

AN ACT

ENTITLED, An Act to revise the South Dakota Uniform Securities Act to conform with the provisions of the National Securities Markets Improvement Act of 1996.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 47-31A-201 be amended to read as follows:

47-31A-201. (a) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless the person is registered under this chapter.

(b) It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when the agent is not associated with a particular broker-dealer registered under this chapter or particular issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the agent as well as the broker-dealer or issuer shall promptly notify the director.

(c) It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless:

- (1) The person is so registered under this chapter; or
- (2) The person has no place of business in this state, and
 - (A) The person's only clients in this state are investment companies as defined by the Investment Company Act of 1940, other investment advisers, federal covered advisers, broker-dealers, banks, trust companies, savings and loan associations, insurance companies, employee benefit plans with assets of not less than one million dollars, and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as designated by rule or order of the director; or
 - (B) During the preceding twelve-month period has had not more than five clients, other than those specified in subparagraph (A), who are residents of this state.

(d) It is unlawful for any:

- (1) Person required to be registered as an investment adviser under this chapter to employ an investment adviser representative unless the investment adviser representative is registered under this chapter. However, the registration of an investment adviser representative is not effective during any period when the representative is not employed by an investment adviser registered under this chapter; or
- (2) Federal covered adviser to employ, supervise, or associate with an investment adviser representative having a place of business located in this state unless the investment adviser representative is registered under this chapter or is exempt from registration.

When an investment adviser representative begins or terminates employment with an investment adviser, the investment adviser, in the case of subparagraph (1), or the investment adviser representative, in the case of subparagraph (2), shall promptly notify the director.

(e) Every registration or notice filing expires on December thirty-first unless renewed.

(f) Except with respect to advisers whose only clients are those described in subparagraph 201(c)(2) of this chapter, it is unlawful for any federal covered adviser to conduct advisory business in this state unless the person complies with the provisions of subsection 202(b) of this chapter.

Section 2. That § 47-31A-202 be amended to read as follows:

47-31A-202. (a) A broker-dealer, agent, investment adviser, or investment adviser representative may obtain an initial or renewal registration by filing with the director an application together with a consent to service of process pursuant to § 47-31A-414(g). The application shall contain whatever information reasonably related to the applicant's qualifications to transact business in this state, the director, by rule, requires concerning such matters as:

- (1) The applicant's form and place of organization;
- (2) The applicant's proposed method of doing business;
- (3) The qualifications and business history of the applicant; in the case of the broker-dealer or

investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser;

- (4) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities or any other financial business and any conviction of a felony;
- (5) The applicant's financial condition and history; and
- (6) Any information to be furnished or disseminated to any client or prospective client, if the applicant is an investment adviser. The director may, by rule or order, require an applicant for initial registration to publish an announcement of the application in one or more specified newspapers published in this state. If no denial order is in effect and no proceeding is pending under § 47-31A-204, registration becomes effective by order of the director. Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer, or director, or a person occupying a similar status or performing similar functions. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, officer, or director, or a person occupying a similar status or performing similar functions.

(b) Except with respect to federal covered advisers whose only clients are those described in subparagraph 201(c)(2)(A) of this chapter, a federal covered adviser shall file with the director, prior to acting as a federal covered adviser in this state, any documents filed with the Securities and Exchange Commission as the director, by rule or order, may require. Until October 10, 1999, the director may require the registration of a federal covered adviser if the filer fails to pay the fees required by this chapter. For the purpose of this subsection, a delay in payment or an underpayment of a fee that is remedied within fifteen days after receipt of notice from the director does not constitute a failure or refusal to pay the fee.

(c) Every applicant for initial or renewal registration shall pay a filing fee of one hundred fifty dollars in the case of a broker-dealer, one hundred twenty-five dollars in the case of an agent, one hundred dollars in the case of an investment adviser who is subject to registration under this chapter, and fifty dollars in the case of an investment adviser representative who is subject to registration under this chapter. Every applicant acting as a federal covered adviser in this state shall pay an initial fee and renewal fee of two hundred dollars.

(d) A registered broker-dealer or investment adviser may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(e) The director may, by rule, require a minimum capital for registered broker-dealers, subject to the limitations of section 15 of the Securities Exchange Act of 1934, and establish minimum financial requirements for investment advisers, subject to the limitations of section 222 of the Investment Advisers Act of 1940, which may include different requirements for those investment advisers who maintain custody of clients' funds or securities or who have discretionary authority over same and those investment advisers who do not.

(f) The director may, by rule or order, require registered broker-dealers, agents, and investment advisers who have custody of or discretionary authority over client funds or securities to post bonds, subject to the limitations provided in section 15 of the Securities and Exchange Act of 1934 and section 222 of the Investment Advisers Act of 1940, and may determine their conditions. Any appropriate deposit of cash or securities may be accepted in lieu of any bonds so required. No bond may be required of any registrant whose net capital or, in the case of an investment adviser whose minimum financial requirements, which may be defined by rule, exceeds the amounts required by rule or order by the director. Every bond shall provide for suit thereon by any person who has a cause of action under § 47-31A-410 and, if the director, by rule or order, requires, by any person who has a cause of action not arising under this chapter. Every bond shall provide that no suit may be

maintained to enforce any liability on the bond unless brought within the time limitations of § 47-31A-410(f).

Section 3. That § 47-31A-203 be amended to read as follows:

47-31A-203. (a) Every registered broker-dealer and investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the director, by rule or order, prescribes, except as provided by section 15 of the Securities Exchange Act of 1934 and section 222 of the Investment Advisers Act of 1940. All records so required, with respect to an investment adviser, shall be preserved for the period prescribed by the director by rule or order.

(b) With respect to investment advisers, the director may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for protection of investors and advisory clients. To the extent it is determined by the director in the director's discretion, information furnished to clients or prospective clients of an investment adviser that would be in compliance with the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or in partial satisfaction of this requirement.

(c) Every registered broker-dealer and investment adviser shall file such financial reports as the director, by rule or order, prescribes, except as provided by section 15 of the Securities and Exchange Commission Act of 1934 and section 222 of the Investment Advisers Act of 1940.

(d) If the information contained in any document filed with the director is or becomes inaccurate or incomplete in any material respect, the registrant or federal covered adviser shall promptly file a correcting amendment if the document is filed with respect to a registrant or when the amendment is required to be filed with the Securities and Exchange Commission if the document is filed with respect to a federal covered adviser, unless a notification of the corrections has been made under § 47-31A-201(b).

(e) All the records referred to in subsection (a) are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the director, within or

without this state, as the director deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the director, insofar as the director deems it practicable in administering the subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securities Exchange Act of 1934.

Section 4. That § 47-31A-301 be amended to read as follows:

47-31A-301. It is unlawful for any person to offer or sell any security in this state unless:

- (1) It is registered under this chapter; or
- (2) The security or transaction is exempted under § 47-31A-402; or
- (3) It is a federal covered security.

Section 5. That chapter 47-31A be amended by adding thereto a NEW SECTION to read as follows:

(a) The director, by rule or order, may require the filing of any of the following documents with respect to a covered security under section 18(b)(2) of the Securities Act of 1933:

- (1) Prior to the initial offer of the federal covered security in this state, all documents that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, together with a consent to service of process signed by the issuer and a filing fee of five hundred dollars for open-end management companies with total net assets of fifty million dollars or less, or a filing fee of one thousand dollars for open-end management companies with total net assets of more than fifty million dollars but less than two hundred fifty million dollars, or a filing fee of two thousand dollars for open-end management companies with total net assets equal to or greater than two hundred fifty million dollars; or a filing fee of one hundred fifty dollars for unit investment trusts. A renewal filing is required annually, including those documents that the director

by rule or order may require and a fee as provided in this subparagraph (a)(1). An initial or renewal filing includes a separate fee for each portfolio, series class, or other designation. Any other federal covered security must submit a filing fee of two hundred fifty dollars.

- (2) After the initial offer of the federal covered security in this state, all documents that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, which shall be filed concurrently with the director. Any amendment filing that includes a name change to any filing, including any portfolio, series, class, or other designation, must include a fifty dollar filing fee for each name change of each portfolio, series, class, or other designation.
- (3) An annual report of the net assets of the fund, together with the requisite filing fee in this section.

(b) With respect to any security that is a covered security under section 18(b)(4)(D) of the Securities Act of 1933, the director may, by rule or order, require the issuer to file a notice on SEC Form D and a consent to service of process signed by the issuer or the issuer's representative, no later than fifteen days after the first sale of the federal covered security in this state, together with a filing fee of two hundred dollars.

(c) The director, by rule or order, may require the filing of any document filed with the Securities and Exchange Commission under the Securities Act of 1933 with respect to a covered security under section 18(b)(3) or (4) of the Securities Act of 1933, together with a two hundred fifty dollar filing fee.

(d) The director may issue a cease and desist order suspending the offer and sale of a covered security, except a covered security under section 18(b)(1) of the Securities Act of 1933, if the director finds that the order is in the public interest and there is a failure to comply with any condition established under this section.

(e) The director, by rule or order, may waive any or all of the provisions of this section.

(f) Until October 10, 1999, the director may require the registration of a federal covered security if the issuer fails to pay the fee required by this chapter. For the purpose of this subsection, a delay in payment or an underpayment of a fee that is remedied within fifteen days after receipt of notice from the director does not constitute a failure to pay the fee.

Section 6. That subsection (b) of § 47-31A-401 be amended to read as follows:

(b) "Agent," means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents:

- (1) An issuer in:
 - (i) Effecting transactions in a security exempted by clause (1), (2), (3), (10), or (11) of § 47-31A-402 (a);
 - (ii) Effecting the transactions exempted by § 47-31A-402 (b);
 - (iii) Effecting transactions in a covered security as described in section 18(b)(3) and 18(b)(4)(D) of the Securities Act of 1933;
 - (iv) Effecting transactions with existing employees, partners or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state; or
- (2) A broker-dealer in effecting transactions in this state limited to those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934.

A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions is an agent only if the person otherwise comes within this definition.

Section 7. That subsection (f) of § 47-31A-401 be amended to read as follows:

(f) "Investment adviser," means any person, who for compensation, engages in the business of advising others, whether directly or through publications or writings, as to the value of securities or

as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation as a part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" does not include:

- (1) An investment adviser representative;
- (2) A bank, savings institution, or trust company;
- (3) A lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession;
- (4) A broker-dealer or its agent whose performance of these services is solely incidental to the conduct of its business as a broker-dealer and who receives no special compensation for them;
- (5) A publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;
- (6) Any person that is a federal covered adviser; or
- (7) Such other person not within the intent of this subsection as the director may, by rule or order, designate.

Section 8. That § 47-31A-401 be amended by adding thereto a NEW SUBSECTION to read as follows:

"Federal covered adviser," means a person who is:

- (1) Registered under section 203 of the Investment Advisers Act of 1940; or
- (2) Excluded from the definition of investment adviser under 202(a)(11).

Section 9. That subsection (g) of § 47-31A-401 be amended to read as follows:

(g) "Investment adviser representative," means any person, including a partner, officer, or director, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who is employed by or associated with an investment adviser that is registered or required to be registered under this chapter, or who has a place of business located in this state and is employed by or associated with a federal covered adviser, and who does any of the following:

- (1) Makes any recommendations or otherwise renders advice regarding securities if the person has direct advisory client contact;
- (2) Manages accounts or portfolios of clients;
- (3) Determines which recommendations or advice regarding securities should be given;
- (4) Solicits, offers, or negotiates for the sale of or sells investment advisory services unless the person is a broker-dealer or agent registered with South Dakota whose solicitation activities are solely incidental to the person's profession and who receives special compensation only from an affiliated entity and the person would not be an investment adviser representative except for the performance of the activities described in this subsection; or
- (5) Directly supervises employees who perform any of the foregoing activities or services.

Section 10. That § 47-31A-401 be amended by adding thereto a NEW SUBSECTION to read as follows:

"Federal covered security," means any security described as a covered security under section 18(b) of the Securities Act of 1933, or rules or regulations promulgated thereunder.

Section 11. That subsection (a)(13) of § 47-31A-402 be repealed.

Section 12. That subsection (b)(13) of § 47-31A-402 be amended to read as follows:

- (13) The director may, by rule or order, create a limited offering transactional exemption which

shall further the objectives of compatibility with federal exemptions and uniformity among the states. Any transactional exemption that complies with the rules promulgated pursuant to this section shall submit a filing fee of two hundred dollars.

Section 13. That § 47-31A-403 be amended to read as follows:

47-31A-403. The director may, by rule or order, require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, including clients or prospective clients of an investment adviser unless a security or transaction is exempted by § 47-31A-402 or the security is a federal covered security or the transaction is with respect to a federal covered security.

Section 14. That subsection (a) of § 47-31A-414 be amended to read as follows:

(a) Sections 47-31A-101, 47-31A-201(a), 47-31A-301, 47-31A-302, 47-31A-405, and 47-31A-410 apply to persons who sell or offer to sell when:

- (1) An offer to sell is made in this state; or
- (2) An offer to buy is made and accepted in this state.

Section 15. That subsection (g) of § 47-31A-414 be amended to read as follows:

(g) Every applicant for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in common-law sense, shall file with the director, in such form as the director, by rule, prescribes, an irrevocable consent appointing the director or the director's successor in office to be the applicant's attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against the applicant or the applicant's successor, executor, or administrator which arises under this chapter, or any rule or order hereunder, after the consent has been filed, with the same force and validity as if served personally on the person filing consent. A person who has filed such a consent in connection with a previous registration or notice filing need not file another. Service may be made by leaving a copy of the process in the office of the director, but it is not effective unless:

- (1) The plaintiff, who may be the director in a suit, action, or proceeding instituted by the director, forthwith sends notice of the service and copy of the process by certified or registered mail to the defendant or the respondent at the last address on file with the director; and
- (2) The plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

Section 16. That the introductory clause to subsection (a) of § 47-31A-402 be amended to read as follows:

(a) The following securities are exempted from §§ 47-31A-301, section 5 of this Act, and 47-31A-403:

Section 17. That the introductory clause to subsection (b) of § 47-31A-402 be amended to read as follows:

(b) The following transactions are exempted from §§ 47-31A-301, section 5 of this Act, and 47-31A-403:

Section 18. That subsection (h) of § 47-31A-407 be amended to read as follows:

(h) The director may prepare and issue any certificate to the effect that the records of the director show that a specified security was or was not registered, that a specified person was or was not registered, or that a filing under section 5 of this Act was or was not made, on a specified date or between specified dates. The director may prepare and issue certified copies of any order of registration, of any filing under section 5 of this Act, or of any license or of any lawful order of the director. Any such certificate may recite that such registration, filing, license, or lawful order has not been suspended, revoked, cancelled, or amended except as therein stated. The director may prepare and issue certified copies of any application, filing, document, exhibit, report, or other paper on file with the director. All certificates issued pursuant to this subsection shall be signed by the director and identified by an impression of the seal of the director. The director shall charge one dollar for each

such certificate and fifty cents per folio for all copies so certified. All such certificates shall be prima facie evidence of the facts therein stated; and all copies so certified shall be received evidence in all courts with the same force and effect as the originals thereof.

Section 19. That subsection (a) of § 47-31A-409 be amended to read as follows:

(a) It is a violation of this chapter and a Class 4 felony for any person to violate any provision of this chapter except § 47-31A-404, who fails to file and pay the requisite fees under section 5 of this Act, or who violates any rule or order under this chapter, or who willfully violates § 47-31A-404 knowing the statement made to be false or misleading in any material respect, or who willfully fails to comply with section 5 of this Act; but no person may be imprisoned for violation of any rule or order or failure to comply with section 5 of this Act, if the person proves that he or she had no knowledge of the rule or order. A subsequent violation is a Class 3 felony.

Section 20. That subsection (a) of § 47-31A-412 be amended to read as follows:

(a) The director may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this chapter, including rules and forms governing registration statements, filings under section 5 of this Act, applications, and reports, and defining any terms whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of this chapter and pursuant to the provisions of chapter 1-26. For the purpose of the rules and forms, the director may classify securities, persons, and matters within the director's jurisdiction, and prescribe different requirements for different classes. The director may, by rule, adopt exemptions from the registration requirements of §§ 47-31A-201 and 47-31A-301 where such exemptions are consistent with the public interest and with the purposes fairly intended by the policy and provisions of this chapter.

Section 21. That subsection (b) of § 47-31A-413 be amended to read as follows:

(b) The director shall keep a register of all applications for registration of securities and registration statements, all filings made for federal covered securities, and all applications for

broker-dealer, agent, investment adviser, or investment adviser representative which are or have ever been effective under this chapter; all written notices of claim of exemption from registration requirements; all orders entered under this chapter; and all interpretative opinions or no-action determinations issued pursuant to subsection (e). All records may be maintained in computer or microfilm format or any other form of data storage. No original records will be maintained any longer than ten years. The register shall be available for public inspection.

Section 22. That subsection (c) of § 47-31A-413 be amended to read as follows:

(c) The information contained in or filed with any registration statement, federal covered security filing, application, or report may be made available to the public under such rules as the director prescribes.

An Act to revise the South Dakota Uniform Securities Act to conform with the provisions of the National Securities Markets Improvement Act of 1996.

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I certify that the attached Act originated in the

SENATE as Bill No. 82

Secretary of the Senate

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President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 82
File No. _____
Chapter No. _____

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Received at this Executive Office this ____ day of _____ ,

19__ at ____ M.

By _____
for the Governor

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The attached Act is hereby approved this _____ day of _____ , A.D., 19__

Governor

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STATE OF SOUTH DAKOTA,
ss.

Office of the Secretary of State

Filed _____ , 19__
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State