

Testimony of Deputy Securities Commissioner Michael Daley**Before the Administrative Rules Committee****December 10, 2009**

Mr. Chairman and members of the Committee, good afternoon. I am Michael Daley, Deputy Securities Commissioner and Enforcement Attorney for the Securities Department. Also with me today is our Chief Securities Examiner, Harold Kocher. We are here today, at your request, to provide information to the Committee concerning certain "standards" (as defined in the study bill) used by the Department in its regulation of securities offerings, issuers, and securities firms and professionals.

The primary mission of the Securities Department is to protect North Dakota investors who purchase securities and investment advice in this state. We support this mission through a number of functions, including the regulation of the capital formation process for business development, while maintaining our focus on investor protection.

Issuers seeking to raise capital in this state must register their securities offerings with the Department or the securities offering or transaction must fall within an exception to registration.

N.D.C.C. § 10-04-08.1 provides that the right to register and sell securities in this state shall not be granted in any case when it appears that the sale of such securities would work a fraud or deception on purchasers or the public, or that the sale would be on unfair terms, or if the proposed plan of business of the applicant appears to be unfair, unjust, or inequitable. Many people, when they think about securities, think of stocks, bonds and mutual funds; stocks traded on recognized exchanges that they see in the paper or on the news each night. But there are many other investment vehicles being offered

that require registration in the various states that must meet the general requirements of full and fair disclosure and suitability of investment, given the investor's income, net worth, investment experience, tolerance for risk and diversification. To promote uniformity in registration filings in North Dakota with those in other states, for the benefit of both investors and issuers, the Commissioner and her staff utilize "Statements of Policy" adopted by the North American Securities Administrators Association (NASAA) as guidelines in determining whether a particular securities offering contains the "reasonable conditions, limitations, and restrictions" necessary for approval of registration.

North American Securities Administrators Association (NASAA)

Organized in 1919, the North American Securities Administrators Association (NASAA) is the oldest international organization devoted to investor protection. NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico.

In the United States, NASAA is the voice of state securities regulators responsible for efficient capital formation and grass-roots investor protection. The fundamental mission of these state regulators is protecting consumers who purchase securities or investment advice, and their jurisdiction extends to a wide variety of issuers and intermediaries who offer and sell securities to the public.

Through the association, NASAA members also participate in multi-state enforcement actions and information sharing. As an example, Commissioner Tyler, in her role as President of NASAA, collaborated with the New York Attorney General and the

Securities and Exchange Commission, as well as other lead state regulators, in negotiating national settlements with 13 investment banking firms over the sale of auction rate securities, resulting in the return to investors of over fifty billion dollars. These settlements benefited hundreds of North Dakota investors. One firm alone had over 300 North Dakota investors with approximately thirty million dollars at risk.

NASAA also coordinates and implements training and education seminars annually for state/district/provincial and territorial securities agency staff. All of our staff have taken advantage of these valuable training programs.

NASAA Statements of Policy

NASAA Statements of Policy as they pertain to securities registration are standards adopted by NASAA in response to an identified need for regulation as the securities industry evolves and offers new investment vehicles. The Statements of Policy pertain to the various types of securities, such as common stock, preferred stock, options and warrants, and debt; issues such as unsound financial condition; or particular types of industries, such as equipment leasing, cattle-feeding programs, commodity pools, asset backed securities, oil and gas drilling ventures, and real estate investment trusts or REITs.

No Statements of Policy are considered without an internal review by the NASAA membership; publication and an opportunity for public comment by other regulators, industry groups, securities professionals or any interested party; possible amendment based on that public input; and finally, a vote by a majority of the NASAA membership.

The Statements of Policy are continuously being reviewed by NASAA due to changes in the marketplace and at the request of representatives involved with securities

offerings pertaining to the various industries for which there is a specific policy. These reviews involve NASAA committees on capital formation consisting of representatives from five to eight state securities departments, representatives of industry such as legal counsel for the issuers and persons associated with the broker-dealer community. These reviews often result in amendments to the Statements of Policy which are then used by the state regulators in their examination of securities registration applications.

There are approximately 25 NASAA Statements of Policy related to various types of securities registration and seven Statements of Policy or Guidelines related to franchise registration, which is also administered by the department. North Dakota has used the Statements of Policy as a guide for decades, and found them to provide an efficient, effective and flexible approach to the administration of matters of corporate finance and franchise registration.

House Bill 1280, as originally proposed, would have prohibited the Securities Department from applying NASAA adopted "Statements of Policy" or in the words of the proposed statute, "standards" to securities registration applications of issuers and franchise applications after its effective date, had it been passed. In the absence of similar rules being proposed, heard and adopted under N.D.C.C. Chapter 28-32, in the interim, a regulatory gap would have occurred with arguably no meaningful ability of the Commissioner to meet her statutory mandates of investor protection and securities registration.

Absence of complaints

It should be noted that in the decades that the Securities Department has been implementing the NASAA Statements of Policy in fulfilling its statutory mandates, the

regulated industry has not made complaint either of a lack of notice or inconsistency of application. To the contrary, issuers, their legal counsel and securities salespeople know what to expect and appreciate the consistency these policies give to the registration process. The current combination of law, rule and policies which the Commissioner can apply in approving offerings with "reasonable conditions, limitations, and restrictions" has served the people of this state and the business community well.

I would like to give you an example of a recent application for a securities offering which might not have been possible if the Statements of Policy were hard and fast Administrative Rules, rather than guidelines which the Department can use to implement its regulatory authority:

(Northern Plains Capital facts)

Making the NASAA Statements of Policy into mandatory Administrative Rules instead of tools for the Commissioner and staff to use to fulfill the Department's statutory mandate would be counter-productive and require additional financial resources for the Securities Department that the State can better use elsewhere.

Mr. Chairman and members of the Committee, thank you for your time and consideration. Mr. Kocher and I would be happy to answer any questions you may have.