

## LEGISLATIVE BILL 60

Approved by the Governor February 10, 1989

Introduced by Barrett, 39

AN ACT relating to the Securities Act of Nebraska; to amend sections 8-1101, 8-1103, and 8-1111, Reissue Revised Statutes of Nebraska, 1943; to change a provision relating to transactions exempt from registration; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 8-1101, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1101. ~~As used in sections 8-1101 to 8-1124~~ For purposes of the Securities Act of Nebraska, unless the context otherwise requires:

(1) Director shall mean the Director of Banking and Finance of the State of Nebraska, except as further provided in section 8-1120;

(2) Agent shall mean any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities, but agent ~~does~~ shall not include an individual who represents an issuer in (a) effecting a transaction in a security exempted by subdivision (8), (9), or (10) of section 8-1110, (b) effecting certain transactions exempted by section 8-1111, or (c) effecting transactions with existing employees, partners, or directors of the issuer or any of its subsidiaries if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state. A partner, officer, or director of a broker-dealer ~~is~~ shall be an agent only if he or she otherwise comes within this definition;

(3) Broker-dealer shall mean any person engaged in the business of effecting transactions in securities for the account of others or for his or her own account. Broker-dealer ~~does~~ shall not include (a) an issuer-dealer, agent, bank, savings institution, or trust company, (b) a person who has no place of business in this state if he or she effects transactions in this state exclusively with or through the issuers of the securities involved in the transactions, other

broker-dealers, or banks, savings institutions, trust companies, insurance companies, investment companies, as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (c) a person who has no place of business in this state if during any period of twelve consecutive months he or she does not direct more than fifteen offers to sell or to buy into this state in any manner to persons other than those specified in subdivision (3)(b) of this section;

(4) Guaranteed shall mean guaranteed as to payment of principal, interest, or dividends;

(5) Investment adviser shall mean any person who, for compensation, engages in the business of advising others, either 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 does shall not include (a) a bank, savings institution, or trust company, ; (b) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his or her profession, ; (c) a broker-dealer, ; (d) an issuer-dealer, ; (e) a publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation, ; (f) a person whose advice, analyses, or reports relate only to securities exempted by subdivision (1) of section 8-1110, ; (g) a person who has no place of business in this state if his or her only clients in this state are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies, as defined in the Investment Company Act of 1940, pension or profit-sharing ~~trust trusts~~, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or during any period of twelve consecutive months he or she does not direct business communications into this state in any manner to more than five clients other than those specified in this subdivision (g), ; or (h) such other persons not within the intent of this subdivision as the director may by rule, regulation, or order designate;

(6) Issuer shall mean any person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates; or with respect to

certificates of interest or shares in an unincorporated investment trust not having a board of directors, or persons performing similar functions, or of the fixed, restricted management, or unit type, the term issuer shall mean the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued;

(7) Issuer-dealer shall mean (a) any issuer located in the State of Nebraska; or (b) any issuer which registered its securities by qualification who proposes to sell to the public of the State of Nebraska the securities that it issues without the benefit of another registered broker-dealer. Such securities shall have been approved for sale in the State of Nebraska pursuant to section 8-1104;

(8) Nonissuer shall mean not directly or indirectly for the benefit of the issuer;

(9) Person shall mean an individual, a corporation, a partnership, an association, a joint-stock company, a trust where in which the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government;

(10) Sale or sell shall include every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. Offer or offer to sell shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value. A purported gift of assessable stock is shall be considered to involve an offer and sale. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is shall be considered to include an offer of the other security;

(11) Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Company Act of 1935, and Investment Company Act of 1940 shall mean the federal statutes of those names as amended before or after August 18, 1965;

(12) Security shall mean any note, stock,

treasury stock, bond, debenture, units of beneficial interest in a real estate trust, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, or in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. Security ~~does~~ shall not include any insurance or endowment policy or annuity contract issued by an insurance company; and

(13) State shall mean any state, territory, or possession of the United States as well as the District of Columbia and Puerto Rico.

Sec. 2. That section 8-1103, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1103. (1) It shall be unlawful for any person to transact business in this state as a broker-dealer, issuer-dealer, or agent, except in certain transactions exempt under section 8-1111, unless he or she is registered under ~~sections 8-1101 to 8-1124~~ the Securities Act of Nebraska. It shall be unlawful for any broker-dealer to employ an agent for purposes of effecting or attempting to effect transactions in this state unless the agent is registered. It shall be unlawful for an issuer to employ an agent unless the issuer is registered as an issuer-dealer and unless the agent is registered. It shall be unlawful for any person to transact business in this state as an investment adviser unless (a) he or she is ~~so~~ registered as an investment adviser under sections 8-1101 to 8-1124 this section, or (b) he or she is registered as a broker-dealer under ~~sections 8-1101 to 8-1124~~ this section, or (c) his or her only clients in this state are investment companies, as defined in the Investment Company Act of 1940, or insurance companies.

(2) A broker-dealer, issuer-dealer, agent, or investment adviser may apply for registration by filing with the director an application together with a consent to service of process pursuant to section 8-1112 and payment of the fee prescribed in subsection (5) of this section. Registration of a broker-dealer or

issuer-dealer shall automatically constitute registration of all partners, officers, or directors of such broker-dealer or issuer-dealer as agents, except any partner, officer, or director whose registration as an agent is denied, suspended, or revoked under subsection (7) of this section, without the filing of applications for registration as agents or the payment of fees for registration as agents. The application shall contain whatever information the director requires concerning such matters as:

(a) The applicant's form and place of organization;

(b) The applicant's proposed method of doing business;

(c) The qualifications and business history of the applicant and, in the case of a broker-dealer or investment adviser, any partner, officer, or director;

(d) Any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and

(e) The applicant's financial condition and history.

(3) If no denial order is in effect and no proceeding is pending under subsection (7) of this section, registration shall become effective at noon of the thirtieth day after an application is filed. The director may specify an earlier effective date, and he or she may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. The director shall require as conditions of registration:

(a) That the applicant, except for renewal, and, in the case of a corporation or partnership, the officers, directors, or partners, pass such examination or examinations as the director may prescribe as evidence of knowledge of the securities business;

(b) That an issuer-dealer and its agents pass an examination prescribed and administered by the Department of Banking and Finance. Such examination shall be administered upon request and upon payment of an examination fee of five dollars. Any applicant for issuer-dealer registration who has satisfactorily passed any other examination approved by the director shall be exempted from this requirement upon furnishing evidence of satisfactory completion of such examination to the director; and

(c) That a broker-dealer or issuer-dealer have a minimum net capital of twenty-five thousand dollars.

In lieu of a minimum net capital requirements requirement of twenty-five thousand dollars, the director may require a broker-dealer or issuer-dealer to post a corporate surety bond with a surety licensed to do business in Nebraska in an amount equal to such capital requirements. When the director finds that a surety bond with a surety company would cause an undue burden on an issuer-dealer, the director may require the issuer-dealer to post a signature bond. Every such surety bond shall run in favor of Nebraska, shall provide for suit thereon by any person who has a cause of action under section 8-1118, and shall provide that no suit may be maintained to enforce any liability on the bond unless brought within two years after the sale or other act upon which it is based. ~~The~~ ~~7~~ ~~PROVIDED~~, that no written examination shall be required of any applicant who immediately prior to August 18, 1965, had an effective license as a broker or salesman under the provisions of sections 81-302 to 81-349, AND ~~PROVIDED~~ ~~FURTHER~~, that the director may waive the requirements requirement of an examination for any applicant who by reason of prior experience can demonstrate his or her knowledge of the securities business.

Registration of a broker-dealer, issuer-dealer, agent, or investment adviser shall be effective for a period of one year and may be renewed as provided in this section. The registration of an agent shall not be effective during any period when he or she is not associated with a registered broker-dealer or issuer-dealer specified in his or her application or a notice filed with the director. When an agent begins or terminates a connection with a registered broker-dealer or issuer-dealer, the agent and the broker-dealer or issuer-dealer shall promptly notify the director.

(4) Registration of a broker-dealer, issuer-dealer, agent, or investment adviser may be renewed by filing with the director prior to the expiration thereof an application containing such information as the director may require to indicate any material change in the information contained in the original application or any renewal application for registration as a broker-dealer, issuer-dealer, agent, or investment adviser filed with the director by the applicant, payment of the prescribed fee, and, in the case of a broker-dealer or issuer-dealer, a financial statement showing the financial condition of such broker-dealer or issuer-dealer as of a date within ninety days.

(5) The fee for initial or renewal

registration shall be one hundred dollars for a broker-dealer or issuer-dealer, fifty dollars for an investment adviser, and fifteen dollars for an agent. When an application is denied or withdrawn, the director shall retain all of the fee.

(6) Every registered broker-dealer, issuer-dealer, and investment adviser shall make and keep such accounts and other records, except with respect to securities exempt under subdivision (1) of section 8-1110, as the director shall prescribe. All records so required shall be preserved for three years unless the director shall prescribe otherwise for particular types of records. All the records of a registered broker-dealer, issuer-dealer, or investment adviser shall be 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 shall deem ~~deems~~ necessary or appropriate in the public interest or for the protection of investors.

(7) The director may by order deny, suspend, or revoke registration of any broker-dealer, issuer-dealer, agent, or investment adviser if he or she finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer, issuer-dealer, or investment adviser, any partner, officer, or director:

(a) Has filed an application for registration under this section which, ~~as of September 27, 1973, or~~ as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) Has willfully violated or willfully failed to comply with any provision of ~~sections 8-1101 to 8-1124~~ the Securities Act of Nebraska or a predecessor act or any rule, regulation, or order adopted and promulgated pursuant to the act or order under the provisions of ~~sections 8-1101 to 8-1124~~ or a predecessor act;

(c) Has been convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;

(d) Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;

(e) Is the subject of an order of the director

denying, suspending, or revoking registration as a broker-dealer, issuer-dealer, agent, or investment adviser;

(f) Is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer or agent, or the substantial equivalent of those terms as defined in sections 8-1101 to 8-1124 section 8-1101, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him or her from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States post office fraud order; but the director may not institute a revocation or suspension proceeding under this subdivision more than one year from the date of the order relied on, and he or she may not enter any order under this subdivision on the basis of an order unless that order was based on facts which would currently constitute a ground for an order under this section;

(g) Has engaged in dishonest or unethical practices in the securities business;

(h) Is insolvent, either in the sense that his or her liabilities exceed his or her assets or in the sense that he or she cannot meet his or her obligations as they mature; but the director may not enter an order against a broker-dealer, issuer-dealer, or investment adviser under this subdivision without a finding of insolvency as to the broker-dealer, issuer-dealer, or investment adviser;

(i) Has not complied with a condition imposed by the director under subsection (3) of this section; or is not qualified on the basis of such factors as training, experience, or knowledge of the securities business;

(j) Has failed to pay the proper filing fee, but the director may enter only a denial order under this subdivision, and he or she shall vacate any such order when the deficiency has been corrected; or

(k) Has been denied the right to do business or his or her respective authority to do business has been revoked by any other governmental agency for cause.

The director may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him or her when registration became effective. The director may by order summarily postpone or suspend registration pending final determination of



any proceeding under this subsection. Upon the entry of the order, the director shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an agent, that it has been entered and of the reasons therefor and that within fifteen days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the director, the order shall remain in effect until it is modified or vacated by the director. If a hearing is requested or ordered, the director, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination. No order may be entered under this section denying or revoking registration without appropriate prior notice to the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is an agent, opportunity for hearing, and written findings of fact and conclusions of law.

If the director finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, issuer-dealer, investment adviser, or agent, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the director may by order cancel the registration or application.

Sec. 3. That section 8-1111, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-1111. Except as hereinafter provided in this section, expressly provided, sections 8-1103 to 8-1109 shall not apply to any of the following transactions:

- (1) Any isolated transaction, whether effected through a broker-dealer or not;
- (2) Any nonissuer distribution of an outstanding security by a registered agent of a registered broker-dealer if (a) a recognized securities manual contains the name of the issuer's officers and directors, a balance sheet of the issuer as of a date within eighteen months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations or (b) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal,

interest, or dividends on the security;

(3) Any nonissuer transaction effected by or through a registered agent of a registered broker-dealer pursuant to an unsolicited order or offer to buy, but the director may by rule or regulation require that the customer acknowledge upon a specified form that the sale was unsolicited and that a signed copy of each such form be preserved by the broker-dealer for a specified period;

(4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter; or among underwriters;

(5) Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust; or by an agreement for the sale of real estate or chattels; if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, are offered and sold as a unit. Such exemption shall not apply to any transaction in a bond or other evidence of indebtedness secured by a real estate mortgage or deed of trust or by an agreement for the sale of real estate if the real estate securing the evidences of indebtedness are parcels of real estate the sale of which requires the subdivision in which the parcels are located to be registered under the Interstate Land Sales Full Disclosure Act, 82 Stat. 590 et seq., 15 U.S.C. 1701 et seq.;

(6) Any transaction by an executor, personal representative, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(7) Any transaction executed by a bona fide pledgee without any purpose of evading the Securities Act of Nebraska;

(8) Any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer; or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(9) Any transaction pursuant to a sale to not more than ten persons, other than those designated in subdivision (8) of this section, in this state during any period of twelve consecutive months if (a) the seller reasonably believes that all the buyers are purchasing for investment, (b) no commission or other remuneration is paid or given directly or indirectly for

soliciting any prospective buyer, except to a registered agent of a registered broker-dealer, registered under the Securities Act of Nebraska; (c) a notice generally describing the terms of the transaction and containing a representation that the conditions of this exemption are met is filed by the seller with the director within thirty days after the first sale for which this exemption is claimed, except that failure to give such notice may be cured by an order issued by the director in his or her discretion, and (d) no solicitations are made by newspaper, radio, or television;

(10) Any offer or sale of a preorganization certificate or subscription if (a) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (b) the number of subscribers does not exceed ten, and (c) no payment is made by any subscriber;

(11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than ninety days of their issuance, if (a) no commission or other remuneration, other than a standby commission, is paid or given directly or indirectly for soliciting any security holder in this state or (b) the issuer first files a notice specifying the terms of the offer and the director does not by order disallow the exemption within the next five full business days;

(12) Any offer, but not a sale, of a security for which registration statements have been filed under both the Securities Act of Nebraska and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either the Securities Act of Nebraska or the Securities Act of 1933;

(13) The issuance of any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by the stockholders for the distribution other than the surrender of a right to a cash dividend when the stockholder can elect to take a dividend in cash or stock;

(14) Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split, merger, consolidation, or sale of assets;

(15) Any transaction involving the issuance for cash of any evidence of ownership interest or indebtedness by an agricultural cooperative formed as a corporation under section 21-1301 or 21-1401 if the issuer has first filed a notice of intention to issue with the director and the director has not by order, mailed to the issuer by certified or registered mail within ten business days after receipt thereof, disallowed the exemption; or

(16) Any transaction in this state not involving a public offering when (a) there is no general or public advertising or solicitation, (b) no commission or remuneration is paid directly or indirectly for soliciting any prospective buyer, except to a registered agent of a registered broker-dealer or registered issuer-dealer, registered under the Securities Act of Nebraska; (c) a notice generally describing the terms of the transaction and containing a representation that the conditions of this exemption are met is filed by the seller with the director within thirty days after the first sale for which this exemption is claimed, except that failure to give such notice may be cured by an order issued by the director in his or her discretion, and (d) any such transaction is effected in accordance with rules and regulations adopted and promulgated by the director relating to this section when the director finds in adopting and promulgating such rules and regulations that the applicability of sections 8-1104 to 8-1107 is not necessary or appropriate in the public interest or for the protection of investors. As used in this section, not involving any public offering shall mean any offering in which the seller has reason to believe that the securities purchased are taken for investment and in which each offeree, by reason of his or her knowledge about the affairs of the issuer or otherwise, does not require the protections afforded by registration under sections 8-1104 to 8-1107 in order to make a reasonably informed judgment with respect to such investment.

The director may by order deny or revoke the exemption specified in subdivision (2) of this section with respect to a specific security. Upon the entry of such an order, the director shall promptly notify all registered broker-dealers that it has been entered and of the reasons therefor and that within fifteen days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the director, the order will remain in effect until it is modified or vacated by the director.

If a hearing is requested or ordered, the director, after notice of and opportunity for hearing to all interested persons, may modify or vacate the order or extend it until final determination. No such order may operate retroactively. No person may be considered to have violated the provisions of the Securities Act of Nebraska by reason of any offer or sale effected after the entry of any such order if he or she sustains the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the order. In any proceeding under the Securities Act of Nebraska, the burden of proving an exemption from a definition shall be upon the person claiming it.

Sec. 4. That original sections 8-1101, 8-1103, and 8-1111, Reissue Revised Statutes of Nebraska, 1943, are repealed.