

LETTER OPINION
80-25

April 3, 1980 (OPINION)

Mr. Byron Knutson
Commissioner
North Dakota Insurance Department
Capitol Building
Bismarck, ND 58505

Dear Mr. Knutson:

This is in response to your letter of March 12, 1980, wherein you request an opinion of this office relative to filing requirements of a corporation formed and existing under the provisions of chapter 6-05 of the North Dakota Century Code. You submit the following in your letter of inquiry.

I respectfully request an opinion as to the filing requirements of a single corporation conducting two separate businesses regulated by two separate boards.

More particularly, a surety and trust corporation organized under the provisions of chapter 6-05 of the North Dakota Century Code is required to file an annual report with the Commissioner of Insurance under the provisions of section 6-05-22, North Dakota Century Code. Must that same corporation file duplicates with the Department of Banking and Financial Institutions and the Secretary of State as well?

You do not specify any particular factual situation giving rise to your inquiry nor do you state any factual matters which may be involved in any particular instance. For this reason, our response and opinion must be general in nature and would note that specific factual matters may alter any conclusion expressed herein.

Initially we would note that a company organized and existing under the provisions of chapter 6-05 of the North Dakota Century Code, must make a filing in the office of the Commissioner of Insurance showing compliance with section 6-05-05 of the North Dakota Century Code. The same provides as follows:

6-05-22. DOMESTIC SURETY COMPANIES AND AGENTS MUST OBTAIN CERTIFICATE FROM COMMISSIONER OF INSURANCE. Every corporation organized under the laws of this state for the purpose, in whole or in part, of transacting the business of fidelity or corporate suretyship must comply with the provisions of this chapter and must pay the fees provided for under section 26-01-04. Upon the filing in the office of the Commissioner of Insurance by any such corporation of a certificate issued by the State Treasurer showing compliance with section 6-05-05, together with a certified copy of its articles of incorporation and the payment of the proper fee therefor, the Commissioner of Insurance shall issue to the corporation a certificate setting forth that it has qualified and is authorized for the ensuing

year to engage in the business of writing fidelity and surety bonds. Such certificate shall be evidence of the corporation's authority to become and be accepted as sole surety and of its solvency and credit for all purposes, and shall be issued annually on the filing by such corporation of a statement of its condition as of December thirty-first of the year last ending. Certificates to the agents of the corporation as provided in chapter 26-17.1 shall be issued on compliance with this section. (Emphasis supplied).

With regard to required filings with the Office of Secretary of State and the State Banking Board, we would note the following provision which is by reference made applicable to corporations doing business under chapter 6-05 of the North Dakota Century Code, as found in section 6-05-34 which provides as follows:

6-05-34. OTHER CODE PROVISIONS APPLICABLE TO CORPORATIONS DOING BUSINESS UNDER THIS CHAPTER. The provisions of title 10, as it may be amended from time to time, governing profit corporations, and sections 6-01-06, 6-01-09, 6-03-11, 6-03-12, 6-03-27, 6-03-33, 6-03-34, 6-03-35, 6-03-41, 6-03-42, 6-03-51, 6-03-52, 6-03-53, 6-03-54, 6-03-55, 6-03-56, 6-03-57, 6-03-58, 6-03-61, 6-03-62, 6-03-63, 6-03-64, 6-03-65, 6-03-70, 6-03-72, 6-07-01, 6-07-02, 6-07-04, 6-07-05, 6-07-06, 6-07-21, 6-07-23, 6-07-24, 6-07-25, 6-07-26, 6-07-27, 6-07-28, 6-07-29, 6-08-03, 6-08-06, 6-08-09, 6-08-14, and 6-08-20 shall be applicable to and shall be observed by all corporations organized under this chapter, except as to provisions thereof inconsistent with the provisions of this chapter. (Emphasis supplied).

Noting also that title 10, governing corporations provides by section 10-23-02 for filing of an annual report of domestic and foreign corporations with the Secretary of State and section 6-03-70 provides for filing reports with the State Banking Board, it appears that such reports are statutorily required.

This office expressed a similar position in a letter dated May 9, 1962, addressed to Mr. A. J. Jensen, Commissioner of Insurance, wherein in response to the question "Would it be necessary that we file our schedule of rates with you and the annual report?", we stated as follows:

Inasmuch as your business is touching two phases, namely insurance and trust activities, a report to the State Examiner under section 6-05-18 of the N.D.C.C. is required and a report to the Insurance Commissioner under the insurance laws is also required.

Due to the fact that the above-noted letter was also in response to a general question, we stated that the response was general and must be considered as such on the basis that we do not have available information on some details which might bring about a different result.

Subsequent to the above-noted letter, this office responded to an inquiry which made reference to the expressions relative to such filing requirements, which was addressed to Mr. K. O. Nygaard,

Insurance Commissioner, dated September 30, 1965, and provided as follows:

MR. K. O. NYGAARD

Insurance Commissioner

This is in response to your letter in which you make reference to a letter written to Mr. A. J. Jensen, dated May 9, 1962, and to chapter 6-05 and then ask what discretion does the Commissioner of Insurance have in granting or refusing a certificate of authority to do business under the following facts:

The American Trust and Deposit, Inc., a domestic corporation organized under the provisions of chapter 6-05, has now applied for a certificate of authority to engage in the business of writing fidelity and surety bonds. The corporation has filed certified copies of its articles of incorporation and amendments thereto. The corporation has also filed a certificate from the State Treasurer indicating that the corporation has complied with the provisions of sections 6-05-04 and 6-05-05 relating to deposit requirements.

Section 6-05-22 provides that every corporation intending to transact business in fidelity or surety bonds must comply with chapter 6-05. This section provides "Upon the filing in the office of the Commissioner of Insurance by any such corporation of a certificate issued by the State Treasurer showing compliance with section 6-05-05, together with a certified copy of its articles of incorporation and the payment of the proper fee therefor, the Commissioner of Insurance shall issue to the corporation a certificate setting forth that it has qualified and is authorized for the ensuing year to engage in the business of writing fidelity and surety bonds. * * * ."

This section is specific and leaves little or no discretion with the Insurance Commissioner. Whether or not he would have discretion would be a matter for the Legislature to determine.

In reviewing the provisions of the title 26 we find that the Insurance Commissioner has general supervision of all companies engaged in the insurance business in the State of North Dakota. The furnishing of surety bonds is a form of insurance. In this respect section 26-01-12 provides as follows:

Before a surety company or an insurance company, other than a life insurance company, shall be authorized to transact business in this state, the Commissioner of Insurance may require it to file with him a sworn statement and other proof that it has not written, or caused to be written, any surety bond or insurance contract on any person, firm, or corporation, or on property in this state, at any time prior to filing its application for a certificate of authority to do business in this state. * * * .

This section appears to be in addition to the provisions of

section 6-05-22 and does not appear to be in conflict with said section. However, it is observed that the provisions of section 26-01-12 are permissible rather than mandatory.

In direct response to your question, it is our opinion that where a corporation organized under the provisions of chapter 6-05 has complied with the provisions of section 6-05-22 and has caused to be performed or has performed all the conditions set forth therein, the corporation is entitled to a certificate of authority to write fidelity and surety bonds. The certificate of authority which is required to be issued by the Insurance Commissioner constitutes authority to do business in the State of North Dakota as contemplated in section 26-17-01. It further appears that there is little or no discretion to be exercised by the Insurance Commissioner after the corporation has complied with the provisions of section 6-05-22, except that he may require the statement referred to in section 26-01-12.

It is our further opinion that the corporation engaging in the business of writing fidelity and surety bonds becomes subject to the provisions of title 26 as well as to the provisions in chapter 6-05. The State Examiner has supervisory authority over the corporation in the matters set out in chapter 6-05 and the Insurance Commissioner has authority over the corporation in matters pertaining to insurance as found in title 26. Dual supervision in these instances can be in complete harmony and would not provide a basis for irreconcilable conflict.

We trust that the foregoing expressions and references will be of interest and assistance to you and that the same will be adequate for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General