

Regulatory Notice for Issuers of Securities

Issuer-Dealer Registration Requirements for Issuers Not Utilizing a Registered Broker-Dealer for the Offer and Sale of its Own Securities who wish to compensate its sales agents and that are not Exempt Transactions under N.D.C.C. § 10-04-06

Many states have adopted some form of the Uniform Securities Act of 2002 definition of “Broker-dealer” which in Section 102(4)(B) specifically excludes “an issuer” from the definition. In those states there is no issuer-dealer registration requirement.

North Dakota was among a number of states that had not adopted this exclusion from the definition of “broker-dealer” or “dealer” in their respective statutes and required issuers to comply with dealer registration requirements when making sales of its own securities in non-exempt transactions. N.D.C.C. § 10-04-10(1).

Pursuant to legislation passed in North Dakota during the 2021 legislative session, the definition of broker-dealer was amended to include the following exemption:

“An issuer, including an officer, director, employee, or trustee of, or member or manager of, or partner in, or a general partner of, an issuer, that sells, offers for sale, or does any act in furtherance of the sale of a security that represents an economic interest in that issuer, provided no commission, fee, or other similar remuneration is paid to or received by the issuer for the sale.”

Examples of issuer transactions that did not require Issuer-Dealer registration in North Dakota prior to the amendment were those exempt transactions set forth in N.D.C.C.



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§ 10-04-06, some of which are self-executing and some of which require a filing with the Department, and issuers utilizing Regulation D, Rule 506 and meeting the requirements of N.D.C.C. § 10-04-08.4(2). In addition to the amendment to the definition of broker-dealer, N.D.C.C. § 10-04-08.4 was also amended to provide a state Issuer-Dealer registration exemption for issuers of securities not utilizing a registered broker-dealer for the offer and sale of its own securities under Tier 2 of Regulation A, provided the securities are 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.

An issuer of securities not utilizing a registered broker-dealer for the offer and sale of its own securities and not in an exempt transaction under N.D.C.C. § 10-04-06, and who wishes to provide a commission, fee or similar remuneration to its sales agents will continue to register as an issuer-dealer and register its issuer-agents as they had prior to the 2021 amendments which became effective August 1, 2021. (See, Issuer-Dealer Registration Form S-4 (SFN 51526) and Issuer-Agent Registration Form S-5 (SFN 51529)).

Federal Law Does Not Preempt North Dakota Law Requiring Issuer-Dealer Registration

Generally speaking, the Securities Act of 1933, 15 U.S.C. § 77a et seq., (the “1933 Act”) deals with the federal registration of securities while the Securities and Exchange Act of 1934, 15 U.S.C. § 78a et seq., (the “1934 Act”) deals with the federal registration of securities firms and industry professionals engaged in the sale of securities. The National Securities Markets Improvement Act of 1996, 15 U.S.C. § 77r, (NSMIA), amended the 1933 Act and only limits state’s *securities* registration requirements. It does not address the registration of securities industry professionals under the 1934 Act and only preempts state law concerning the registration of “federal covered securities,” not the registration

of issuers or their agents. The North Dakota Securities Act, N.D.C.C. Chapter 10-04, was amended after NSMIA's passage by Congress to reflect that federally covered securities were excluded from N.D.C.C. § 10-04-04 registration requirements. The general issuer-dealer and issuer-agent registration requirements under N.D.C.C. § 10-04-10 were not eliminated for issuers of federal covered securities although the exemption found at N.D.C.C. § 10-04-10(2)(c) was added, as were the current requirements for the sale of Reg D, Rule 506 securities in North Dakota found at N.D.C.C. § 10-04-08.4(2), and the recent changes for the sale of Reg A, Tier 2 securities found at N.D.C.C. § 10-04-08.4(4) referred to above.

Unless the issuer and its officer/employee/agent qualify for an exemption from registration, North Dakota law requires registration of such persons as issuer-dealers and agents of the issuer. NSMIA does not limit the ability of states to regulate the salespersons through whom securities offerings are made. The federal government and the states have concurrent jurisdiction in this area. Registration or licensing requirements for securities salespersons are intended to protect the public from wrongdoing. It is perfectly appropriate to require the registration of dealers and agents, "even if the securities or underlying transactions are exempt." *People v. Milne*, 690 P.2d 829, 835 (Colo. 1984); *State ex rel. Holloway v. First Am. Bank & Trust Co.*, 186 N.W.2d 573, 580 (N.D. 1971). "NSMIA regulates the registration of securities and preempts state securities laws that require the registration of "covered securities." NSMIA does not preempt state laws that require registration of individuals involved in the sale of securities." *State v. Hager*, 2010 ND 217 ¶14, 790 N.W.2d 745.