a security interest in all commodity contracts carried in the commodity account.
3. A description of collateral in a security agreement or financing statement is sufficient to create or perfect a security interest in a certificated security, uncertificated security, security entitlement, securities account, commodity contract, or commodity account whether it describes the collateral by those terms, or as investment property, or by description of the underlying security, financial asset, or commodity contract. A description of investment property collateral in a security agreement or financing statement is sufficient if it identifies the collateral by specific listing, by category, by quantity, by a computational or allocational formula or procedure, or by any other method, if the identity of the collateral is objectively determinable.
4. Perfection of a security interest in investment property is governed by the following rules:

  - a. A security interest in investment property may be perfected by control. A secured creditor that obtains control over any investment property to perfect a security interest as provided by this chapter, by virtue of that conduct alone, does not control a debtor for any purpose under the federal bankruptcy code [11 U.S.C.].
  - b. Except as otherwise provided in subdivisions c and d, a security interest in investment property may be perfected by filing.
  - c. If the debtor is a broker or securities intermediary, a security interest in investment property is perfected when it attaches. The filing of a financing statement with respect to a security interest in investment property granted by a broker or securities intermediary has no effect for purposes of perfection or priority with respect to that security interest.
  - d. If a debtor is a commodity intermediary, a security interest in a commodity contract or a commodity account is perfected when it attaches. The filing of a financing statement with respect to a security interest in a commodity contract or a commodity account granted by a commodity intermediary has no effect for purposes of perfection or priority with respect to that security interest.
5. Priority between conflicting security interests in the same investment property is governed by the following rules:

  - a. A security interest of a secured party who has control over investment property has priority over a security interest of a secured party who does not have control over the investment property.
  - b. Except as otherwise provided in subdivisions c and d, conflicting security interests of secured parties each of whom has control rank equally.

- c. Except as otherwise agreed by the securities intermediary, a security interest in a security entitlement or a securities account granted to the debtor's own securities intermediary has priority over any security interest granted by the debtor to another secured party.
  - d. Except as otherwise agreed by the commodity intermediary, a security interest in a commodity contract or a commodity account granted to the debtor's own commodity intermediary has priority over any security interest granted by the debtor to another secured party.
  - e. Conflicting security interests granted by a broker, a securities intermediary, or a commodity intermediary which are perfected without control rank equally.
  - f. In all other cases, priority between conflicting security interests in investment property is governed by subsections 5, 6, and 7 of section 41-09-33. Subsection 4 of section 41-09-33 does not apply to investment property.
6. If a security certificate in registered form is delivered to a secured party pursuant to agreement, a written security agreement is not required for attachment or enforceability of the security interest, delivery suffices for perfection of the security interest, and the security interest has priority over a conflicting security interest perfected by means other than control, even if a necessary endorsement is lacking.

**SECTION 12.** A new section to chapter 41-09 of the North Dakota Century Code is created and enacted as follows:

**(9-116) Security interest arising in purchase or delivery of financial asset.**

1. If a person buys a financial asset through a securities intermediary in a transaction in which the buyer is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary, the securities intermediary has a security interest in the buyer's security entitlement securing the buyer's obligation to pay. A security agreement is not required for attachment or enforceability of the security interest, and the security interest is automatically perfected.
2. If a certificated security or other financial asset represented by a writing which in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment is delivered pursuant to an agreement between persons in the business of dealing with such securities or financial assets and the agreement calls for delivery versus payment, the person delivering the certificate or other financial asset has a security interest in the certificated security or other financial asset securing the seller's right to receive payment. A security agreement is not required for attachment or enforceability of the security interest, and the security interest is automatically perfected.

<sup>18</sup> **SECTION 13. AMENDMENT.** Subsection 1 of section 41-09-16 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Subject to the provisions of section 41-04-22 on the security interest of the collecting bank, ~~section 41-08-36.4~~ sections 11 and 12 of this Act on security interests in securities investment property, and section 41-09-13 on a security interest arising under the chapters on sales and leases, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless all of the following take place:
  - a. The collateral is in the possession of the secured party pursuant to agreement, the collateral is investment property and the secured party has control pursuant to agreement, or the debtor has signed a security agreement that contains a description of the collateral and, in addition, if the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned.
  - b. Value has been given.
  - c. The debtor has rights in the collateral.

<sup>19</sup> **SECTION 14. AMENDMENT.** Subsection 4 of section 41-09-16 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

4. A transaction, although subject to this chapter, is also subject to chapters ~~40-48.1~~, 13-03, 35-05, 49-09, and 51-13, and in the case of conflict between the provisions of this chapter and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

**SECTION 15. AMENDMENT.** Subdivision d of subsection 1 of section 41-09-22 of the North Dakota Century Code is amended and reenacted as follows:

- d. In the case of accounts ~~and~~, general intangibles, and investment property, a person who is not a secured party and who is a transferee to the extent that ~~he~~ person gives value without knowledge of the security interest and before it is perfected.

**SECTION 16. AMENDMENT.** Subsection 1 of section 41-09-23 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. A financing statement must be filed to perfect all security interests except the following:

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<sup>18</sup> Section 41-09-16 was also amended by section 1 of Senate Bill No. 2295, chapter 361, and section 14 of Senate Bill No. 2099, chapter 362.

<sup>19</sup> Section 41-09-16 was also amended by section 1 of Senate Bill No. 2295, chapter 361, and section 13 of Senate Bill No. 2099, chapter 362.

- a. A security interest in collateral in possession of the secured party under section 41-09-26.
- b. A security interest temporarily perfected in instruments, certificated securities, or documents without delivery under section 41-09-25 or in proceeds for a ten-day period under section 41-09-27.
- c. A security interest created by an assignment of a beneficial interest in a trust or a decedent's estate.
- d. A purchase money security interest in consumer goods<sup>21</sup>, but filing is required for a motor vehicle required to be registered and fixture filing is required for priority over a conflicting real estate interest in a fixture to the extent provided in section 41-09-34.
- e. An assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor.
- f. A security interest of a collecting bank (section 41-04-22) or ~~in securities (section 41-08-36.1)~~ or arising under the chapters on sales and leases (section 41-09-13) or covered in subsection 3.
- g. An assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder.
- h. A security interest in investment property which is perfected without filing under section 11 or 12 of this Act.

**SECTION 17. AMENDMENT.** Subsection 1 of section 41-09-24 of the North Dakota Century Code is amended and reenacted as follows:

1. A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. ~~Such~~ These steps are specified in sections 11 of this Act, 41-09-23, 41-09-25, 41-09-26, and 41-09-27. If ~~such~~ these steps are taken before the security interest attaches, it is perfected at the time when it attaches.

<sup>20</sup> **SECTION 18. AMENDMENT.** Section 41-09-25 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-25. (9-304) Perfection of security interest in instruments, documents, and goods covered by documents - Perfection by permissive filing - Temporary perfection without filing or transfer of possession.**

1. A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments, other than ~~certificated securities~~ or instruments that constitute part of chattel paper, can be perfected only by the secured party's taking possession,

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<sup>20</sup> Section 41-09-25 was also amended by section 2 of Senate Bill No. 2142, chapter 360, and section 8 of Senate Bill No. 2098, chapter 358.

except as provided in subsections 4 and 5 of this section and subsections 2 and 3 of section 41-09-27.

2. During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during that period is subject thereto.
3. A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.
4. A security interest in a negotiable document or ~~an instrument other than~~ a certificated security is perfected without filing or the taking of possession for a period of twenty-one days after it attaches to the extent that it arises for new value given under a written security agreement.
5. A security interest remains perfected for a period of twenty-one days without filing if a secured party having a perfected security interest in a negotiable document, ~~an instrument other than~~ a certificated security, or goods in possession of a bailee other than one who has issued a negotiable document therefor:
  - a. Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection 3 of section 41-09-33; or
  - b. Delivers the instrument or certificated security to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal, or registration of transfer.
6. After the twenty-one-day period in subsections 4 and 5, perfection depends upon compliance with applicable provisions of this chapter.

<sup>21</sup> **SECTION 19. AMENDMENT.** Section 41-09-26 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-26. (9-305) When possession by secured party perfects security interest without filing.** A security interest in letters of credit and advices of credit (subdivision a of subsection 2 of section 41-05-16), goods, instruments ~~other than certificated securities~~, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. If the collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of

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<sup>21</sup> Section 41-09-26 was also amended by section 3 of Senate Bill No. 2142, chapter 360, and section 9 of Senate Bill No. 2098, chapter 358.

the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

**SECTION 20. AMENDMENT.** Subsections 1 and 3 of section 41-09-27 of the North Dakota Century Code are amended and reenacted as follows:

1. "Proceeds" includes whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Any payments or distributions made with respect to investment property collateral are proceeds. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "noncash proceeds".
3. The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless:
  - a. A filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds;
  - b. A filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; ~~or~~
  - c. The original collateral was investment property and the proceeds are identifiable cash proceeds; or
  - d. The security interest in the proceeds is perfected before the expiration of the ten-day period.

Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this chapter for original collateral of the same type.

**SECTION 21. AMENDMENT.** Section 41-09-30 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**41-09-30. (9-309) Protection of purchasers of instruments, documents, and securities.** Nothing in this chapter limits the rights of a holder in due course of a negotiable instrument (section 41-03-28) or a holder to whom a negotiable document of title has been duly negotiated (section 41-07-30) or a ~~bona fide~~ protected purchaser of a security (section ~~41-08-18~~ 41-08-29) and those holders or purchasers take priority over an earlier security interest even though perfected. Filing under this chapter does not constitute notice of the security interest to those holders or purchasers.

**SECTION 22. AMENDMENT.** Subsections 1 and 7 of section 41-09-33 of the 1995 Supplement to the North Dakota Century Code are amended and reenacted as follows:

1. The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: section ~~41-04-22~~ 41-04-26 with respect to the security interests of collecting banks in items being collected, accompanying documents, and proceeds; section 41-09-03 on security interests related to other jurisdictions; ~~and~~ section 41-09-14 on consignments; and section 11 of this Act on security interests in investment property.
  
7. If future advances are made while a security interest is perfected by filing, the taking of possession, or under section ~~41-08-36.1~~ on securities 11 or 12 of this Act on investment property, the security interest has the same priority for the purposes of subsection 5 or subsection 5 of section 11 of this Act with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases, a perfected security interest has priority from the date the advance is made.

**SECTION 23. REPEAL.** Chapters 10-18.1 and 41-08 of the North Dakota Century Code are repealed.

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