

**Fifty-seventh Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 9, 2001**

SENATE BILL NO. 2090
(Industry, Business and Labor Committee)
(At the request of the Securities Commissioner)

AN ACT to create and enact a new subsection to section 10-04-06 of the North Dakota Century Code, relating to exempt securities transactions; to amend and reenact section 10-04-04, subsections 5 and 8, paragraph 6 of subdivision b of subsection 9, and paragraph 3 of subdivision a of subsection 16 of section 10-04-06, subsection 1 of section 10-04-08.4, sections 10-04-10 and 10-04-10.1, subsection 1 of section 10-04-14, section 10-04-15, subsection 1 of section 10-04-16, and sections 10-04-16.1 and 10-04-18 of the North Dakota Century Code, relating to registration of securities, exempt transactions, federal covered securities, registration of dealers, agents, investment advisers, and investment adviser representatives, investment advisory activity, consent to service of process, fraudulent practices, the authority of the securities commissioner to conduct investigations and to issue orders, and statutes of limitation; to direct the securities commissioner to review policies and procedures regarding financing for North Dakota companies and to report to the legislative council; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 10-04-04 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

10-04-04. Registration of securities. It is unlawful for any person to sell, or offer for sale, any security in this state unless it is registered under this chapter or the security or transaction is exempt under section 10-04-05 or 10-04-06 or it is a federal covered security.

SECTION 2. AMENDMENT. Subsection 5 of section 10-04-06 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

5. Any offer or sale of securities to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or similar benefit plan, or other financial institution, or qualified institutional buyer, or to a dealer, whether the purchaser is acting for itself or in a fiduciary capacity.

SECTION 3. AMENDMENT. Subsection 8 of section 10-04-06 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

8. The sale by a registered dealer, acting either as principal or agent, of securities theretofore sold and distributed to the public, provided that:
 - a. Such securities are sold at prices reasonably related to the current market price thereof at the time of sale and, if such registered dealer is acting as agent, the commission collected by such registered dealer on account of the sale thereof is not in excess of usual and customary commissions collected with respect to securities and transactions having comparable characteristics.
 - b. Such securities do not constitute an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer, its officers, or directors or by or through an underwriter.

- c. A balance sheet of the issuer as of a date within eighteen months prior to the date of such sale and an income statement for either the fiscal year preceding that date or the most recent year of operations are contained in a securities manual.
- d. ~~Such securities are listed in the standards~~ Standard and poor's standard corporation descriptions ~~Poor's, Moody's Mergent's industrial manual, Moody's Mergent's bank and finance manual, Moody's Mergent's transportation manual, Moody's Mergent's public utility manual, or Fitch's individual stock bulletin.~~
- ~~d.~~ e. Such securities are limited to issuers organized under the laws of any state, territory, or insular possession of the United States.
- ~~e.~~ f. Provided, however, that even though the foregoing conditions might all be met, the exemption would not apply to the securities of open-end management companies, mutual funds, unit investment trusts, contractual plans, and face amount certificate companies.

SECTION 4. AMENDMENT. Paragraph 6 of subdivision b of subsection 9 of section 10-04-06 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- (6) The gross proceeds of the offering may not exceed ~~one~~ five million dollars.

SECTION 5. AMENDMENT. Paragraph 3 of subdivision a of subsection 16 of section 10-04-06 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- (3) The issuer intends to register securities in this state or receive approval for an exemption under subsection 9 ~~and conduct its offering pursuant to either regulation A or rule 504, as promulgated by the securities and exchange commission.~~

SECTION 6. A new subsection to section 10-04-06 of the 1999 Supplement to the North Dakota Century Code is created and enacted as follows:

Any offer or sale of an agricultural-related cooperative security by or on behalf of an agricultural producer, as defined by section 32-44-01, to a person for the purpose of producing and selling agricultural products, as defined by section 32-44-01, to the cooperative. Commissions or other remuneration may not be paid or given directly or indirectly for soliciting any prospective buyer in this state, except to a dealer or agent registered in this state, to an agent of a bank or a commercial trust department, to a licensed real estate agent, or to a licensed auctioneer if the sale is made at a bona fide public auction.

SECTION 7. AMENDMENT. Subsection 1 of section 10-04-08.4 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- 1. Any federal covered security that is subject to section 18(b)(2) of the Securities Act of 1933, as amended, may be offered and sold upon the filing of:
 - a. A copy of the issuer's registration statement or a notice of intent in writing or electronically for an indefinite or definite dollar amount for each security or class of security on a form prescribed by the commissioner ~~with a consent to service of process.~~
 - b. ~~If the notice filing is~~ A unit investment trust may file an initial notice filing for a definite dollar amount, at or an indefinite dollar amount. At the time of the initial notice filing for a definite dollar amount, the issuer shall pay a nonrefundable filing fee of one-tenth of one percent of the first seven hundred fifty thousand dollars and one-twentieth of one percent of any amount in excess of seven hundred fifty thousand

dollars of the aggregate offering price of each security or class of security. In no event, however, may such filing fee be less than one hundred twenty-five dollars for each security or class of security.

- c. ~~If the notice filing is for an indefinite dollar amount, at the time of the~~ An investment company or unit investment trust may file an initial notice filing ~~the issuer shall for an indefinite dollar amount and pay a nonrefundable filing fee of five~~ four hundred dollars for each security or class of security.
- d. A notice filing for a definite dollar amount may be increased before the expiration ~~of one year from the date of~~ on the certificate of effectiveness at the same reduced fee, which must be calculated as provided in subdivision b as a separate fee for each additional amount.
- e. A notice filing for a definite dollar amount may be renewed for additional periods of one year by filing, at least fifteen days prior to its expiration, a renewal and sales report notice with a fee of one hundred dollars to renew the unsold balance.
- f. A notice filing for an indefinite dollar amount may be renewed by filing, within sixty days following the issuer's fiscal year, a renewal and sales report notice with a fee of ~~one twentieth of one percent of the amount of securities sold in this state during the period of the notice filing being renewed one hundred twenty-five dollars. In no case may such fee be less than one hundred dollars nor more than two hundred fifty dollars.~~
- g. A notice filing may be terminated by the issuer upon providing the commissioner a notice of such termination.
- h. The provision for each security or class of security in this subsection is effective when the federal registration statement becomes effective with the securities and exchange commission or the date the notice of intent is received by the commissioner, whichever is later. A filing notice for a definite dollar amount is effective for a period of ~~one year~~ eighteen months from the date of effectiveness.
- i. A copy of any document filed with the securities and exchange commission as the commissioner may require.

SECTION 8. AMENDMENT. Section 10-04-10 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

10-04-10. Registration of dealers, agents, investment advisers, and investment adviser representatives - Notice filings by federal covered advisers. A dealer or agent may not offer for sale or sell any securities within or from this state, except in transactions exempt under section 10-04-06, unless registered as a dealer or agent pursuant to the provisions of this section.

1. Dealers. Application for registration as a dealer may be made by any person eighteen years of age or older. Such application for registration must be made in writing or electronically in a form prescribed by the commissioner, must be signed by the applicant, duly verified by oath, must be filed in the office of the commissioner, and must contain ~~the following~~ information: the commissioner determines to be necessary concerning the applicant.
 - a. ~~The name of the applicant.~~
 - b. ~~The address of the principal place of business of the applicant and the addresses of all branch offices, if any, of the applicant in this state.~~
 - c. ~~The form of business organization and the date of organization of the applicant.~~

- d. ~~The names and business addresses of all members, partners, officers, directors, trustees, or managers of the applicant; a statement of the limitations, if any, of the liability of any partner, member, manager, or trustee; and a statement setting forth in chronological order the occupational activities of each such partner, member, officer, director, trustee, or manager during the preceding ten years.~~
- e. ~~A brief description of the general character of the business conducted or proposed to be conducted by the applicant.~~
- f. ~~A list of any other states in which the applicant is registered as a dealer, and, if registration of the applicant as a dealer has ever been refused, canceled, suspended, or withdrawn in any state, full details with respect thereto.~~
- g. ~~Whether the applicant is registered as a dealer under the Securities Exchange Act of 1934 or any act in amendment thereof and whether any such registration of the applicant has ever been denied, revoked, or suspended or is then the subject of proceedings for revocation or suspension by the securities and exchange commission.~~
- h. ~~The names of all organizations of dealers or brokers of which the applicant is a member or before which any application for membership on the part of the applicant is then pending, and whether any such membership of the applicant has ever been denied, revoked, or suspended or is then the subject of proceedings for revocation or suspension.~~
- i. ~~The names of any securities exchange of which the applicant or any of its partners, officers, directors, trustees, members, managers, or employees is a member, and whether any such membership has ever been denied, revoked, or suspended or is then the subject of proceedings for revocation or suspension.~~
- j. ~~A financial statement or balance sheet, prepared in accordance with standard accounting practice, showing the financial condition of the applicant as of the most recent practicable date prior to the date of such application, such financial statement or balance sheet to be certified to by an independent certified public accountant, or by a responsible officer or member of said applicant as the commissioner may require. A dealer that is registered under the Securities Exchange Act of 1934 may satisfy this requirement by filing with the commissioner the dealer's most recent financial statements prepared under such Act.~~
- k. ~~Whether the applicant or any officer, director, partner, member, trustee, or manager of the applicant, has ever been convicted of a felony or any misdemeanor other than minor highway traffic offenses and, if so, all pertinent information with respect to any such conviction.~~
- l. ~~Any other information which the commissioner may by rule or order require.~~

The commissioner may also require such additional information relating to the applicant and as to the previous history, record, or association of the applicant, its officers, directors, employees, members, partners, managers, or trustees as the commissioner deems necessary to establish whether or not the applicant should be registered as a dealer under the provisions of this law.

There must be filed with such application a written consent to the service of process upon the commissioner in actions against such dealer, conforming to the requirements of section 10-04-14, and payment of the prescribed registration fee, which must be returned if registration is refused.

When an applicant has fully complied with the provisions of this subsection, the commissioner may register such applicant as a dealer unless the commissioner finds that the applicant is not of good business reputation, or is not solvent, or ~~does the applicant's designees do~~ not appear qualified by training, examination or experience to act ~~as on~~ behalf of a dealer in securities.

Except as prohibited by the Securities Exchange Act of 1934, the commissioner may require an indemnity bond running to the state of North Dakota conditioned for the faithful compliance by the dealer and the dealer's agents with all the provisions of this law and for the faithful performance and payment of all obligations of the dealer and the dealer's agents.

The bond must be of such type as may be approved by the commissioner and must be in such amount as the commissioner deems necessary to protect purchasers. Any such bond must have as surety thereon a surety company authorized to do business in this state. When the commissioner has registered an applicant as a dealer, the commissioner shall notify the applicant of such registration.

2. Agent. Application for registration as an agent may be made by any individual eighteen years of age or older. Such application for registration must be made in writing or electronically in a form prescribed by the commissioner, must be signed by the applicant and by the registered dealer or issuer employing or proposing to employ such applicant, duly verified by oath, must be filed in the office of the commissioner and must contain ~~the following~~ information: the commissioner determines to be necessary concerning the applicant.

- a. ~~Name and residence and business address of the applicant.~~
- b. ~~Name of the dealer or issuer employing or proposing to employ the applicant, unless the applicant is to be self-employed.~~
- c. ~~Applicant's date of birth.~~
- d. ~~All full and part time work, self employment, military service, unemployment and full time education for the period of ten years immediately preceding the date of application. For all employment, include the nature of the employment and the names and addresses of employers of the applicant.~~
- e. ~~A list of the states or other jurisdictions with which the applicant is registered as a dealer or agent of securities, and, if any such registration has ever been refused, canceled, limited, suspended, or revoked, full details with respect thereto.~~
- f. ~~Whether the applicant has ever been convicted of or pled guilty or nolo contendere in a domestic, foreign, or military court to a felony or misdemeanor and all pertinent information with respect to any such conviction or plea.~~

The commissioner shall require as a condition of registration that the applicant, ~~and, in the case of a corporation, limited liability company, or partnership, all officers, directors, managers, governors, or partners doing securities business in this state,~~ pass a written examination as evidence of knowledge of the securities business; provided, that not more than two officers or managers of an issuer may be registered as an agent for a particular original offering of the issuer's securities without being required to pass such written examination; and provided, further, that no such officer or manager may again register within three years as such agent for this or any other issuer without passing the written examination.

The commissioner may also require such additional information as to the applicant's previous business experience as the commissioner deems necessary to determine

whether or not the applicant should be registered as an agent under the provisions of this law. If an agent proposes to be self-employed, the agent shall specifically state the particular security or securities the agent proposes to sell in this state in the application, and if said security or securities are exempt under section 10-04-05 or 10-04-06, or have been registered by description under section 10-04-07, or have been registered by announcement under section 10-04-07.1, or have been registered by qualification under section 10-04-08, then the commissioner ~~shall~~ may require that said self-employed agent file an indemnity bond running to the state of North Dakota conditioned for the faithful compliance by said self-employed agent with all the applicable provisions of this chapter and for the faithful performance and payment of all obligations hereunder. The bond must be in a form approved and in the amount required by the commissioner. ~~There must be filed with such application payment of the prescribed registration fee, which must be returned if registration is refused.~~

When an applicant has fully complied with the provisions of this subsection, the commissioner may register such applicant as an agent unless the commissioner finds that such applicant is not of good business reputation, or that the dealer named on the application is not a registered dealer. When the commissioner has registered an applicant as an agent, the commissioner shall immediately notify the dealer of such registration.

Every registered dealer or issuer shall promptly notify the commissioner of the termination of the employment by the dealer or issuer of a registered agent.

3. Investment advisers.

a. It is unlawful for any person to transact business in this state as an investment adviser unless:

- (1) The person is registered under this chapter;
- (2) The person's only clients in this state are investment companies as defined in the Investment Company Act of 1940, other investment advisers, federal covered advisers, dealers, banks, trust companies, savings and loan associations, insurance companies, employee benefit plans with assets of not less than one million dollars, and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the commissioner; or
- (3) Such person is registered either under the laws of the state where its principal place of business is located or with the securities and exchange commission, if the investment adviser has no place of business in this state and, during the preceding twelve-month period has had not more than six clients, other than those specified in paragraph 2, who are residents of this state.

b. Application for registration as an investment adviser may be made by any person eighteen years of age or older. Such application for registration must be made in writing or electronically in a form prescribed by the commissioner, must be signed by the applicant, duly verified by oath, must be filed in the office of the commissioner, and must contain ~~the following~~ information: the commissioner determines to be necessary concerning the applicant.

- ~~(1) Name, residence, and business address of the applicant.~~
- ~~(2) If the applicant is a corporation, limited liability company, or association, give full information as to officers, partners, managers, and managing officers.~~

- ~~(3) Information concerning the educational and business background and disciplinary history of all officers, directors, partners, control persons, and owners of five percent or more of the investment adviser.~~
 - ~~(4) The plan and character of business, and the proposed method of operation.~~
 - ~~(5) Such other information as may be required.~~
- ~~e. If the applicant is a foreign corporation, limited liability company, or association, it shall file with its application:~~
 - ~~(1) A copy of its articles.~~
 - ~~(2) Certificate showing authorization to transact business.~~
- ~~d. The commissioner may also require such additional information relating to the applicant and~~ as to the previous history, record, or association of the applicant, its officers, directors, employees, members, partners, managers, or trustees, as the commissioner deems necessary to establish whether or not the applicant should be registered as an investment adviser under the provisions of this chapter.
- ~~e. There must be filed with such application:~~
 - ~~(1) A written consent to the service of process upon the commissioner in actions against the investment adviser conforming to the requirements of section 10-04-14.~~
 - ~~(2) Payment of the prescribed registration fee, which must be returned if registration is refused.~~
 - ~~(3) A financial statement or balance sheet, prepared in accordance with standard accounting practice, showing the financial condition of the applicant as of the most recent practicable date prior to the date of such application, such financial statement or balance sheet to be certified to by an independent certified public accountant or by a responsible officer or member of the applicant, as the commissioner may require. An investment adviser that maintains its principal place of business in a state other than this state and that is registered with and in compliance with such state's financial reporting requirements may satisfy this requirement by filing with the commissioner a copy of those financial statements, if any, that are filed by the investment adviser with the state in which it maintains its principal place of business.~~
- ~~f. Except as prohibited by the Investment Advisers Act of 1940, the commissioner may require an indemnity bond running to the state of North Dakota conditioned for the faithful compliance by the investment adviser and the investment adviser's representatives with all the provisions of this law and for the faithful performance and payment of all obligations of the investment adviser and the investment adviser's representatives. The bond must be of such type as may be approved by the commissioner and must be in such amount as the commissioner deems necessary to protect persons in this state. Any such bond must have as surety thereon a surety company authorized to do business in this state.~~
- ~~g. The commissioner may by rule or order provide for an examination to be taken by any class of or all applicants, as well as persons who represent or will represent an investment adviser in doing any of the acts which make the person an investment adviser.~~
- ~~h. When an applicant has fully complied with the provisions of this subsection, the commissioner may register such applicant as an investment adviser unless the~~

commissioner finds that the applicant is not of good business reputation or is not solvent.

- i. A registrant as investment adviser shall notify the commissioner of any change of address.
- 4. Federal covered adviser. Except with respect to a federal covered adviser whose clients are those described in paragraph 2 of subdivision a of subsection 3 or who meets the criteria of paragraph 3 of subdivision a of subsection 3, it shall be unlawful for a person to transact business in this state as a federal covered adviser unless such person has made a notice filing with the commissioner, in writing or electronically, consisting of a copy of those documents that have been filed with the securities and exchange commission as the commissioner may require by rule or otherwise and the prescribed notice filing fee.

A notice filing is effective from receipt until the following ~~May-first~~ December thirty-first. It may be renewed by filing with the commissioner, prior to expiration, those documents filed with the securities and exchange commission as the commissioner may require by rule or otherwise, with the notice filing renewal fee.

If the information contained in any document filed with the commissioner is or becomes inaccurate or incomplete in any material respect, the federal covered adviser shall file an amendment with the commissioner whenever such amendment is filed with the securities and exchange commission.

A notice filing may be terminated by a federal covered adviser by filing a notice of termination with the commissioner.

- 5. Investment adviser representatives. Application for registration as an investment adviser representative may be made by any person eighteen years of age or older. The application for registration must be submitted in writing or electronically in a form prescribed by the commissioner, be signed by the applicant and if applicable, by the investment adviser employing or proposing to employ the applicant, be duly verified by oath, be filed in the office of the commissioner, and contain ~~the following information: the commissioner determines to be necessary concerning the applicant.~~

- a. ~~Name, residence, and business address of the applicant.~~
- b. ~~Name of the investment adviser employing or proposing to employ the applicant, unless the applicant is to be self-employed.~~
- c. ~~Applicant's date of birth.~~
- d. ~~All full time and part time work, self employment, military service, unemployment and full time education for the period of ten years immediately preceding the date of application. For all employment, include the nature of the employment and the names and addresses of employers of the applicant.~~
- e. ~~A list of the states or other jurisdictions with which the applicant is registered as an investment adviser representative, and, if any registration has ever been refused, canceled, limited, suspended, or revoked, full details with respect thereto.~~
- f. ~~Whether the applicant has ever been convicted of or pled guilty or nolo contendere in a domestic, foreign, or military court to a felony or misdemeanor and all pertinent information with respect to any such conviction or plea.~~

~~There must be filed with the application payment of the prescribed registration fee, which must be returned if registration is refused.~~

When an applicant has fully complied with the provisions of this subsection, the commissioner may register the applicant as an investment adviser representative unless the commissioner finds that: the applicant is not of good business reputation; that the investment adviser named in the application is not a registered investment adviser; or the federal covered adviser named in the application has not made a notice filing with the commissioner. When the commissioner has registered an applicant as an investment adviser representative, the commissioner shall immediately notify the investment adviser or the federal covered adviser, as applicable, of such registration.

Every registered investment adviser shall promptly notify the commissioner of the termination of the employment by the adviser of a registered investment adviser representative. Every registered investment adviser representative employed by a federal covered adviser or the federal covered adviser shall promptly notify the commissioner of the termination of such employment. The registration of the investment adviser representative is automatically suspended from the time of termination of employment until such time as the representative is registered by the commissioner as a representative of another investment adviser or federal covered adviser.

The commissioner may by rule or order provide for an examination to be taken by the applicant.

6. Refusal of registration. If the commissioner has reason to believe there are grounds to refuse the approval of any application under this section, the commissioner may, by order, summarily postpone the approval of any application made under this section. If, after affording an applicant a hearing or an opportunity for a hearing as provided in section 10-04-12, the commissioner finds that there is sufficient ground to refuse to register such applicant as provided in this section, the commissioner shall enter an order refusing to register such applicant. Such order shall state specifically the grounds for its issuance. A copy of such order must be mailed to the applicant at the applicant's business address, and if the application is for registration as an agent, to the registered dealer or issuer or if the application is for registration as an investment adviser representative to the investment adviser or federal covered adviser who proposed to employ such applicant. If the commissioner finds that an applicant has been guilty of any act or omission which would constitute a sufficient ground for revocation of a dealer's, agent's, investment adviser's, or investment adviser representative's registration under section 10-04-11, such act or omission may constitute a sufficient ground for a finding by the commissioner that such applicant is not of good business reputation.
7. Record and renewal of registrations. The names and addresses of all persons who have been registered as dealers, agents, investment advisers, or investment adviser representatives, and all orders with respect thereto, and the names and addresses of all federal covered advisers who have made a notice filing must be recorded in a register of dealers, agents, investment advisers, federal covered advisers, and investment adviser representatives in the office of the commissioner. Every registration ~~and notice filing~~ under this section expires on May first of each year, except for the registration of an investment adviser and investment adviser representative which will expire on December thirty-first of each year, unless renewed. The commissioner may by ~~rule~~ order provide for expirations and renewals, including dates, forms, and procedures, adjust registration and notice filing fees to correspond with expiration dates, and do any other thing which may be necessary or convenient in order to participate in a central registration depository or any similar arrangement designed to promote uniformity, to ease regulatory burdens, or to encourage cooperation with other states, the securities and exchange commission, or any registered national securities association or exchange.
8. Fees. The fee, which must accompany the application, for registration, transfer, or notice filing, and for each annual renewal thereof is:

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|---|----------|
| a. For each dealer | \$200.00 |
| b. For each agent | \$60.00 |
| c. For each investment adviser or federal covered adviser | \$100.00 |
| d. For each investment adviser representative | \$50.00 |

An application to register as a dealer, agent, investment adviser, or investment adviser representative may, with the consent of the commissioner, be withdrawn upon written application, but in no event may any registration fees be returned.

SECTION 9. AMENDMENT. Section 10-04-10.1 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

10-04-10.1. Advisory activities.

1. It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:
 - a. To employ any device, scheme, or artifice to defraud the other person; or
 - b. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person.
2. It is unlawful for any person, in the solicitation of a client for investment advisory services, to make any false or misleading statement of material fact, or to fail to disclose a material fact.
3. It is unlawful for any person who provides investment advisory services subject to the provisions of this chapter to knowingly sell any security to or purchase any security from a client while acting for the person's own account or as a broker for another client unless the person first makes a written disclosure to the client of the capacity in which the person is acting and obtains the client's written consent to the transaction.
4. It is unlawful for any person who provides investment advisory services subject to the provisions of this chapter to engage in dishonest or unethical practices as the commissioner may define by rule.
5. It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides in writing that:
 - a. The investment adviser shall not be compensated on the basis of a share of capital gains, earnings, or capital appreciation of the funds or any portion of the funds of the client. This does not prohibit an investment advisory contract that provides for compensation based on the total value of a fund determined as of a definite date or averaged as of definite dates or over a definite period.
 - b. An assignment of the investment advisory contract may not be made by the investment adviser unless the investment adviser notifies the client of the intended assignment and obtains the prior written consent of the client.
 - c. The investment adviser shall provide written notice to the client within fifteen days of any change of ownership in excess of five percent.
 - d. The investment adviser shall provide written notice to the client within fifteen days of a change of controlling interest of the investment adviser. The client may terminate the investment advisory contract without penalty by providing a written notice to the

investment adviser within thirty days after the client's receipt of the notice of change of controlling interest.

6. It is unlawful for any investment adviser to take or have custody of any securities or funds of any client if:
 - a. ~~The commissioner by rule prohibits custody; or~~
 - b. ~~The investment adviser fails to notify the commissioner that unless the investment adviser has or may have custody acts as a fiduciary pursuant to duties as an executor, guardian, conservator, receiver, or trustee.~~
7. ~~No action may be brought under this section by the commissioner after six years from the date of the alleged violation.~~

SECTION 10. AMENDMENT. Subsection 1 of section 10-04-14 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Every applicant for registration under this chapter, every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense, and every person making a notice filing under ~~this chapter~~ subsection 2 of section 10-04-08.4 shall file with the commissioner, in such form as the commissioner prescribes, an irrevocable consent appointing the commissioner or the commissioner's successor in office to be the applicant's attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against the applicant or the applicant's successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration or notice filing need not file another. Service may be made by leaving a copy of the process in the office of the commissioner, but it is not effective unless the plaintiff, who may be the commissioner in a suit, action, or proceeding instituted by the commissioner, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at the defendant's or respondent's last address on file with the commissioner, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

SECTION 11. AMENDMENT. Section 10-04-15 of the North Dakota Century Code is amended and reenacted as follows:

10-04-15. Fraudulent practices. It shall be a fraudulent practice and it shall be unlawful:

1. For any person knowingly to subscribe to, or make or cause to be made, any material false statement or representation in any application, financial statement, or other document or statement required to be filed under any provision of this chapter, or to omit to state any material statement or fact in any such document or statement which is necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.
2. For any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to employ any device, scheme, or artifice to defraud.
3. For any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

4. For any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to engage in any act, practice, or course of business which operates or would operate as a fraud or deception upon purchasers or the public.
5. For any person, in connection with the offer, sale, or purchase of any security, directly or indirectly, to effect a series of transactions creating actual or apparent active trading in any security, or to raise or depress the price of a security, for the purpose of inducing the purchase of the security.
6. ~~No action may be brought under this section by the commissioner after six years from the date of the alleged violation.~~

SECTION 12. AMENDMENT. Subsection 1 of section 10-04-16 of the North Dakota Century Code is amended and reenacted as follows:

1. Issue any order including cease and desist, rescission, stop, and suspension orders, which the commissioner deems necessary or appropriate in the public interest or for the protection of investors. The commissioner may, in addition to any other remedy authorized by this chapter, impose by order and collect a civil penalty against any person found in an administrative action to have violated any provision of this chapter, or any rule or order adopted or issued under this chapter, in an amount not to exceed ten thousand dollars for each violation. The commissioner may bring actions to recover penalties pursuant to this section in district court. A person aggrieved by an order issued pursuant to this subsection may request a hearing before the commissioner if a written request is made within ten days after receipt of the order. Subsections 2, 3, and 4 of section 10-04-12 apply to any hearing conducted under this subsection. If, after a hearing, the commissioner sustains an order previously issued, the sustaining order is subject to appeal to the district court of Burleigh County by serving on the commissioner within twenty days after the date of entry of the sustaining order a written notice of appeal signed by the appellant stating:
 - a. The order of the commissioner from which the appeal is taken.
 - b. The grounds upon which a reversal or modification of the order is sought.
 - c. A demand for a certified transcript of the record of the order.

SECTION 13. AMENDMENT. Section 10-04-16.1 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

10-04-16.1. Investigations and subpoenas.

1. The commissioner may:
 - a. Make such public or private investigations within or outside of this state as the commissioner deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder. ~~Any investigation under this section may include an investigatory hearing held in accordance with section 28-32-08.~~ In the discretion of the commissioner, the expense reasonably attributed to an investigation under this section must be paid by the dealer, agent, investment adviser, or investment adviser representative whose affairs are investigated.
 - b. Require or permit any person to file a statement in writing, under oath or otherwise as the commissioner determines, as to all the facts and circumstances concerning the matter to be investigated.
 - c. Publish information concerning any violation of this chapter or any rule or order hereunder, and may keep confidential the information or documents obtained or

prepared in the course of any investigation conducted under this section but only during an active and ongoing investigation. If an investigation under this section extends beyond six months, the commissioner shall, upon a request by any party, state in writing that the need for confidentiality still exists, the general reason why the need exists, and the date, as can best be determined at the time, when the need for confidentiality will cease.

2. For the purpose of any investigation or proceeding under this chapter, the commissioner or any officer designated by the commissioner may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the commissioner deems relevant or material to the inquiry.
3. The commissioner may issue subpoenas in this state at the request of a securities agency or administrator of another state if the activities constituting an alleged violation for which information is sought would be a violation of this chapter if the activities had occurred in this state.
4. In case of contumacy by, or refusal to obey a subpoena issued to, any person, the district court, upon application by the commissioner, may issue to the person an order requiring the person to appear before the commissioner, or the officer designated by the commissioner, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.
- ~~4.~~ 5. No person is excused from attending and testifying or from producing any document or record before the commissioner, or in obedience to the subpoena of the commissioner or any officer designated by the commissioner, or in any proceeding instituted by the commissioner, on the ground that the testimony or evidence, documentary or otherwise, required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture. No testimony or evidence, documentary or otherwise, compelled from an individual after a valid claim of the privilege against self-incrimination has been made may be used against the individual in any criminal proceeding, or in any proceeding to subject the individual to a penalty or forfeiture, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

SECTION 14. AMENDMENT. Section 10-04-18 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

10-04-18. Penalties.

1. Any person who willfully violates any provision of this chapter, except section 10-04-08.4 or subsection 4 of section 10-04-10, or any rule or order of the commissioner made pursuant to the provisions of this chapter, or who engages in any act, practice, or transaction declared by any provision of this chapter to be unlawful shall be guilty of a class B felony.
2. As used in this section, the term "willfully", except as it applies to subdivisions a and b of subsection 1 of section 10-04-10.1 and subsections 2 and 4 of section 10-04-15, means that the person acted intentionally in the sense that the person was aware of what the person was doing. Proof of evil motive or intent to violate the law or knowledge that the law was being violated is not required.
3. Each violative act or omission constitutes a separate offense, and a prosecution or conviction for any one offense shall not bar a prosecution or conviction for any other offense.
4. An information must be filed or an indictment must be found under this chapter within five years after the alleged violation.

5. No action may be brought under this chapter by the commissioner after five years from the date that the commissioner knew or reasonably should have known about the facts that are the basis for the alleged violation. This subsection does not apply to any action under sections 10-04-09, ~~10-04-10.1~~, and 10-04-11, ~~and 10-04-15~~.

SECTION 15. SECURITIES COMMISSIONER REVIEW OF POLICIES AND PROCEDURES.

During the 2001-02 interim, the securities commissioner shall conduct a review of policies and procedures relating to access to capital for North Dakota companies, with the goal of increasing North Dakota companies' access to capital investment. Before August 1, 2002, the securities commissioner shall report the commissioner's findings and any recommendations to the legislative council.

SECTION 16. EMERGENCY. Sections 6 and 8 of this Act are declared to be an emergency measure.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Fifty-seventh Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2090 and that two-thirds of the members-elect of the Senate voted in favor of said law.

Vote: Yeas 49 Nays 0 Absent 0

President of the Senate

Secretary of the Senate

This certifies that two-thirds of the members-elect of the House of Representatives voted in favor of said law.

Vote: Yeas 95 Nays 0 Absent 3

Speaker of the House

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2001.

Approved at _____ M. on _____, 2001.

Governor

Filed in this office this _____ day of _____, 2001,
at ____ o'clock _____ M.

Secretary of State