

**Sixty-eighth Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 3, 2023**

SENATE BILL NO. 2060  
(Industry and Business Committee)  
(At the request of the Securities Commissioner)

AN ACT to create and enact subsection 7 of section 10-04-07.2 of the North Dakota Century Code, relating to fees of an effective offering; and to amend and reenact subsection 17 of section 10-04-06, subsection 5 of section 10-04-08.4, sections 10-04-10, 10-04-10.1, and 10-04-10.3, subsection 1 of section 10-04-16, and subsection 1 of section 10-04-16.1 of the North Dakota Century Code, relating to exempt transaction filing requirements, federal crowdfunding, investment advisors' custody, postregistration recordkeeping, effectiveness of orders, and professional services for investigations.

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

**SECTION 1. AMENDMENT.** Subsection 17 of section 10-04-06 of the North Dakota Century Code is amended and reenacted as follows:

17. Any offer or sale of a security by an issuer in a transaction provided all of the following conditions are met:
  - a. Sales of securities may be made only to persons who are, or the issuer reasonably believes are, accredited investors as defined in 17 CFR 230.501(a) promulgated by the securities and exchange commission.
  - b. The exemption is not available to an issuer that is in the development stage that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person.
  - c. The issuer reasonably believes that all purchasers are purchasing for investment and not with the view to, or for, sale in connection with a distribution of the security. Any resale of a security sold in reliance of this exemption within twelve months of sale must be presumed to be with a view to distribution and not for investment, except a resale pursuant to a registration statement effective under section 10-04-04 or to an accredited investor pursuant to an exemption available under subsection 5.
  - d. (1) The exemption is not available to an issuer if the issuer, any of the issuer's predecessors, any affiliated issuer, any of the issuer's directors, officers, general partners, beneficial owners of ten percent or more of any class of its equity securities, any of the issuer's promoters presently connected with the issuer in any capacity, any underwriter of the securities to be offered, or any partner, director, or officer of such underwriter:
    - (a) Within the last five years, has filed a registration statement that is the subject of a currently effective registration stop order entered by any state securities administrator or the securities and exchange commission;
    - (b) Within the last five years, has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit;
    - (c) Is currently subject to any state or federal administrative enforcement order or judgment, entered within the last five years, finding fraud or deceit in connection with the purchase or sale of any security; or

- (d) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security.
- (2) Paragraph 1 does not apply if:
  - (a) The party subject to the disqualification is licensed or registered to conduct securities-related business in the state in which the order, judgment, or decree creating the disqualification was entered against such party;
  - (b) Before the first offer under this exemption, the state securities administrator, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification; or
  - (c) The issuer establishes that it did not know and in the exercise of reasonable care, based on a factual inquiry, could not have known that a disqualification existed under this subdivision.
- e. (1) A general announcement of the proposed offering may be made by any means.
- (2) The general announcement must include only the following information, unless additional information is specifically permitted by the commissioner:
  - (a) The name, address, and telephone number of the issuer of the securities;
  - (b) The name, a brief description, and price, if known, of any security to be issued;
  - (c) A brief description of the business of the issuer in twenty-five words or less;
  - (d) The type, number, and aggregate amount of securities being offered;
  - (e) The name, address, and telephone number of the person to contact for additional information; and
  - (f) A statement that:
    - [1] Sales will only be made to accredited investors;
    - [2] No money or other consideration is being solicited or will be accepted by way of this general announcement; and
    - [3] The securities have not been registered with or approved by any state securities agency or the securities and exchange commission and are being offered and sold pursuant to an exemption from registration.
- f. The issuer, in connection with an offer, may provide information in addition to the general announcement under subdivision e, if such information:
  - (1) Is delivered through an electronic database that is restricted to persons who have been prequalified as accredited investors; or
  - (2) Is delivered after the issuer reasonably believes that the prospective purchaser is an accredited investor.
- g. Telephone solicitation is not permitted unless prior to placing the call, the issuer reasonably believes that the prospective purchaser to be solicited is an accredited investor.

- h. Dissemination of the general announcement of the proposed offering to persons who are not accredited investors does not disqualify the issuer from claiming the exemption.
- i. The issuer shall file with the department a notice of transaction, a consent to service of process, a copy of the general announcement, and a nonrefundable filing fee of one hundred dollars within fifteen days after the first sale in this state. In the event the filing is not made within fifteen days after the first sale in this state, the filing fee is two hundred fifty dollars.
- j. The security offered or sold under this subsection is offered or sold by a broker-dealer and agent registered in accordance with section 10-04-10, or offered and sold through an officer, director, governor, or partner of the issuer and no commission or other remuneration is paid.

**SECTION 2.** Subsection 7 of section 10-04-07.2 of the North Dakota Century Code is created and enacted as follows:

- 7. An applicant may increase the aggregate amount of each security or class of security to be registered by filing a notice of the additional aggregate dollar amount to be registered and payment of a filing fee of one-tenth of one percent of the additional aggregate dollar amount but not more than five hundred dollars.

**SECTION 3. AMENDMENT.** Subsection 5 of section 10-04-08.4 of the North Dakota Century Code is amended and reenacted as follows:

- 5. a. The following provisions apply to offerings made under federal Regulation Crowdfunding [17 CFR 227] and sections 4(a)(6) and 18(b)(4)(C) of the Securities Act of 1933 [15 U.S.C. 77d(a)(b) and 15 U.S.C. 77r(b)(4)(C)]:

~~(1)~~a.(1) An issuer that offers and sells securities in this state in an offering exempt under federal Regulation Crowdfunding [17 CFR 227], and that either has the issuer's principal place of business in this state or sells fifty percent or greater of the aggregate amount of the offering to residents of this state, shall file electronically the following with the commissioner:

~~{1}~~(a) A completed uniform notice of federal crowdfunding offering form;

~~{2}~~(b) A copy of any document filed with the securities and exchange commission, as the commissioner may require; and

~~{3}~~(c) A filing fee of one hundred fifty dollars.

~~(b)~~(2) If the issuer has the issuer's principal place of business in this state, the filing required under this subsection must be filed with the commissioner when the issuer makes its initial form C filing concerning the offering with the securities and exchange commission. If the issuer does not have the issuer's principal place of business in this state but residents of this state have purchased fifty percent or greater of the aggregate amount of the offering, the filing required under this subsection must be filed when the issuer becomes aware that such purchases have met this threshold and in no event later than thirty days from the date of completion of the offering. The initial notice filing is effective for twelve months from the date of the filing with this state.

~~(2)~~b. An issuer conducting an offering under this subsection may renew the offering for an additional period of twelve months by electronically filing the uniform notice of federal crowdfunding offering form marked "renewal" and payment of the renewal filing fee of one hundred dollars.

- b. ~~A security may not be offered or sold under this subsection, except through or by a broker-dealer and agent registered in accordance with section 10-04-10, unless the security is offered and sold through an officer, director, governor, or partner of the issuer and no commission or other remuneration is paid, either directly or indirectly.~~

**SECTION 4. AMENDMENT.** Section 10-04-10 of the North Dakota Century Code is amended and reenacted as follows:

**10-04-10. Registration of broker-dealers, agents, investment advisers, and investment adviser representatives - Notice filings by federal covered advisers.**

1. Broker-dealers. It is unlawful for a person to transact business in this state as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt. The following persons are exempt from the registration requirements:
  - a. A broker-dealer without a place of business in this state if its only transactions effected in this state are with:
    - (1) The issuer of the securities involved in the transactions;
    - (2) A broker-dealer registered as a broker-dealer under this chapter or not required to be registered as a broker-dealer under this chapter;
    - (3) An institutional investor;
    - (4) A nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars acting for the account of others pursuant to discretionary authority in a signed record;
    - (5) A bona fide pre-existing customer whose principal place of residence is not in this state and the person is registered as a broker-dealer under the Securities Exchange Act of 1934 or not required to be registered under the Securities Exchange Act of 1934 and is registered under the securities laws of the state in which the customer maintains a principal place of residence; and
    - (6) A bona fide pre-existing customer whose principal place of residence is in this state but was not present in this state when the customer relationship was established, if:
      - (a) The broker-dealer is registered under the Securities Exchange Act of 1934 or not required to be registered under the Securities Exchange Act of 1934 and is registered under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and
      - (b) Within thirty days after the customer's first transaction in this state, the person files an application for registration as a broker-dealer in this state and a further transaction is not effected more than forty-five days after the date on which the application is filed, or, if earlier, the date on which the commissioner notifies the person that the commissioner has denied the application for registration or has stayed the pendency of the application for good cause.
  - b. A person that deals solely in United States government securities and is supervised as a broker-dealer in government securities by the board of governors of the federal reserve system, the comptroller of the currency, the federal deposit insurance corporation, or the office of thrift supervision.

Application for registration as a broker-dealer 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 with the department, and must contain information the commissioner determines to be necessary concerning the applicant.

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 broker-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 broker-dealer, conforming to the requirements of section 10-04-14.

When an applicant has fully complied with the provisions of this subsection, the commissioner may register such applicant as a broker-dealer unless the commissioner finds that the applicant is not of good business reputation, or is not solvent, or the applicant's principals and compliance or sales supervisor do not appear qualified by training, examination, or experience to act on behalf of a broker-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 broker-dealer and the broker-dealer's agents with all the provisions of this law and for the faithful performance and payment of all obligations of the broker-dealer and the broker-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 broker-dealer, the commissioner shall notify the applicant of such registration.

2. a. Agent. It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration. The following individuals are exempt from the registration requirements:
  - (1) An individual who represents a broker-dealer in effecting transactions in this state limited to those in section 15(h)(2) of the Securities Exchange Act of 1934;
  - (2) An individual who represents a broker-dealer that is exempt under subsection 1;
  - (3) An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, but an individual who effects transactions in a federal covered security under section 18(b)(3) or 18(b)(4)(D) of the Securities Act of 1933 is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities; or
  - (4) An individual who represents a broker-dealer registered in this state or exempt from registration in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of one hundred million dollars acting for the account of others pursuant to discretionary authority in a signed record.
- b. Application for registration as an agent must be made in writing or electronically in a form prescribed by the commissioner, must be signed by the applicant and by the registered broker-dealer or issuer employing or proposing to employ such applicant, duly verified by oath, must be filed with the department, and must contain information the commissioner determines to be necessary concerning the applicant.

- c. The commissioner shall require as a condition of registration that the applicant pass a written examination as evidence of knowledge of the securities business.
- d. 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 announcement under section 10-04-07.1, or have been registered by coordination under section 10-04-07.2, or have been registered by qualification under section 10-04-08, then the commissioner 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.
- e. 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 broker-dealer named on the application is not a registered broker-dealer. When the commissioner has registered an applicant as an agent, the commissioner shall immediately notify the broker-dealer of such registration.
- f. Every registered broker-dealer or issuer promptly shall notify the department of the termination of the employment by the broker-dealer or issuer of a registered agent.

Application for registration as an agent must be made in writing or electronically in a form prescribed by the commissioner, must be signed by the applicant and by the registered broker-dealer or issuer employing or proposing to employ such applicant, duly verified by oath, must be filed with the department, and must contain information the commissioner determines to be necessary concerning the applicant.

The commissioner shall require as a condition of registration that the applicant 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 announcement under section 10-04-07.1, or have been registered by qualification under section 10-04-08, then the commissioner 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.

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 broker-dealer named on the application is not a registered broker-dealer. When the commissioner has registered an

applicant as an agent, the commissioner shall immediately notify the broker-dealer of such registration.

Every registered broker-dealer or issuer shall promptly notify the department of the termination of the employment by the broker-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 the person is registered under this chapter as an investment adviser or is exempt from registration as an investment adviser. The following persons are exempt from the registration requirements:

(1) A person without a place of business in this state that is registered under the securities laws of the state in which the person has its principal place of business if its only clients in this state are:

(a) Federal covered investment advisers, investment advisers registered under this chapter, or broker-dealers registered under this chapter;

(b) Institutional investors; or

(c) Bona fide pre-existing clients whose principal places of residence are not in this state if the investment adviser is registered under the securities laws of the state in which the clients maintain principal places of residences.

(2) A person without a place of business in this state if the person has had, during the preceding twelve months not more than five clients resident in this state in addition to those specified in paragraph 1; or

(3) Any other person exempted by rule or order of the commissioner issued under this chapter.

b. Application for registration as an investment adviser 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 with the department, and must contain information the commissioner determines to be necessary concerning the applicant.

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.

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.

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.

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.

A registrant as investment adviser shall notify the department of any change of address.

4. Federal covered adviser.
  - a. Except with respect to a federal covered investment adviser described in subdivision b, 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 department, 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.
  - b. The following federal covered investment advisers are not required to comply with the notice filing requirement:
    - (1) A federal covered investment adviser without a place of business in this state if its only clients are:
      - (a) Federal covered investment advisers, investment advisers registered under this chapter, and broker-dealers registered under this chapter;
      - (b) Institutional investors; or
      - (c) Bona fide pre-existing clients whose principal places of residence are not in this state.
    - (2) A federal covered investment adviser without a place of business in this state if the person has had, during the preceding twelve months, not more than five clients that are resident in this state in addition to those specified under paragraph 1.

A notice filing is effective from receipt until the following December thirty-first. It may be renewed by filing with the department, 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 department is or becomes inaccurate or incomplete in any material respect, the federal covered adviser shall file an amendment with the department 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 department.

5. Investment adviser representatives. It is unlawful for an individual to transact business in this state as an investment adviser representative unless the individual is registered under this chapter as an investment adviser representative or is exempt from registration as an investment adviser representative or that the investment adviser representative is employed by or associated with an investment adviser that is exempt from registration or a federal covered investment adviser that is excluded from the notice filing requirements.

Application for registration as an investment adviser representative 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 with the department, and contain information the commissioner determines to be necessary concerning the applicant.



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, as required by subsection 4. 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 department 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 department 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 shall require as a condition of registration that the applicant pass a written examination as evidence of knowledge of the securities business and comply with any continuing education requirements as prescribed by the commissioner. At the discretion of the commissioner, certain professional designations may be accepted in lieu of an examination.

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 broker-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 broker-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 broker-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 broker-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 December thirty-first of each year, unless renewed. The commissioner may by 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 broker-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 broker-dealer, agent, investment adviser, or investment adviser representative may, with the consent of the commissioner, be withdrawn upon written application.

**SECTION 5. AMENDMENT.** Section 10-04-10.1 of 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, extend, or renew any investment advisory contract unless the investment advisory contract provides in writing that:
  - a. The investment adviser may 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 subdivision 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. This subdivision does not prohibit an investment advisory contract that provides for performance fees permitted and determined in accordance with section 205 of the Investment Advisers Act of 1940 [Pub. L. 768; 54 Stat. 852; 15 U.S.C. 80b--5] and the rules adopted thereunder.
  - 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. Client securities or funds must be maintained by a qualified custodian. It is unlawful for any investment adviser to take or have custody of any securities or funds of any client unless the investment adviser acts as a fiduciary pursuant to duties as an executor, guardian, conservator, receiver, or trustee.
7. "Custody" means holding directly or indirectly, client funds or securities, or having any authority to obtain possession or having the ability to appropriate funds or securities. The investment adviser has custody if a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of funds or securities, in connection with advisory services the investment adviser provides to clients.
  - a. Custody includes:
    - (1) Possession of client funds or securities unless the investment adviser receives the funds or securities inadvertently and returns the funds or securities to the sender within three business days of receiving the funds or securities and the investment adviser maintains the records required under section 10-04-10.3.
    - (2) Any arrangement, including a general power of attorney, under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the investment adviser's instruction to the custodian; and
    - (3) Any capacity, such as general partner of a limited partnership, managing member of a limited liability company or a comparable position or another type of pooled investment vehicle, or trustee of a trust, that gives the investment adviser or its supervised person legal ownership of or access to client funds or securities.
  - b. Receipt of checks drawn by clients and made payable to third parties does not meet the definition of custody if forwarded to the third party within three business days of receipt and the investment adviser maintains the records required under section 10-04-10.3.
8. "Qualified custodian" means the following:
  - a. A depository institution;
  - b. A broker-dealer registered in this jurisdiction and with the securities and exchange commission holding the client assets in customer accounts;
  - c. A registered futures commission merchant registered under section 4f(a) of the Commodity Exchange Act [7 U.S.C. 1 et seq.], holding the client assets in customer accounts, but only with respect to client funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options; and
  - d. A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

**SECTION 6. AMENDMENT.** Section 10-04-10.3 of the North Dakota Century Code is amended and reenacted as follows:

**10-04-10.3. Postregistration provisions.**

1. Every broker-dealer, agent, investment adviser, and investment adviser representative conducting business in this state shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as described below:
  - a. With the exclusion of a broker-dealer whose activities are limited to the sale of securities that it issues and who is not a member or required to be a member of any self-regulatory organization, every broker-dealer registered in or conducting business in this state, and each branch office located in or conducting business in this state, must keep and maintain all records as required by:
    - (1) Federal statutes or by rules or regulations promulgated by the securities and exchange commission.
    - (2) Rules promulgated by any securities exchange or self-regulatory organization of which the broker-dealer is a member.
    - (3) The laws, rules, or regulations of any state in which the broker-dealer is registered or maintains a place of business from which it conducts securities business in North Dakota.
  - b. Every investment adviser which maintains its principal place of business in any state, other than this state, and is registered as an investment adviser in the state in which it maintains its principal place of business, shall keep and maintain such books and records as required by the state in which it maintains its principal place of business.
  - c. Every investment adviser which maintains its principal place of business in this state, or is not registered or exempt from registration in the state in which it maintains its principal place of business, shall keep and maintain the following books and records for a period of three years:
    - (1) Financial documents of the investment adviser which shall include:
      - (a) Journals and ledgers tracking income and expenses of the investment adviser. These documents must be continually maintained to within thirty days of current.
      - (b) Trial balances, financial statements, and internal audit papers.
      - (c) Checkbooks and statements on any type of account on which the investment adviser has check-writing privileges.
      - (d) Statements regarding any account of the investment adviser with any insurance company, broker-dealer, investment adviser, federal covered adviser, or financial institution.
    - (2) A file which contains copies of all incoming and outgoing correspondence between the investment adviser or its representative and any of its customers, prospective customers, or former customers.
    - (3) A file containing a copy of each customer complaint against the investment adviser or a representative of the investment adviser.
    - (4) A file containing all advertisements used by the investment adviser or a representative of the investment adviser. To the extent that past performance of the investment adviser is used in advertising materials, the investment adviser shall maintain all accounts, records, and internal working papers that form the basis of the performance of the investment adviser.

- (5) Copies of all contracts between the investment adviser and its customers.
- (6) A manual regarding the supervisory procedures of the investment adviser, unless the investment adviser is wholly owned by the only representative of the investment adviser and the investment adviser has no employees.
- (7) With respect to discretionary accounts:
  - (a) A list of all discretionary accounts.
  - (b) A file containing all discretionary trading agreements.
  - (c) A list of all trades that were conducted on a discretionary basis.
- (8) All records created by the investment adviser or provided by a client or prospective client of an investment adviser regarding the financial condition of the client or prospective client.
- (9) Records tracking all securities purchased by or advice provided by the investment adviser and the payment for the services if any. These records shall disclose whether the investment adviser or the investment adviser representative had any direct or indirect beneficial interest in the investment involved.
- (10) An updated A copy of part H2 of the form ADV, annually updated and filed with the department, and a summary of all material updates ~~changes to the same part 1 and part 2 of form ADV, as required to be filed with the department within ninety days of the material change.~~
- (11) A list of all parties to whom referral fees have been paid and the amount of money paid to each such person.
- (12) A list ~~record~~ containing the date of receipt and date of transmission of each customer check ~~funds~~ provided to the investment adviser for the purpose of deposit with the custodian of the investment adviser. Copies of each of the any checks or electronic transfer instructions, must be maintained with the list ~~record.~~

All records required to be maintained pursuant to subdivision a or b must be preserved as set forth in the rules or regulations of the jurisdiction originating the recordkeeping requirement. The commissioner may by rule enhance or waive the requirements of this subsection.

It is a violation of this subsection for any person who is registered, required to be registered, or is affiliated with or employed by any such entity, to create or cause to be created any record discussed in this subsection, if such record contains a material misstatement or misrepresentation regarding a customer or a customer's investments and the person knew or should have known of the falsity of the information or acted in reckless disregard of the truthfulness of the information.

2. Every registered broker-dealer, agent, investment adviser, and investment adviser representative shall file such financial reports as the commissioner prescribes by rule.
3. If the information contained in any document filed with the commissioner is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment.
4. All the records of any registered person are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the commissioner, within or outside this state, as the commissioner deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication

of examinations, the commissioner, if deemed practicable in administering this subsection, may cooperate with the securities administrators of other states, the securities and exchange commission, any national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or any other jurisdiction, agency, or organization charged by law or statute with regulating or prosecuting any aspect of the securities business, and in so cooperating may share any information obtained as a result of any investigation or examination.

5. The commissioner and the commissioner's representatives may copy records or require a registrant to copy records and provide the copies to the commissioner and the commissioner's representatives to the extent and in a manner reasonable under the circumstances.

**SECTION 7. 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. An order of the commissioner is effective upon issuance. 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 fifteen days after receipt of the order. If a request for hearing is made under this subsection, the commissioner shall schedule a hearing within a reasonable time. Subsections 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 according to the procedures set forth in chapter 28-32. Any order issued under this subsection is a final order if it is properly served and no hearing was requested within the required timeline. If an order issued under this subsection is sustained or modified after a hearing held in accordance with section 10-04-12, the order sustaining or modifying that order is a final order. If the final order is not appealed in accordance with the procedures set forth in chapter 28-32 or if the final order is sustained on appeal, the securities department may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.

**SECTION 8. AMENDMENT.** Subsection 1 of section 10-04-16.1 of the North Dakota Century Code is amended and reenacted as follows:

1. The department may:
  - a. Make such public or private investigations within or outside of this state as deemed 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.
    - (1) For the purposes of this section, an investigation may include an examination of the books and records of any person registered under the provisions of this chapter. In the discretion of the commissioner, the expense reasonably attributed to an investigation under this section must be paid by the broker-dealer, agent, investment adviser, or investment adviser representative whose affairs are investigated.

- (2) No person is liable to a broker-dealer, agent, investment adviser, federal covered adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required or requested by the securities department pursuant to this subsection or required to be maintained under section 10-04-10.3, unless the person knew, or should have known at the time the statement was made, that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity.
- (3) Professional services contracted and rendered under this section are exempt from chapter 54-44.4.
- b. Require or permit any person to file a statement in writing, under oath or otherwise, 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.

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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 Sixty-eighth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2060.

Senate Vote:    Yeas 43            Nays 0            Absent 4

House Vote:    Yeas 93            Nays 0            Absent 1

\_\_\_\_\_  
Secretary of the Senate

Received by the Governor at \_\_\_\_\_ M. on \_\_\_\_\_, 2023.

Approved at \_\_\_\_\_ M. on \_\_\_\_\_, 2023.

\_\_\_\_\_  
Governor

Filed in this office this \_\_\_\_\_ day of \_\_\_\_\_, 2023,

at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Secretary of State