

HOUSE BILL NO. 1154

Introduced by

Industry, Business and Labor Committee

(At the request of the Securities Commissioner)

1 A BILL for an Act to amend and reenact subsection 16 of section 10-04-06 of the North Dakota
2 Century Code, relating to the test the waters security offering exempt transaction.

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

4 **SECTION 1. AMENDMENT.** Subsection 16 of section 10-04-06 of the 1997
5 Supplement to the North Dakota Century Code is amended and reenacted as follows:

6 16. a. ~~The distribution of a prospectus or similar disclosure document by~~ An offer,
7 but not a sale, of a security made by or on behalf of an issuer to "test the
8 waters" with an offer of a security for the sole purpose of discussing possible
9 business strategies or economic development or soliciting potential
10 indications an indication of interest from prospective purchasers if the issuer
11 in receiving a prospectus or similar disclosure document for the security if all
12 of the following conditions are satisfied:

13 a. (1) ~~Is~~ The issuer is or will be a business entity organized under the laws of
14 this state and operates its principal place of business in this state or is a
15 person who is a member of the North Dakota private capital investment
16 network or multistate angel capital electronic network who has
17 registered with the commissioner and who offers, sells, purchases, or
18 exchanges only securities that are registered with the commissioner or
19 the securities and exchange commission.

20 b. ~~Does not engage in or propose activities for~~ one of the states or possessions
21 of the United States or one of the provinces or territories of Canada; is
22 engaged in or proposes to engage in a business other than petroleum
23 exploration, oil or production, extractive mining, or any blind pool other
24 extractive industries; and is not a blind pool offering without a or other offering

- 1 for which the specific business purpose or properties cannot now be
2 described.
- 3 e. ~~Discusses potential business strategies and economic development or solicits~~
4 (2) The issuer may solicit indications of ~~potential~~ interest in a project or
5 business only within a period of twelve months after receiving approval
6 from the commissioner and does not pay a commission or fee to any
7 person for soliciting a potential investor or prospective purchaser in this
8 state ~~or involving a resident of this state~~ unless the person who
9 receives the commission or fee is registered as a dealer or sales agent
10 in this state.
- 11 d. ~~Intends to file an application~~
12 (3) The issuer intends to register securities in this state or ~~to~~ receive
13 approval for an exemption under subsection 9 and ~~the issuer intends to~~
14 ~~offer and sell securities described in section 3(a)11 of the federal~~
15 ~~Securities Act of 1933, in~~ conduct its offering pursuant to either
16 regulation A or rule 504 ~~of regulation D of, as promulgated by the~~
17 securities and exchange commission, ~~in a small corporate offering~~
18 ~~registration, or in a state or federal securities registration for a private~~
19 ~~placement involving only accredited investors as defined by the~~
20 ~~securities and exchange commission.~~
- 21 e. (4) ~~Files~~ The issuer files a solicitation of interest form and copies of any
22 advertising or marketing materials, including scripts for use in
23 telephone, television, electronic, or computer publications, for approval
24 by the commissioner at least ten business days before the issuer
25 begins soliciting indications of interest from potential purchasers and at
26 least ten business days before publishing or distributing any materials
27 or information to any person.
- 28 f. (5) ~~Obtains~~ The issuer obtains approval of the commissioner for any
29 amendments or changes in filed forms, marketing materials, or
30 advertisements at least ten business days before distributing the

1 amended marketing materials or amended advertising information to
2 any person.

3 (6) The issuer does not use any solicitation of interest form, script,
4 advertisement, or other material which the issuer has been notified by
5 the commissioner not to distribute, to solicit indications of interest.

6 (7) Except for scripted broadcasts and published notices, the issuer does
7 not communicate with any offeree about the contemplated offering
8 unless the offeree is provided with the most current solicitation of
9 interest form at or before the time of the communication or within five
10 days from the communication.

11 g. (8) ~~Stops~~ The issuer stops all communications with prospective investors
12 made in reliance on this exemption immediately after filing an
13 application to register or qualify the securities with the commissioner or
14 with the securities and exchange commission.

15 h. (9) ~~Does~~ The issuer does not accept money or sign completed contracts
16 for sales of securities with any person while soliciting indications of
17 interest and does not complete any sales of securities until at least ten
18 business days after completing a securities registration or approval to
19 offer and sell securities in this state.

20 i. ~~Includes the name, address, and telephone number of the chief executive~~
21 ~~officer of the issuer, a general description of the business and products, and~~
22 ~~the following statements in any published notice, marketing materials, or~~
23 ~~broadcast scripts:~~

24 ~~NO MONEY OR OTHER CONSIDERATION IS BEING SOLICITED~~
25 ~~AND NONE WILL BE ACCEPTED UNTIL AFTER THESE~~
26 ~~SECURITIES ARE REGISTERED OR QUALIFIED WITH THE~~
27 ~~SECURITIES COMMISSIONER OF THIS STATE AND WITH THE~~
28 ~~SECURITIES AND EXCHANGE COMMISSION.~~

29 ~~NO SALES OF THESE SECURITIES WILL BE MADE OR~~
30 ~~COMMITMENT TO PURCHASE ACCEPTED UNTIL AFTER~~

1 ~~DELIVERY OF A PROSPECTUS THAT INCLUDES ADDITIONAL~~
2 ~~INFORMATION ABOUT THE OFFERING.~~

3 ~~A PROSPECTIVE INVESTOR WHO EXPRESSES AN INTEREST IN~~
4 ~~THIS INVESTMENT OR PROJECT IS NOT OBLIGATED OR~~
5 ~~COMMITTED TO INVEST MONEY OR PURCHASE SECURITIES.~~

6 j. ~~Does not know and, in the exercise of reasonable care, could not have known~~
7 ~~that the issuer or any officer, director, ten percent shareholder, promoter,~~
8 ~~partner, manager or agent of the issuer has:~~

9 ~~(1)~~ (10) ~~Been~~ The issuer does not make a sale until three days after delivery to
10 the purchaser of a prospectus or similar disclosure document.

11 (11) The issuer does not know, and in the exercise of reasonable care could
12 not know, that the issuer or any officer, director, manager, ten percent
13 shareholder, promoter, partner, or agent of the issuer:

14 (a) Has been the subject of or filed a registration statement that is
15 the subject of a stop order, administrative enforcement order,
16 judgment, injunction, or restraining order issued by any federal or
17 state securities agency, any court of competent jurisdiction, or the
18 United States postal service and which prohibits, denies, or
19 revokes the registration; or use of any exemption from
20 registration in connection with the offer, sale, or purchase of a
21 security, franchise, commodity, or other financial transaction or
22 which involves fraud, deceit, misstatements of material facts,
23 forgery, embezzlement, obtaining money under false pretenses,
24 larceny, conspiracy to defraud, or similar deceptive acts within
25 five years prior to the filing of the solicitation of interest form; or

26 ~~(2)~~ (b) ~~Been~~ Has been convicted of any felony or misdemeanor
27 involving the offer, purchase, or sale of a security, franchise,
28 commodity, or financial transaction, or any felony or
29 misdemeanor involving fraud, deceit, forgery, embezzlement,
30 ~~obtaining money under false pretenses, larceny,~~ conspiracy to
31 defraud, or a similar financial crime.

- 1 The prohibitions listed above shall not apply if the person subject to the
2 disqualification is duly licensed or registered to conduct
3 securities-related business in the state in which the administrative order
4 or judgment was entered against such person or if the dealer employing
5 such party is licensed or registered in this state and the form B-D filed
6 with this state discloses the order, conviction, judgment, or decree
7 relating to such person. A person disqualified under this subsection
8 may not act in a capacity other than that for which the person is
9 licensed or registered. Any disqualification caused by this section is
10 automatically waived if the agency, which created the basis for
11 disqualification, determines upon a showing of good cause that it is not
12 necessary under the circumstances that the exemption be denied.
- 13 b. The issuer shall comply with the requirements set forth below. Failure to
14 comply will not result in the loss of the exemption from the requirements of
15 section 10-04-04, but is a violation of this chapter, is actionable by the
16 commissioner under section 10-04-16, and constitutes grounds for denying or
17 revoking the exemption as to a specific security or transaction.
- 18 (1) Any published notice must contain at least the identity of the chief
19 executive officer of the issuer, a brief and general description of its
20 business and products, and the following legends:
- 21 (a) NO MONEY OR OTHER CONSIDERATION IS BEING
22 SOLICITED AND NONE WILL BE ACCEPTED;
- 23 (b) NO SALES OF THE SECURITIES WILL BE MADE OR
24 COMMITMENT TO PURCHASE ACCEPTED UNTIL DELIVERY
25 OF A PROSPECTUS OR SIMILAR DISCLOSURE DOCUMENT
26 THAT INCLUDES COMPLETE INFORMATION ABOUT THE
27 ISSUER AND THE OFFERING;
- 28 (c) AN INDICATION OF INTEREST MADE BY A PROSPECTIVE
29 INVESTOR INVOLVES NO OBLIGATION OR COMMITMENT
30 OF ANY KIND; AND

- 1 (d) THIS OFFER IS BEING MADE PURSUANT TO AN EXEMPTION
2 FROM REGISTRATION UNDER THE FEDERAL AND STATE
3 SECURITIES LAWS. NO SALE MAY BE MADE UNTIL THE
4 OFFERING STATEMENT IS QUALIFIED BY THE SECURITIES
5 AND EXCHANGE COMMISSION AND IS REGISTERED OR
6 APPROVED IN THIS STATE.
- 7 (2) Any script for broadcast must contain at least the identity of the chief
8 executive of the issuer, a brief description of its business and products,
9 its address and telephone number and the following legends:
- 10 (a) THIS IS FOR AN INDICATION OF INTEREST ONLY AND
11 INVOLVES NO OBLIGATION OR COMMITMENT OF ANY KIND
12 UPON A PROSPECTIVE INVESTOR;
- 13 (b) NO MONEY OR OTHER CONSIDERATION IS BEING
14 SOLICITED; and
- 15 (c) THIS OFFER IS MADE PURSUANT TO AN EXEMPTION FROM
16 REGISTRATION UNDER FEDERAL AND STATE SECURITIES
17 LAWS.
- 18 c. Offers made on reliance of this exemption will not result in a violation of
19 section 10-04-04 by virtue of being integrated with subsequent offers or sales
20 of securities unless such subsequent offers and sales would be integrated
21 under federal securities laws.