

OPINION
66-239

February 9, 1966 (OPINION)

Mr. Wallace E. Warner

Securities Commissioner

RE: Securities - Exemption - Interpretation

This is in response to your request for an official opinion clarifying the language found in section 10-04-05(2) of the North Dakota Century Code, as amended. This subsection is under the general heading, "EXEMPT SECURITIES", and provides as follows:

* * * * Sections 10-04-04, 10-04-07, 10-04-07.1 and 10-04-08 shall not apply to any of the following securities:

* * * *

2. Securities issued by a national bank or a national bank and trust company or bank or credit or loan or savings association or savings and loan association or credit union organized pursuant to an act of Congress of the United States of America and supervised by the United States of America, or any agency thereof, or issued by a state bank, trust company, savings bank or savings institution or credit union incorporated under the laws of this state, and subject to supervision by this state or by any agency thereof, and securities of any person subject to examination by the state examiner of North Dakota;
* * * *."

The specific question is whether the language, "* * * * and securities of any person subject to examination by the state examiner of the State of North Dakota * * * *", refers only to those financial corporations and institutions mentioned in Chapter 6-01 (more specifically section 6-01-09); or whether it provides for a separate and distinct exemption for those persons or institutions which are subject to examination by the state examiner, for example, licensees under the Small Loans Act.

On a cursory examination it might appear that the language "* * * * and securities of any person subject to examination by the state examiner of the State of North Dakota" might have reference to political subdivisions and public corporations as mentioned in sections 6-01-21.1 and 6-01-21.2, as amended. However, upon closer examination it is found that political subdivisions and public agencies, which would include public corporations, are already exempt under subsection 1 of section 10-04-05, consequently, there is no need for further exemption. It is also observed that the language in question appeared in the Securities Act prior to the enactment of the Small Loans Act.

Upon careful examination of the exemption provision, it is found that the securities issued by such persons are exempt. The term "person" includes corporation, partnership, etc., as defined in subsection 6 of section 10-04-02. We recognize a distinction between securities issued by a person or corporation after same are authorized to engage in a certain business as compared to securities issued before the person or corporation are authorized to engage in a business; as an example, the issuance of securities to form a business and the issuance of securities in due course of business after the business is formed and is operating. In this respect we must take into consideration the statutory definition of "securities" which includes, amongst other things, bonds, notes promissory notes, etc.

Keeping in mind the foregoing and by careful examination of the language found in section 10-04-05(2), it is observed that there are in reality three (3) exemptions afforded under said section. The first exemption pertains to securities issued by national banking institutions organized pursuant to an act of Congress and supervised by the United States of America, or an agency thereof; the second exemption pertains to state banks, etc., incorporated under the laws of this state and subject to supervision by this state, or an agency thereof; and the third exemption pertains to those securities issued by persons or corporations subject to examination by the state examiner of the State of North Dakota. It appears that the Legislature provided this exemption to avoid duplicity in supervision, etc. While the language in question was not specifically designed to cover small loans, nevertheless it applies to same. Nearly all of the daily transactions of a small loans business involve securities.

We also take note that Chapter 10-04 of the North Dakota Century Code contains a penalty for violating any of the provision thereunder. The language of section 10-04-05(2) is sufficiently broad enough to cover the securities issued by a small loans licensee. Any attempt to hold that the transactions of a small loans licensee would not be exempt and would constitute a violation of Chapter 10-04 would, in all probability, be unsuccessful.

It is therefore our opinion that the language referred to exempts securities issued by a licensee under the Small Loans Act, Chapter 10-03 of the North Dakota Century Code, if the securities issued are the result of business transactions of the licensee operating and conducting a small loans business. This exemption, however, does not apply to any securities issued by individuals or corporations in the formation of a small loans business. The exemptions afforded under subsection 2 are available only to the persons or institutions which are authorized by law to engage in the business as distinguished from securities issued to form a corporation to engage in the business, or securities issued to expand the business. The exemption applies only to the transactions resulting from the business itself.

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