

**CHAPTER 45-03-23**  
**CUSTODIAL AGREEMENTS AND THE USE OF CLEARING CORPORATIONS**

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**45-03-23-01. Definitions.**

As used in this chapter, unless the context requires otherwise, the term:

1. "Agent" means a national bank, state bank, trust company, or broker-dealer which maintains an account in its name in a clearing corporation or which is a member of the federal reserve system and through which a custodian participates in a clearing corporation, including the treasury/reserve automated debt entry securities system (TRADES) or treasury direct systems except that with respect to securities issued by institutions organized or existing under the laws of any foreign country or securities used to meet the deposit requirements pursuant to the laws of a foreign country as a condition of doing business therein, "agent" may include a corporation which is organized or existing under the laws of any foreign country and which is legally qualified under those laws to accept custody of securities.
2. "Clearing corporation" means a corporation as defined in subsection 1 of North Dakota Century Code section 41-08-02 which is organized for the purpose of effecting transactions in securities by computerized book-entry; except that with respect to securities issued by institutions organized or existing under the laws of any foreign country or securities used to meet the deposit requirements pursuant to the laws of a foreign country as a condition of doing business therein, "clearing corporation" may include a corporation that is organized or existing under the laws of any foreign country and which is legally qualified under those laws to effect transactions in securities by computerized book-entry. Clearing corporation also includes "treasury/reserve automated debt entry securities system" and "treasury direct" book-entry securities systems established under 31 U.S.C. 3100 et seq., 12 U.S.C. pt. 391, and 5 U.S.C. pt. 301.
3. "Custodian" means:
  - a. A national bank, state bank, or trust company that must at all times during which it acts as a custodian under this chapter be no less than adequately capitalized as determined by the standards adopted by United States banking regulators and which is regulated by either state banking laws or is a member of the federal reserve system and which is legally qualified to accept custody of securities in accordance with the standards set forth below; except that with respect to securities issued by institutions organized or existing under the laws of any foreign country, or securities used to meet the deposit requirements pursuant to the laws of a foreign country as a condition of doing business therein, "custodian" may include a bank or trust company incorporated or organized under the laws of a country other than the United States that is regulated as such by that country's government or an agency of that country that must be at all times during which it acts as a custodian pursuant to this chapter be no less than adequately capitalized as determined by the standards adopted by international banking authorities and which is legally qualified to accept custody of securities; or
  - b. A broker-dealer that shall be registered with and subject to jurisdiction of the securities and exchange commission, maintains membership in the securities investor protection corporation, and has a tangible net worth equal to or greater than two hundred fifty million dollars.

4. "Custodied securities" means securities held by the custodian or its agent or in a clearing corporation, including the treasury/reserve automated debt equity securities system or treasury direct systems.
5. "Securities" means certificated securities and uncertificated securities as defined in subdivisions d and r of subsection 1 of North Dakota Century Code section 41-08-02.
6. "Securities certificate" means a certificate as defined in subdivision p of subsection 1 of North Dakota Century Code section 41-08-02.
7. "Tangible net worth" means shareholders' equity, less intangible assets, as reported in the broker-dealer's most recent annual or transition report under section 13 or 15(d) of the Securities Exchange Act of 1934 (SEC form 10-K) filed with the securities and exchange commission.
8. "Treasury/reserve automated debt entry securities system" ("TRADES") and "treasury direct" mean the book-entry securities systems established under 31 U.S.C. 3100 et seq., 12 U.S.C. pt. 391 and 5 U.S.C. pt. 301. The operation of TRADES and treasury direct systems are subject to 31 C.F.R. pt. 357, et seq.

**History:** Effective March 1, 2004; amended effective April 1, 2010.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-05-35

#### **45-03-23-02. Custody of agreement - Requirements.**

1. An insurance company may provide, by written agreement with a custodian, for the custody of its securities with a custodian. The securities that are the subject of the agreement may be held by the custodian or its agent or in a clearing corporation.
2. The agreement must be in writing and must be authorized by the resolution of the board of directors of the insurance company or of an authorized committee of the board. The terms of the agreement must comply with the following:
  - a. Securities certificates held by the custodian must be held separate from the securities of the custodian and of all of its other customers.
  - b. Securities held indirectly by the custodian and securities in a clearing corporation must be separately identified on the custodian's official records as being owned by the insurance company. The records must identify which securities are held by the custodian or by its agent and which securities are in a clearing corporation. If the securities are in a clearing corporation, the records must also identify where the securities are and, if in a clearing corporation, the name of the clearing corporation and, if through an agent, the name of the agent.
  - c. All custodied securities that are registered must be registered in the name of the company or in the name of a nominee of the company or in the name of the custodian or its nominee or, if in a clearing corporation, in the name of the clearing corporation or its nominee.
  - d. Custodied securities shall be held subject to the instructions of the insurance company and shall be withdrawable upon the demand of the insurance company, except that custodied securities used to meet the deposit requirements set forth in North Dakota Century Code section 26.1-05-23 must, to the extent required by that section, be under the control of the insurance commissioner and must not be withdrawn by the insurance company without the commissioner's approval.

- e. The custodian shall be required to send or cause to be sent to the insurance company a confirmation of all transfers of custodied securities to or from the account of the insurance company. In addition, the custodian shall be required to furnish no less than monthly the insurance company with reports of holdings of custodied securities at such times and containing information as may be reasonably requested by the insurance company. The custodian's trust committee's annual reports of its review of the insurer's trust accounts shall also be provided to the insurer. Reports and verifications may be transmitted in electronic or paper form.
- f. During the course of the custodian's regular business hours, any officer or employee of the insurance company, any independent accountant selected by the insurance company, and any representative of an appropriate regulatory body shall be entitled to examine, on the premises of the custodian, the custodian's records relating to custodied securities, but only upon furnishing the custodian with written instructions to that effect from an appropriate officer of the insurance company.
- g. The custodian and its agents shall be required to send to the insurance company:
  - (1) All reports which they receive from a clearing corporation on their respective systems of internal accounting control; and
  - (2) Any reports prepared by outside auditors on the custodians or its agent's internal accounting control of custodied securities that the insurance company may reasonably request.
- h. The custodian shall maintain records sufficient to determine and verify information relating to custodied securities that may be reported in the insurance company's annual statement and supporting schedules and information required in any audit of the financial statements of the insurance company.
- i. The custodian shall provide, upon written request from an appropriate officer of the insurance company, the appropriate affidavits, substantially in the form described in the appendices to this chapter, with respect to custodied securities.
- j. A national bank, state bank, or trust company shall secure and maintain insurance protection in an adequate amount covering the bank's or trust company's duties and activities as custodian for the insurer's assets and shall state in the custody agreement that protection is in compliance with the requirements of the custodian's banking regulator. A broker-dealer shall secure and maintain insurance protection for each insurance company's custodied securities in excess of that provided by the securities investor protection corporation in an amount equal to or greater than the market value of each respective insurance company's custodied securities. The commissioner may determine whether the type of insurance is appropriate and the amount of coverage is adequate.
- k. The custodian shall be obligated to indemnify the insurance company for any loss of custodied securities, except that the custodian shall not be so obligated to the extent that the loss was caused by other than the negligence or dishonesty of the custodian.
- l. The custodian shall be obligated to indemnify the insurance company for any loss of custodied securities occasioned by the negligence or dishonesty of the custodian's officers or employees, or burglary, robbery, holdup, theft, or mysterious disappearance, including loss by damage or destruction.
- m. In the event that there is a loss of custodied securities for which the custodian shall be obligated to indemnify the insurance company, the custodian shall promptly replace the

securities or their value thereof and the value of any loss of rights or privileges resulting from the loss of securities.

- n. The agreement may provide that the custodian will not be liable for any failure to take any action required to be taken under the agreement in the event and to the extent that the taking of such action is prevented or delayed by war (whether declared or not and including existing wars), revolution, insurrection, riot, civil commotion, act of God, accident, fire, explosion, stoppage of labor, strikes or other differences with employees, laws, rules, orders, or other acts of any governmental authority, or any other cause whatever beyond its reasonable control.
  - o. In the event that the custodian gains entry in a clearing corporation through an agent, there shall be an agreement between the custodian and the agent under which the agent shall be subject to the same liability for loss of custodied securities as the custodian; provided, however, that if the agent shall be subject to regulation under the laws of a jurisdiction which is different from the jurisdiction the laws of which regulate the custodian, the insurance commissioner of the state of domicile of the insurance company may accept a standard of liability applicable to the agent which is different from the standard of liability applicable to the custodian.
  - p. The custodian shall provide written notification to the insurer's domiciliary commissioner if the custodial agreement with the insurer has been terminated or if one hundred percent of the account assets in any one custody account have been withdrawn. This notification shall be remitted to the insurance commissioner within three business days of the receipt by the custodian of the insurer's written notice of termination or within three business days of the withdrawal of one hundred percent of the account assets.
3. An insurer having direct written and assumed premiums of less than three million dollars in any calendar year may request an exemption from the requirements of this section. The insurer must file with the commissioner a written statement explaining the reasons why the insurer should be exempt. The commissioner may grant an exemption if the commissioner finds that compliance with this section would constitute a financial or organizational hardship upon the insurer.

**History:** Effective March 1, 2004; amended effective April 1, 2010; July 1, 2012.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-05-35

#### **45-03-23-03. Deposit with affiliates - Requirements.**

1. Nothing prevents an insurance company from depositing securities with another insurance company with which the depositing insurance company is affiliated, provided that the securities are deposited pursuant to a written agreement authorized by the board of directors of the depositing insurance company or an authorized committee of the board and that the receiving insurance company is organized under the laws of one of the states of the United States or of the District of Columbia. If the respective states of domicile of the depositing and receiving insurance companies are not the same, the depositing insurance company shall have given notice of such deposit to the insurance commissioner in the state of its domicile and the commissioner shall not have objected to it within thirty days of the receipt of the notice.
2. The terms of the agreement must comply with the following:
  - a. The insurance company receiving the deposit shall maintain records adequate to identify and verify the securities belonging to the depositing insurance company.

- b. The receiving insurance company shall allow representatives of any appropriate regulatory body to examine records relating to securities held subject to the agreement.
- c. The depositing insurance company may authorize the receiving insurance company:
  - (1) To hold the securities of the depositing insurance company in bulk, in certificates issued in the name of the receiving insurance company or its nominee, and to commingle them with securities owned by other affiliates of the receiving insurance company; and
  - (2) To provide for such securities to be held by a custodian, including the custodian of securities of the receiving insurance company or in a clearing corporation.

**History:** Effective March 1, 2004; amended effective April 1, 2010.

**General Authority:** NDCC 28-32-02

**Law Implemented:** NDCC 26.1-05-35

**APPENDIX I**

**FORM A  
CUSTODIAN AFFIDAVIT**

(For use by a custodian where securities entrusted to its care have not been redeposited elsewhere)

STATE OF \_\_\_\_\_ )

) ss.

COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_, being duly sworn deposes and says that he or she is \_\_\_\_\_ of \_\_\_\_\_, a corporation organized under and pursuant to the laws of the \_\_\_\_\_ with the principal place of business at \_\_\_\_\_ ("corporation");

That his or her duties involve supervision of activities of the corporation as custodian and records relating to the corporation;

That the corporation is custodian for certain securities of \_\_\_\_\_ having a place of business at \_\_\_\_\_ ("insurance company") pursuant to an agreement between the corporation and the insurance company;

That the schedule attached is a true and complete statement of securities (other than those caused to be deposited with The Depository Trust Company or like entity or a Federal Reserve Bank under the TRADES or Treasury Direct systems) which were in the custody of the corporation for the account of the insurance company as of the close of business on \_\_\_\_\_; that, unless otherwise indicated on the schedule the next maturing and all subsequent coupons were then either attached to coupon bonds or in the process of collection; and that, unless otherwise shown on the schedule, all such securities were in bearer form or in registered form in the name of the insurance company or its nominee, or of the corporation or its nominee, or were in the process of being registered in such form;

That the corporation as custodian has the responsibility for the safekeeping of the securities as that responsibility is specifically set forth in the agreement between the corporation as custodian and the insurance company; and

That, to the best of his or her knowledge and belief, unless otherwise shown on the schedule, the securities were the property of the insurance company and were free of all liens, claims, or encumbrances whatsoever.

Subscribed and sworn to before me this

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(L.S.)

\_\_\_\_\_  
Vice President (or other  
authorized officer)

**APPENDIX II**

**FORM B  
CUSTODIAN AFFIDAVIT**

(For use in instances where a custodian corporation maintains securities on deposit with The Depository Trust Company or like entity)

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ )

ss.

\_\_\_\_\_, being duly sworn deposes and says that he or she is \_\_\_\_\_ of \_\_\_\_\_, a corporation organized under and pursuant to the laws of the \_\_\_\_\_ with the principal place of business at \_\_\_\_\_ ("corporation");

That his or her duties involve supervision of activities of the corporation as custodian and records relating thereto;

That the corporation is custodian for certain securities of \_\_\_\_\_ having a place of business at \_\_\_\_\_ ("insurance company") pursuant to an agreement between the corporation and the insurance company;

That the corporation has caused certain of the securities to be deposited with \_\_\_\_\_ and that the schedule attached hereto is a true and complete statement of the securities of the insurance company of which the custodian was custodian as of the close of business on \_\_\_\_\_, and which were so deposited on such date;

That the corporation as custodian has the responsibility for the safekeeping of the securities both in the possession of the corporation or deposited with \_\_\_\_\_ as is specifically set forth in the agreement between the corporation as custodian and the insurance company; and

That, to the best of his or her knowledge and belief, unless otherwise shown on the schedule, the securities were the property of the insurance company and were free of all liens, claims, or encumbrances whatsoever.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(L.S.)  
Vice President (or other  
authorized officer)

**APPENDIX III**

**FORM C  
CUSTODIAN AFFIDAVIT**

(For use where ownership is evidenced by book-entry at a Federal Reserve Bank)

STATE OF \_\_\_\_\_ )

) ss.

COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_, being duly sworn deposes and says that he or she is \_\_\_\_\_ of \_\_\_\_\_, a corporation organized under and pursuant to the laws of the \_\_\_\_\_ with the principal place of business at \_\_\_\_\_ ("corporation");

That his or her duties involve supervision of activities of the corporation as custodian and records relating to the corporation;

That the corporation is custodian for certain securities of \_\_\_\_\_ ("insurance company") with a place of business at \_\_\_\_\_ pursuant to an agreement between the corporation and the insurance company;

That it has caused certain securities to be credited to its book-entry account with the Federal Reserve Bank of \_\_\_\_\_ under the TRADES or Treasury Direct systems; and that the schedule attached is a true and complete statement of the securities of the insurance company of which the corporation was custodian as of the close of business on \_\_\_\_\_ which were in a "General" book-entry account maintained in the name of the corporation on the books and records of the Federal Reserve Bank of \_\_\_\_\_ at such date;

That the corporation has the responsibility for the safekeeping of the securities both in the possession of the corporation or in the general book-entry account as is specifically set forth in the agreement between the corporation as custodian and the insurance company; and

That, to the best of his or her knowledge and belief, unless otherwise shown on the schedule, the securities were the property of the insurance company and were free of all liens, claims, or encumbrances whatsoever.

Subscribed and sworn to before me this

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(L.S.)

Vice President (or other  
authorized officer)