

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

HOUSE BILL NO. 1080
(Industry, Business and Labor Committee)
(At the request of the Department of Financial Institutions)

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

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

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

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

13-05-01.1. Definitions.

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

1. "Collection agency" means a person or entity who, in the ordinary course of business, engages in debt collection.
2. "Commissioner" means the commissioner of financial institutions.
3. "Communication" means the conveyance or receipt of information regarding or facilitating the collection of a debt, directly or indirectly, to or from any person through any medium.

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

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

13-05-02.1. Branch offices.

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

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

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

This chapter does not apply to:

1. Attorneys at law who are licensed to practice in the state of North Dakota. This exemption is limited to the actions of the licensed attorney and does not extend to persons either employed by the attorney or acting on behalf of the attorney;
2. Licensed real estate brokers;
3. Banks;
4. Trust companies;
5. Building and loan associations;
6. Credit unions;

7. Agencies of a state or of the federal government;
8. Abstract companies doing an escrow business;
9. Creditors collecting their own debts;
10. Mortgage servicing company;
11. Individuals or firms who purchase or take accounts receivable for collateral purposes;
12. Individuals employed in the capacity of creditmen upon the staff of an employer not engaged in the business of a collection agency; or
13. A public officer, receiver, or trustee acting under the order of a court; ~~or,~~
14. ~~A person whose activities are limited to collecting debts from debtors located in this state by means of interstate communications, including telephone, mail, or facsimile transmission from the person's location in another state if the person is licensed and bonded in that state and that state has enacted similar legislation.~~

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

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

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

1. The full name and proposed business name of the applicant.
2. The address where the business is to be conducted.
3. The names and addresses of the applicant and those associated with the applicant. If the applicant is a corporation, the application must contain the names of the officers of the corporation. If the applicant is a limited liability company, the application must contain the names of the managers of the limited liability company. The applicant must register with the North Dakota secretary of state if so required.
4. Such additional information which the department of financial institutions shall require.

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

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

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

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

13-05-04.1. Surety bond required.

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

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

13-05-04.2. Minimum net worth required.

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

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

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

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

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

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

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

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

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

2. Conduct investigations and make an examination of any licensee or licensee's place of business, including all records of such business, and to subpoena witnesses anytime it has reason to believe such is necessary to ensure and enforce compliance with state and federal rules and regulations. The licensee shall pay an examination or visitation fee and must be charged by the department of financial institutions at an hourly rate to be set by the commissioner, sufficient to cover all reasonable expenses of the department associated with the examination or visitation provided for by this section. Fees must be paid to the state treasurer and deposited in the financial institutions regulatory fund.
3. Establish codes of ethical conduct for licensees.
4. Adopt any and all rules and regulations necessary to carry out the purpose of this chapter.
5. Issue and serve upon any person or licensed collection agency an order to cease and desist to take corrective action when the department has reason to believe the person or agency is violating, has violated, or is about to violate the provisions of this chapter. An interested party may appeal issuance of a cease and desist order under the provisions of chapter 28-32 by filing written notice of appeal within twenty days after service of the order.
6. If the commissioner determines a licensee is insolvent, or the license has expired or terminated for any reason, the commissioner, on determining such action necessary to protect the public interest, may apply to the district court for the county in which the main office of such licensee is located for appointment of a receiver to receive the assets of the licensee for the purpose of liquidating its business or for such other relief as the nature of the case and the interest of the claimants may require. The reasonable and necessary expenses of the receivership shall constitute the first claim on the bond.

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

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

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

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

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

13-05-06.2. Investigations and subpoenas.

1. The department of financial institutions may:
 - a. Make such public or private investigation within or outside this state as it deems necessary to determine whether a person has violated or is about to violate a provision of this chapter or a rule or order under this chapter, or to aid in the enforcement of this chapter or in the adopting of rules and forms under this chapter.
 - b. Require or permit a person to file a statement in writing, under oath or otherwise as the department determines, as to all the facts and circumstances concerning the matter to be investigated.
 - c. Publish information concerning a violation of this chapter or a rule or order under this chapter.
2. For the purpose of an investigation or proceeding under this chapter, the department of financial institutions may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of books, papers, correspondence, memoranda, agreements, or other documents or records which the department deems relevant or material to the inquiry.
3. In case of contumacy by, or refusal to obey a subpoena issued to, a person, the district court, upon application by the department of financial institutions, may issue to the person an order requiring the person to appear before the department, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.
4. A person is not excused from attending and testifying or from producing a document or record before the department of financial institutions, or in obedience of the subpoena of the department or in a proceeding instituted by the department, on the grounds that the testimony or evidence, documentary or otherwise, required of the person may tend to incriminate the

person or subject the person to a penalty or forfeiture; but an individual may not be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter, or thing concerning which the person is compelled, after claiming the privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

5. In making any examination or investigation authorized by this chapter, the commissioner may control access to any documents and records of the licensee or person under examination or investigation. The commissioner may take possession of the documents and records or place a person in exclusive charge of the documents and records in the place where they are usually kept. During the period of control, no individual or person shall remove or attempt to remove any of the documents and records except pursuant to a court order or with the consent of the commissioner. Unless the commissioner has reasonable grounds to believe any of the documents and records of the licensee have been, or are at risk of being altered or destroyed for purposes of concealing a violation of this chapter, the licensee or owner of the documents and records shall have access to the documents and records as necessary to conduct its ordinary business affairs. All records controlled by the commissioner under the authority of this subsection shall be exempt under the open records law.
6. In order to carry out the purposes of this section, the commissioner may:
 - a. Retain accountants or other professionals and specialists as examiners, auditors, or investigators to conduct or assist in the conduct of examinations or investigations; and
 - b. Use, hire, contract, or employ publicly or privately available analytical systems, methods, or software to examine or investigate the licensee, individual, or person subject to this chapter.
7. The authority of this section remains in effect, whether such a licensee, individual, or person subject to this chapter acts or claims to act under any licensing or registration law of this state or claims to act without such authority.

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

13-05-06.3. Prohibited acts and practices.

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

1. Negligently make any false statement or knowingly make any omission of material fact in connection with any information, reports, or applications filed with the department or another governmental agency.
2. Collect, charge, attempt to collect or charge, or use or propose any agreement purporting to collect or charge any fee prohibited by this chapter.
3. Fail to truthfully account for moneys belonging to or collected from another.

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

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

1. Every collection agency licensed under this chapter shall keep a record of all sums collected by it and of all disbursements made by it for a period of six years from the date of last entry thereon. The records of a licensee may be maintained electronically provided they can be reproduced upon request of the department of financial institutions and within the required statutory time period provided in this section.

2. When a licensee ceases operations for any reason, the licensee shall be required to inform the department of the location of the records required to be maintained in accordance with section 13-05-07. In addition, the licensee shall provide the name of the individual responsible for maintenance of the records. The licensee shall notify the department within ten business days of the change of the location of the records or the change of the individual responsible for maintenance of the records.
3. No collection agency, or any employees thereof, licensee, individual, or person subject to investigation or examination under this section may intentionally make any false entry in any such collection agency record or intentionally knowingly withhold, abstract, secrete, remove, mutilate, destroy, or otherwise dispose of any such record books, records, computer records, or other information within the time limit provided in this section.
4. No licensee under this chapter may commingle the money of collection agency customers with other than collection funds and shall maintain a separate bank account for such customer's funds and shall keep such funds in the bank account until disbursed to the customer.

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

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

1. The department of financial institutions commissioner may, if it has reason to believe that grounds for revocation of a license exist, send by registered or certified mail to the licensee, a notice of hearing stating the contemplated action and in general the grounds thereof and setting the time and place for a hearing thereon. Such hearing may not be held less than ten nor more than thirty days from the date of mailing such notice. Within ten days after such hearing, the department of financial institutions shall issue a written order either dismissing the charges or suspending or revoking the license and the grounds therefor. A copy of such written order must be sent to the licensee. A license may be revoked for one or more of the following reasons issue and serve upon any licensee an order suspending or revoking a licensee's license if the commissioner finds that:
 - a. The licensee has failed to pay the annual license fee under this chapter or any examination fee imposed by the commissioner under the authority of this chapter.
 - b. The licensee, either knowingly or without the exercise of due care to prevent the same, has violated any provision of this chapter or any regulation or order lawfully made pursuant to and within the authority of this chapter.
 - c. Any fact or condition existing at the time of the original application for such license which clearly would have warranted the department of financial institutions in refusing originally to issue such license.
 - d. The licensee has failed to maintain the required bond.
 - e. The licensee has failed to maintain registration with the North Dakota secretary of state if so required.
2. The order must contain a notice of opportunity for hearing pursuant to chapter 28-32.
3. If no hearing is requested within twenty business days of the date the order is served upon the licensee, or if a hearing is held and the commissioner finds that the record so warrants, the commissioner may enter a final order suspending or revoking the license.
- 2.4. If the department of financial institutions commissioner finds that probable cause for revocation of any license exists and that enforcement of the chapter requires immediate suspension of

such license pending investigation, it may, upon written notice, enter an order suspending such license for a period not exceeding ~~thirty~~^{sixty} days, pending the holding of a hearing as prescribed in this chapter.

- 3-5. Any licensee may surrender the licensee's license by delivering it to the department of financial institutions with written notice of its surrender, but such surrender does not affect the licensee's civil or criminal liability for acts committed prior thereto.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-second Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1080.

House Vote: Yeas 92 Nays 1 Absent 1

Senate Vote: Yeas 47 Nays 0 Absent 0

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2011.

Approved at _____ M. on _____, 2011.

Governor

Filed in this office this _____ day of _____, 2011,

at _____ o'clock _____ M.

Secretary of State