

SENATE BILL NO. 140
INTRODUCED BY D. MAHLUM
BY REQUEST OF THE STATE AUDITOR

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING SECURITIES LAWS; REQUIRING BROKER-DEALERS TO NOTIFY THE STATE SECURITIES COMMISSIONER OF CERTAIN BRANCH OFFICE ACTIVITIES; REQUIRING NOTICE FILING FEES FOR BRANCH OFFICES AND MULTILEVEL DISTRIBUTION COMPANIES; REVISING FILING REQUIREMENTS FOR MULTILEVEL DISTRIBUTION COMPANIES; REVISING THE STATUTE OF LIMITATIONS FOR THE SECURITIES COMMISSIONER'S MAINTAINING AN ADMINISTRATIVE OR CIVIL ACTION; REVISING THE STATUTE OF LIMITATIONS FOR A PERSON OTHER THAN THE SECURITIES COMMISSIONER TO MAINTAIN AN ACTION FOR A VIOLATION OF STATE SECURITIES LAWS; INCREASING THE SCOPE OF LIABILITY FOR WHICH THE SECURITIES COMMISSIONER MAY REQUIRE A PERSON TO PAY RESTITUTION; DEFINING "BRANCH OFFICE"; MODIFYING THE DEFINITIONS OF "COMPENSATION", "CONSIDERATION", "MULTILEVEL DISTRIBUTION COMPANY", AND "PYRAMID PROMOTIONAL SCHEME"; DELETING THE DEFINITION OF "PARTICIPANT"; REVISING FILING REQUIREMENTS FOR MULTILEVEL DISTRIBUTION COMPANIES; AND AMENDING SECTIONS 30-10-103, 30-10-201, 30-10-209, 30-10-303, 30-10-305, 30-10-307, 30-10-309, 30-10-324, AND 30-10-326, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 30-10-103, MCA, is amended to read:

"30-10-103. Definitions. When used in parts 1 through 3 of this chapter, unless the context requires otherwise, the following definitions apply:

(1) (a) "Branch office" means any location other than a main office that is held out as a branch office or where one or more persons associated with a broker-dealer or investment adviser regularly conduct the business of effecting any transactions in or inducing or attempting to induce the purchase or sale of any security.

(b) The term does not include:

(i) a location that is established solely for customer service where sales activities are not conducted and that is not held out to the public as a branch office;

(ii) a location that is the primary residence of a person associated with a broker-dealer or investment

adviser, provided that the location conforms to the requirements of [section 2];

(iii) a location, other than a primary residence, that is used for securities business less than 30 business days in any 1 calendar year, provided that the broker-dealer or investment adviser complies with the provisions of [section 2(3) through (9)] and maintains a list of locations used for securities business pursuant to this subsection (1)(b)(iii). Any partial business day that a person associated with a broker-dealer spends at the location is not included in the 30 business days if the person also spends at least 4 hours of that business day at the person's designated branch office during the branch office's normal business hours.

(iv) an office of convenience that is not held out to the public as a branch office and where a person associated with a broker-dealer or investment adviser occasionally and exclusively meets with customers by appointment;

(v) a location that is used primarily to engage in nonsecurities activities and where a person or persons associated with a broker-dealer or investment adviser do not effect more than 25 securities transactions in any 1 calendar year and provided that any advertisements or sales literature identifying the location also set forth the address and telephone number of the location from which the person or persons associated with the broker-dealer or investment adviser who are conducting the business are directly supervised;

(vi) the floor of a registered national securities exchange where a broker-dealer or investment adviser conducts direct business with public customers; or

(vii) a temporary location established in response to the implementation of an emergency or disaster response plan.

~~(1)~~(2) (a) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for the person's own account.

(b) The term does not include:

(i) a salesperson, issuer, bank, savings institution, trust company, or insurance company; or

(ii) a person who does not have a place of business in this state if the person 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 trustee.

~~(2)~~(3) "Commissioner" means the securities commissioner of this state.

~~(3)~~(4) (a) "Commodity" means:

(i) any agricultural, grain, or livestock product or byproduct;

(ii) any metal or mineral, including a precious metal, or any gem or gem stone, whether characterized as precious, semiprecious, or otherwise;

(iii) any fuel, whether liquid, gaseous, or otherwise;

(iv) foreign currency; and

(v) all other goods, articles, products, or items of any kind.

(b) Commodity does not include:

(i) a numismatic coin with a fair market value at least 15% higher than the value of the metal it contains;

(ii) real property or any timber, agricultural, or livestock product grown or raised on real property and offered and sold by the owner or lessee of the real property; or

(iii) any work of art offered or sold by an art dealer at public auction or offered or sold through a private sale by the owner.

~~(4)~~(5) "Commodity Exchange Act" means the federal statute of that name.

~~(5)~~(6) "Commodity futures trading commission" means the independent regulatory agency established by congress to administer the Commodity Exchange Act.

~~(6)~~(7) (a) "Commodity investment contract" means any account, agreement, or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise. Any commodity investment contract offered or sold, in the absence of evidence to the contrary, is presumed to be offered or sold for speculation or investment purposes.

(b) A commodity investment contract does not include a contract or agreement that requires, and under which the purchaser receives, within 28 calendar days after the payment in good funds of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement. The purchaser is not considered to have received physical delivery of the total amount of each commodity to be purchased under the contract or agreement when the commodity or commodities are held as collateral for a loan or are subject to a lien of any person when the loan or lien arises in connection with the purchase of each commodity or commodities.

~~(7)~~(8) (a) "Commodity option" means any account, agreement, or contract giving a party to the account, agreement, or contract the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance

guaranty, decline guaranty, or otherwise.

(b) The term does not include an option traded on a national securities exchange registered with the U.S. securities and exchange commission.

~~(8)(9)~~ (a) "Federal covered adviser" means a person who is registered under section 203 of the Investment Advisers Act of 1940.

(b) The term does not include a person who would be exempt from the definition of investment adviser pursuant to subsection ~~(11)(12)(c)(i)~~, ~~(11)(12)(c)(ii)~~, ~~(11)(12)(c)(iii)~~, ~~(11)(12)(c)(iv)~~, ~~(11)(12)(c)(v)~~, ~~(11)(12)(c)(vi)~~, ~~(11)(12)(c)(vii)~~, or ~~(11)(12)(c)(ix)~~.

~~(9)(10)~~ "Federal covered security" means a security that is a covered security under section 18(b) of the Securities Act of 1933 or rules promulgated by the commissioner.

~~(10)(11)~~ "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.

~~(11)(12)~~ (a) "Investment adviser" means a 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.

(b) The term includes a financial planner or other person who:

(i) as an integral component of other financially related services, provides the investment advisory services described in subsection ~~(11)(12)(a)~~ to others for compensation, as part of a business; or

(ii) represents to any person that the financial planner or other person provides the investment advisory services described in subsection ~~(11)(12)(a)~~ to others for compensation.

(c) Investment adviser does not include:

(i) an investment adviser representative;

(ii) a bank, savings institution, trust company, or insurance company;

(iii) a lawyer or accountant whose performance of these services is solely incidental to the practice of the person's profession or who does not accept or receive, directly or indirectly, any commission, payment, referral, or other remuneration as a result of the purchase or sale of securities by a client, does not recommend the purchase or sale of specific securities, and does not have custody of client funds or securities for investment purposes;

(iv) a registered broker-dealer whose performance of services described in subsection ~~(11)(12)(a)~~ is solely incidental to the conduct of business and for which the broker-dealer does not receive special compensation;

(v) a publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form or by electronic means or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;

(vi) a person whose advice, analyses, or reports relate only to securities exempted by 30-10-104(1);

(vii) an engineer or teacher whose performance of the services described in subsection ~~(11)~~(12)(a) is solely incidental to the practice of the person's profession;

(viii) a federal covered adviser; or

(ix) other persons not within the intent of this subsection ~~(11)~~ (12) as the commissioner may by rule or order designate.

~~(12)~~(13) (a) "Investment adviser representative" means:

(i) any partner of, officer of, director of, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, employed by or associated with an investment adviser who:

(A) makes any recommendation or otherwise renders advice regarding securities to clients;

(B) manages accounts or portfolios of clients;

(C) solicits, offers, or negotiates for the sale or sells investment advisory services; or

(D) supervises employees who perform any of the foregoing; and

(ii) with respect to a federal covered adviser, any person who is an investment adviser representative with a place of business in this state as those terms are defined by the securities and exchange commission under the Investment Advisers Act of 1940.

(b) The term does not include a salesperson registered pursuant to 30-10-201(1) whose performance of the services described in subsection ~~(12)~~(13)(a) is solely incidental to the conduct of business as a salesperson and for which the salesperson does not receive special compensation other than fees relating to the solicitation or offering of investment advisory services of a registered investment adviser or of a federal covered adviser who has made a notice filing under parts 1 through 3 of this chapter.

~~(13)~~(14) "Issuer" means 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" means 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.

~~(14)~~(15) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

~~(15)~~(16) "Offer" or "offer to sell" includes each attempt or offer to dispose of or solicitation of an offer to buy a security or interest in a security for value.

~~(16)~~(17) "Person", for the purpose of parts 1 through 3 of this chapter, means an individual, a corporation, a partnership, an association, a joint-stock company, a trust in which the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

~~(17)~~(18) "Precious metal" means the following, in coin, bullion, or other form:

- (a) silver;
- (b) gold;
- (c) platinum;
- (d) palladium;
- (e) copper; and
- (f) other items as the commissioner may by rule or order specify.

~~(18)~~(19) "Registered broker-dealer" means a broker-dealer registered pursuant to 30-10-201.

~~(19)~~(20) "Sale" or "sell" includes each contract of sale of, contract to sell, or disposition of a security or interest in a security for value.

~~(20)~~(21) "Salesperson" means an individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities. A partner, officer, or director of a broker-dealer or issuer is a salesperson only if the person otherwise comes within this definition. Salesperson does not include an individual who represents:

- (a) an issuer in:
 - (i) effecting a transaction in a security exempted by 30-10-104(1), (2), (3), (8), (9), (10), or (11);
 - (ii) effecting transactions exempted by 30-10-105, except when registration as a salesperson, pursuant to 30-10-201, is required by 30-10-105 or by any rule promulgated under 30-10-105;
 - (iii) effecting transactions in a federal covered security described in section 18(b)(4)(D) of the Securities Act of 1933 for a qualified purchaser as defined in section 18(b)(3) of the Securities Act of 1933; or
 - (iv) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state; or
- (b) a broker-dealer in effecting in this state solely those transactions described in section 15(h)(2) of the Securities Exchange Act of 1934.

~~(21)~~(22) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act

of 1935", "Investment Advisors Act of 1940", and "Investment Company Act of 1940" mean the federal statutes of those names.

~~(22)~~(23) (a) "Security" means any note; stock; treasury stock; bond; commodity investment contract; commodity option; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable shares; 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 a title or lease; or, in general, any interest or instrument commonly known as a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest in a security or based on the value of a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

(b) Security does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period.

~~(23)~~(24) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico.

~~(24)~~(25) "Transact", "transact business", or "transaction" includes the meanings of the terms "sale", "sell", and "offer".

NEW SECTION. Section 2. Requirements for primary residence to not be branch office. A branch office does not include any location that is a primary residence of a person associated with a broker-dealer or investment adviser, provided that:

(1) the location is used for securities business less than 50 business days in any 1 calendar year. Any partial business day that a person associated with a broker-dealer spends at the location is not included in the 50 business days if the person also spends at least 4 hours of that business day at the person's designated branch office during the branch office's normal business hours.

(2) only one person conducts business at the location, except that multiple persons associated with a broker-dealer or investment adviser who are members of the same immediate family and reside at that location may conduct business at that location;

(3) the person associated with a broker-dealer or investment adviser does not meet with customers at the location and the location is not held out to the public as an office;

- (4) customer funds and securities are not handled at the location;
- (5) the person associated with a broker-dealer or investment adviser is assigned to a designated branch office and the designated branch office is reflected on the person's business cards, stationery, advertisements, and other communications to the public;
- (6) the correspondence and communications with the public of a person associated with a broker-dealer or investment adviser are subject to supervision by the broker-dealer or investment adviser;
- (7) electronic communications are made through the electronic system of the broker-dealer or investment adviser;
- (8) all orders are entered through the designated branch office;
- (9) written supervisory procedures pertaining to supervision of sales activities conducted at the location are maintained by the broker-dealer or investment adviser; and
- (10) a list of residence locations is maintained by the broker-dealer or investment adviser.

Section 3. Section 30-10-201, MCA, is amended to read:

"30-10-201. Registration and notice filing requirements of broker-dealers, salespersons, investment advisers, and investment adviser representatives -- notice of operation of branch office. (1) It is unlawful for a person to transact business in this state as a broker-dealer or salesperson, except as provided in 30-10-105, unless the person is registered under parts 1 through 3 of this chapter.

(2) It is unlawful for a broker-dealer or issuer to employ a salesperson to represent the broker-dealer or issuer in this state, except in transactions exempt under 30-10-105, unless the salesperson is registered under parts 1 through 3 of this chapter.

(3) It is unlawful for a person to transact business in this state as an investment adviser or as an investment adviser representative unless:

- (a) the person is registered under parts 1 through 3 of this chapter;
- (b) the person does not have a place of business in the state and the person's only clients in this state are:
 - (i) investment companies, as defined in the Investment Company Act of 1940, or insurance companies;
 - (ii) other investment advisers;
 - (iii) federal covered advisers;
 - (iv) broker-dealers;
 - (v) banks;

(vi) trust companies;

(vii) savings and loan associations;

(viii) employee benefit plans with assets of not less than \$1 million;

(ix) governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control; or

(x) other institutional investors as designated by rule or order of the commissioner; or

(c) the person does not have a place of business in this state and during the preceding 12-month period, the person has not had more than five clients who are residents of this state, other than those clients specified in subsection (3)(b).

(4) Except for federal covered advisers whose only clients are clients listed in subsection (3)(b) or who meet the requirements of subsection (3)(c), it is unlawful for a federal covered adviser to conduct advisory business in this state unless the federal covered adviser complies with the provisions of subsection ~~(6)~~ (7)(b).

(5) (a) It is unlawful for a person required to be registered as an investment adviser under Title 30, chapter 10, parts 1 through 3, to employ an investment adviser representative unless the investment adviser representative is registered or exempt from registration under Title 30, chapter 10, parts 1 through 3.

(b) It is unlawful for a federal covered adviser to employ, supervise, or associate with an investment adviser representative who maintains a place of business in this state unless the investment adviser representative is registered or exempt from registration under Title 30, chapter 10, parts 1 through 3.

(6) (a) It is unlawful for a broker-dealer to operate a branch office in this state unless the broker-dealer files a notice with the commissioner, on a form prescribed by the commissioner, for each branch office located in this state, together with the fee provided for in 30-10-209.

(b) A broker-dealer shall promptly notify the commissioner in writing if the broker-dealer:

- (i) engages a new branch manager at a branch office in this state;
- (ii) acquires a branch office in this state of another broker-dealer; or
- (iii) relocates a branch office in this state.

~~(6)~~(7) (a) A broker-dealer or a salesperson, acting as an agent for an issuer or as an agent for a broker-dealer in the offer or sale of securities for an issuer, or an investment adviser or investment adviser representative may apply for registration by filing an application in the form that the commissioner prescribes and payment of the fee prescribed in 30-10-209.

(b) Except for a federal covered adviser whose only clients are those listed in subsection (3)(b) or who meet the requirements of subsection (3)(c), a federal covered adviser shall, prior to acting as a federal covered

adviser in this state, submit a notice filing to the commissioner consisting of the fee prescribed in 30-10-209 and copies of any documents filed with the securities and exchange commission that the commissioner requires by rule or order. A notice filing is effective upon its receipt by the commissioner.

~~(7)~~(8) The application must contain whatever information the commissioner requires. A registration application of a broker-dealer, salesperson, investment adviser, or investment adviser representative may not be withdrawn before the commissioner approves or denies the registration, without the express written consent of the commissioner.

~~(8)~~(9) When the registration requirements are met, the commissioner shall make the registration effective. An effective registration of a broker-dealer, salesperson, investment adviser, or investment adviser representative may not be withdrawn or terminated without the express written consent of the commissioner.

~~(9)~~(10) Registration of a broker-dealer, salesperson, investment adviser, or investment adviser representative or a notice filing by a federal covered adviser:

(a) is effective until December 31 following the registration or notice filing or any other time as the commissioner may by rule adopt; and

(b) may be renewed pursuant to subsection ~~(11)~~ (12).

~~(10)~~(11) (a) The registration of a salesperson is not effective during any period when the salesperson is not associated with an issuer or a registered broker-dealer specified in the application. When a salesperson begins or terminates a connection with an issuer or registered broker-dealer, the salesperson and the issuer or broker-dealer shall promptly notify the commissioner.

(b) The registration of an investment adviser representative is not effective during any period when the person is not associated with either an investment adviser registered under this act or a federal covered adviser with an effective notice filing who is specified in the application. When an investment adviser representative begins or terminates a connection with an investment adviser, the investment adviser shall promptly notify the commissioner. When an investment adviser representative begins or terminates a connection with a federal covered adviser, the investment adviser representative shall promptly notify the commissioner.

~~(11)~~(12) Registration of a broker-dealer, salesperson, investment adviser, or investment adviser representative or notice filing for a federal covered adviser may be renewed by filing, prior to the expiration of the registration or notice filing, an application containing information as the commissioner may require to indicate any material change in the information contained in the original application or any renewal application for registration or notice filing, and payment of the fee prescribed by 30-10-209. A broker-dealer who is not a member of the national association of securities dealers, inc., is required to file a financial statement of the broker-dealer within

90 days of the end of the broker-dealer's fiscal year, except as provided in section 15 of the Securities Exchange Act of 1934. A registered broker-dealer or investment adviser may file an application for registration of a successor, to become effective upon approval of the commissioner.

~~(12)~~(13) (a) Except as provided in section 15 of the Securities Exchange Act of 1934 in the case of a broker-dealer and section 222 of the Investment Advisers Act of 1940 in the case of an investment adviser, every registered broker-dealer and investment adviser shall make and keep accounts and other records, except with respect to securities exempt under 30-10-104(1), as may be prescribed by the commissioner by rule or order. All required records of an investment adviser must be preserved for the period the commissioner prescribes by rule or order. All the records of a registered broker-dealer or investment adviser are subject at any time or from time to time to reasonable periodic, special, or other examinations, within or outside this state, by representatives of the commissioner, as the commissioner considers necessary or appropriate in the public interest or for the protection of investors.

(b) The commissioner may require investment advisers who are registered or required to be registered to furnish or disseminate certain information as necessary or appropriate in the public interest or for the protection of investors and advisory clients.

(c) If information contained in any document filed with the commissioner is, or becomes, inaccurate or incomplete in any material respect, the registrant or federal covered adviser shall promptly file a correcting amendment.

~~(13)~~(14) The commissioner may by order deny, suspend, or revoke registration of any broker-dealer, salesperson, investment adviser, or investment adviser representative if the commissioner finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, director, person occupying a similar status or performing similar functions, or person directly or indirectly controlling the broker-dealer or investment adviser:

(a) has filed an application for registration under this section that, as of its effective date 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 that was, in 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 parts 1 through 3 of this chapter or a predecessor law or any rule or order under parts 1 through 3 of this chapter or a predecessor law;

(c) has been convicted 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 commissioner denying, suspending, or revoking registration as a broker-dealer, salesperson, investment adviser, or investment adviser representative;

(f) is the subject of an adjudication or determination, within the past 5 years, by a securities or commodities agency or administrator of another state or a court of competent jurisdiction, that the person has violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisors Act of 1940, the Investment Company Act of 1940, or the Commodity Exchange Act or the securities or commodities law of any other state;

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

(h) is insolvent, either in the sense that the person's liabilities exceed the person's assets or in the sense that the person cannot meet obligations as they mature, but the commissioner may not enter an order against a broker-dealer or investment adviser under this subsection ~~(13)~~ (14) without a finding of insolvency as to the broker-dealer or investment adviser;

(i) has not complied with a condition imposed by the commissioner under 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 commissioner may enter only a denial order under this subsection ~~(13)~~ (14), and the commissioner shall vacate any order when the deficiency has been corrected; or

(k) has failed to reasonably supervise the person's salespersons or employees or investment adviser representatives or employees to ensure their compliance with this act.

~~(14)~~(15) The commissioner may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to the commissioner when registration became effective unless the proceeding is instituted within 30 days after the date on which the registration became effective.

~~(15)~~(16) The commissioner may by order summarily postpone or suspend registration pending final determination of any proceeding under this section.

~~(16)~~(17) Upon the entry of the order under subsection ~~(13)~~ (14), the commissioner shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is a salesperson or investment adviser representative, that it has been entered and of the reasons for the order and that if requested by the applicant or registrant within 15 days after the receipt of the commissioner's notification, the matter will be promptly set for hearing. If a hearing is not requested within 15 days and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing

is requested or ordered, the commissioner, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

~~(17)~~(18) If the commissioner finds that a registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, salesperson, investment adviser, or investment adviser representative 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 commissioner may by order cancel the registration or application.

~~(18)~~(19) The commissioner may, after suspending or revoking registration of any broker-dealer, salesperson, investment adviser, or investment adviser representative, impose a fine not to exceed \$5,000 upon the broker-dealer, salesperson, investment adviser, or investment adviser representative. The fine is in addition to all other penalties imposed by the laws of this state and must be collected by the commissioner in the name of the state of Montana and deposited in the general fund. Imposition of any fine under this subsection is an order from which an appeal may be taken pursuant to 30-10-308. If any broker-dealer, salesperson, investment adviser, or investment adviser representative fails to pay a fine referred to in this subsection, the amount of the fine is a lien upon all of the assets and property of the broker-dealer, salesperson, investment adviser, or investment adviser representative in this state and may be recovered by suit by the commissioner and deposited in the general fund. Failure of a broker-dealer, salesperson, investment adviser, or investment adviser representative to pay a fine also constitutes a forfeiture of the right to do business in this state under parts 1 through 3 of this chapter.

~~(19)~~(20) A sole proprietor registered as a broker-dealer or investment adviser who does not employ other salespersons or investment adviser representatives, other than the sole proprietor, is not required to register as both a broker-dealer and a salesperson or as an investment adviser and an investment adviser representative if the sole proprietor meets the examination requirements established by the commissioner by rule.

~~(20)~~(21) A person who is subject to the provisions of this section and who has passed the general securities principal's examination is not required to also pass the uniform investment adviser law examination. The commissioner shall by rule provide for a form that a person who passes the general securities principal's examination shall file with the commissioner as a verification of having passed the examination unless the commissioner can verify electronically that the person has passed the exam."

Section 4. Section 30-10-209, MCA, is amended to read:

"30-10-209. Fees. The following fees must be paid in advance under the provisions of parts 1 through

3 of this chapter:

(1) (a) For the registration of securities by notification, coordination, or qualification, or for notice filing of a federal covered security, there must be paid to the commissioner for the initial year of registration or notice filing a fee of \$200 for the first \$100,000 of initial issue or portion of the first \$100,000 in this state, based on offering price, plus 1/10 of 1% for any excess over \$100,000, with a maximum fee of \$1,000.

(b) Each succeeding year, a registration of securities or a notice filing of a federal covered security may be renewed, prior to its termination date, for an additional year upon consent of the commissioner and payment of a renewal fee to be computed at 1/10 of 1% of the aggregate offering price of the securities that are to be offered in this state during that year. The renewal fee may not be less than \$200 or more than \$1,000. The registration or the notice filing may be amended to increase the amount of securities to be offered.

(c) If a registrant or issuer of federal covered securities sells securities in excess of the aggregate amount registered for sale in this state, or for which a notice filing has been submitted, the registrant or issuer may file an amendment to the registration statement or notice filing to include the excess sales. If the registrant or issuer of a federal covered security fails to file an amendment before the expiration date of the registration order or notice, the registrant or issuer shall pay a filing fee for the excess sales of three times the amount calculated in the manner specified in subsection (1)(b). Registration or notice of the excess securities is effective retroactively to the date of the existing registration or notice.

(d) Each series, portfolio, or other subdivision of an investment company or similar issuer is treated as a separate issuer of securities. The issuer shall pay a portfolio notice filing fee to be calculated as provided in subsections (1)(a) through (1)(c). The portfolio notice filing fee collected by the commissioner must be deposited in the state special revenue account provided for in 30-10-115.

(2) (a) For registration of a broker-dealer or investment adviser, the fee is \$200 for original registration and \$200 for each annual renewal.

(b) For registration of a salesperson or investment adviser representative, the fee is \$50 for original registration with each employer, \$50 for each annual renewal, and \$50 for each transfer. A salesperson who is dually registered as an investment adviser representative with a broker-dealer dually registered as an investment adviser is not required to pay the \$50 fee to register as an investment adviser representative.

(c) For a federal covered adviser the fee is \$200 for the initial notice filing and \$200 for each annual renewal.

(d) For the notice filing of a branch office, the fee is \$100 for the initial notice filing and \$100 for each annual renewal. However, a broker-dealer is not liable for a fee relating to branch offices in an amount greater

than \$1,000.

(e) For the notice filing of a multilevel distribution company, the fee is \$200 for the initial notice filing and \$200 for each annual renewal.

(3) For certified or uncertified copies of any documents filed with the commissioner, the fee is the cost to the department.

(4) For a request for an exemption under 30-10-105(15), the fee must be established by the commissioner by rule. For a request for any other exemption or an exception to the provisions of parts 1 through 3 of this chapter, the fee is \$50.

(5) All fees are considered fully earned when received. In the event of overpayment, only those amounts in excess of \$10 may be refunded.

(6) Except for portfolio notice filing fees established in this section, all fees, examination charges, miscellaneous charges, fines, and penalties collected by the commissioner pursuant to parts 1 through 3 of this chapter and the rules adopted under parts 1 through 3 of this chapter must be deposited in the general fund."

Section 5. Section 30-10-303, MCA, is amended to read:

"30-10-303. Unlawful representation concerning registration or exemption. (1) The fact that an application for registration under 30-10-201~~(6)~~(7), a notice filing under 30-10-211, or a registration statement under 30-10-203, 30-10-204, or 30-10-205 has been filed or the fact that a person or security is effectively registered or a complete notice filing has been made does not constitute a finding by the commissioner that any document filed under parts 1 through 3 of this chapter is true, complete, and not misleading.

(2) The fact that an application for registration or a notice filing has been filed or a person or security is effectively registered or a complete notice filing has been made as provided in subsection (1) or the fact that an exemption or exception is available for a security or a transaction does not mean that the commissioner has passed in any way upon the merits of, qualifications of, or recommended or given approval to, any person, security, or transaction. It is unlawful to make or cause to be made to any prospective purchaser, customer, or client any representation inconsistent with this section."

Section 6. Section 30-10-305, MCA, is amended to read:

"30-10-305. Injunctions and other remedies -- limitations on actions. (1) If it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of parts 1 through 3 of this chapter or any rule or order under this chapter, the commissioner

may:

(a) issue an order directing the person to cease and desist from continuing the act or practice after reasonable notice and opportunity for a hearing. The commissioner may issue a temporary order pending the hearing that:

(i) remains in effect until 10 days after the hearing examiner issues proposed findings of fact and conclusions of law and a proposed order; or

(ii) becomes final if the person to whom notice is addressed does not request a hearing within 15 days after receipt of the notice; or

(b) without the issuance of a cease and desist order, bring an action in any court of competent jurisdiction to enjoin any acts or practices and to enforce compliance with parts 1 through 3 of this chapter or any rule or order under this chapter. Upon a proper showing, a permanent or temporary injunction, restraining order, or writ of mandamus must be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The commissioner may not be required to post a bond. If the commissioner prevails, the commissioner is entitled to reasonable ~~attorneys'~~ attorney fees as fixed by the court.

(2) A final judgment or decree, criminal or civil, determining that a person has violated parts 1 through 3 of this chapter in an action brought by the commissioner for the violation, other than a consent judgment or decree entered before trial, is prima facie evidence against that person in an action brought against the person under 30-10-307.

(3) The commissioner may, after giving reasonable notice and an opportunity for a hearing under this section, impose a fine not to exceed \$5,000 per violation upon a person found to have engaged in any act or practice constituting a violation of any provision of parts 1 through 3 of this chapter or any rule or order issued under parts 1 through 3 of this chapter. The fine is in addition to all other penalties imposed by the laws of this state and must be collected by the commissioner in the name of the state of Montana and deposited in the general fund. Imposition of any fine under this subsection is an order from which an appeal may be taken pursuant to 30-10-308. If any person fails to pay a fine referred to in this subsection, the amount of the fine is a lien upon all of the assets and property of the person in this state and may be recovered by suit by the commissioner and deposited in the general fund. Failure of the person to pay a fine also constitutes a forfeiture of the right to do business in this state under parts 1 through 3 of this chapter.

(4) ~~(a)~~ An administrative or civil action may not be maintained by the commissioner under this section to enforce a liability founded on a violation of ~~30-10-201(1) through (3) or 30-10-202~~ parts 1 through 3 of this chapter or any rule or order issued under this chapter unless it is brought within ~~2~~ 5 years after the violation

occurs or within 2 years after discovery by the commissioner or the commissioner's staff of the facts constituting the violation.

~~(b) An administrative or civil action may not be maintained by the commissioner under this section to enforce a liability founded on a violation of parts 1 through 3 of this chapter or any rule or order issued under this chapter, except 30-10-201(1) through (3) and 30-10-202, unless it is brought within 2 years after discovery by the commissioner or the commissioner's staff of the facts constituting the violation.~~

~~————(c) An action may not be maintained under this section to enforce any liability founded on a violation of parts 1 through 3 of this chapter or any rule or order issued under this chapter unless it is brought within 5 years after the transaction on which the action is based."~~

Section 7. Section 30-10-307, MCA, is amended to read:

"30-10-307. Civil liabilities -- limitations on actions. (1) Any person who offers or sells a security in violation of 30-10-202 or offers or sells a security by means of fraud or misrepresentation is liable to the person buying the security, ~~from him, who~~ The person buying the security may sue either at law or in equity to recover the consideration paid for the security, together with interest at 10% ~~per annum~~ a year from the date of payment, costs, and reasonable ~~attorneys'~~ attorney fees, less the amount of any income received on the security, upon the tender of the security, or for damages if ~~he~~ the person buying the security no longer owns the security. Damages are the amount that would be recoverable upon a tender less:

- (a) the value of the security when the buyer disposed of it; and
- (b) interest at 10% ~~per annum~~ a year from the date of disposition.

(2) ~~Every~~ Any person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of ~~such~~ a seller liable under subsection (1), and every broker-dealer or salesperson who participates or materially aids in the sale is liable jointly and severally with and to the same extent as the seller if the nonseller knew, or in the exercise of reasonable care could have known, of the existence of the facts by reason of which the liability is alleged to exist. There ~~shall~~ must be contribution among the several persons ~~so~~ liable.

(3) Any tender specified in this section may be made at any time before entry of judgment. A cause of action under this ~~statute~~ section survives the death of any person who might have been a plaintiff or a defendant. ~~No~~ A person may not sue under this section:

(a) if the buyer has received a written offer, at a time when ~~he~~ the buyer owned the security, to refund the consideration paid, together with interest at 10% ~~per annum~~ a year from the date of payment, less the amount

of any income received on the security and ~~he~~ the buyer failed to accept the offer within 30 days of its receipt;
or

(b) if the buyer has received a written offer at a time when ~~he~~ the buyer did not own the security in the amount that would be recoverable under subsection (1) upon a tender less:

- (i) the value of the security when the buyer disposed of it; and
- (ii) interest at 10% ~~per annum~~ a year from the date of disposition.

(4) ~~No~~ A person who has made or engaged in the performance of any contract in violation of any provision of parts 1 through 3 of this chapter or any rule or order ~~hereunder~~ issued under parts 1 through 3 of this chapter or who has acquired any purported right under ~~any such~~ the contract with knowledge of the facts by reason of which ~~its~~ the contract's making or performance was in violation may not base any suit on the contract. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of parts 1 through 3 of this chapter or any rule or order ~~hereunder~~ issued under parts 1 through 3 of this chapter is void as against public policy and not in the public interest.

(5) ~~(a) No~~ An action may not be maintained under this section to enforce any liability founded on a violation of ~~30-10-202~~ parts 1 through 3 of this chapter and any rule or order issued under parts 1 through 3 of this chapter unless it is brought within:

- (a) 2 ~~5~~ years after the violation occurs;
- (b) 2 years after discovery of the fraud or misrepresentation on which liability is founded; or
- (c) 2 years after discovery of the fraud or misrepresentation should have been made by the exercise of reasonable diligence.

~~(b) No action may be maintained under this section to enforce any liability founded on fraud or misrepresentation unless it is brought within 2 years after discovery of the fraud or misrepresentation on which the liability is founded or after such discovery should have been made by the exercise of reasonable diligence.~~

~~————(c) In no event may an action be maintained under this section to enforce any liability founded on fraud or misrepresentation unless it is brought within 5 years after the transaction on which the action is based."~~

Section 8. Section 30-10-309, MCA, is amended to read:

"30-10-309. Securities restitution. (1) The commissioner may, after conducting a hearing pursuant to 30-10-305, require a person found to have committed a violation of ~~30-10-304~~ parts 1 through 3 of this chapter or any rule or order issued under parts 1 through 3 of this chapter to make restitution for all financial losses sustained by any person as a result of the violation. The commissioner may further require a person found to

have violated ~~30-10-304~~ parts 1 through 3 of this chapter or any rule or order issued under parts 1 through 3 of this chapter to pay 10% annual interest on the amount of restitution from the date of the violation, reasonable attorney fees, and costs associated with bringing the administrative action.

(2) An amount required to be paid under this section is in addition to all other penalties imposed by law. If a person fails to pay an amount referred to in this section, the amount required to be paid is a lien upon all of the assets and property of the person in this state and may be recovered by suit by the commissioner and remitted to the person ordered to receive restitution.

(3) The commissioner or a person awarded restitution may bring suit in a court of competent jurisdiction to recover the sums awarded, attorney fees, and costs incurred in obtaining a judgment.

(4) Failure of a person to pay any amount ordered under this section constitutes a forfeiture of the right to do business in this state."

Section 9. Section 30-10-324, MCA, is amended to read:

"30-10-324. Definitions. As used in 30-10-324 through 30-10-326, the following definitions apply:

(1) ~~(a)~~ "Compensation" means the receipt of money, a thing of value, or a financial benefit.

~~(b) Compensation does not include:~~

~~—— (i) payments to a participant based upon the sale of goods or services by the participant to third persons when the goods or services are purchased for actual use or consumption; or~~

~~—— (ii) payments to a participant based upon the sale of goods or services to the participant that are used or consumed by the participant.~~

(2) ~~(a)~~ "Consideration" means the payment of money, the purchase of goods or services, or the purchase of intangible property.

~~(b) Consideration does not include:~~

~~—— (i) the purchase of goods or services furnished at cost that are used in making sales and that are not for resale; or~~

~~—— (ii) a participant's time and effort expended in the pursuit of sales or in recruiting activities.~~

(3) ~~(a)~~ "Multilevel distribution company" means a person that:

~~(i)(a) that sells, distributes, or supplies goods or services through independent agents, contractors, or distributors at different levels of distribution;~~

~~(ii)(b) that may recruit other participants in the company; and~~

~~(iii)(c) is eligible for commissions, cross-commissions, override commissions, bonuses, refunds,~~

dividends, or other consideration that is or may be paid as a result of whose compensation structure provides that its agents, contractors, or distributors are or may be paid direct or indirect compensation for the sale of goods or services or the recruitment of or the performance or actions of by other participants agents, contractors, or distributors.

~~(b) The term does not include an insurance producer, real estate broker, or salesperson or an investment adviser, investment adviser representative, broker-dealer, or salesperson, as defined in 30-10-103, operating in compliance with this chapter.~~

~~(4) "Participant" means a person involved in a sales plan or operation.~~

~~—— (5) "Person" means an individual, corporation, partnership, limited liability company, or other business entity.~~

~~(6)(4) (a) "Pyramid promotional scheme" means a sales plan or operation any program in which a participant person gives consideration for the opportunity to receive compensation derived primarily from obtaining the participation of other persons in the sales plan or operation rather than from the sale of goods or services by the participant or the other persons induced to participate in the sales plan or operation by the participant.~~

~~(b) A pyramid promotional scheme does not include a sales plan or operation that:~~

~~—— (i) subject to the provisions of subsection (6)(b)(v), provides compensation to a participant based primarily upon the sale of goods or services by the participant, including goods or services used or consumed by the participant, and not primarily for obtaining the participation of other persons in the sales plan or operation and that provides compensation to the participant based upon the sale of goods or services by persons whose participation in the sales plan or operation has been obtained by the participant;~~

~~—— (ii) does not require a participant to purchase goods or services in an amount that unreasonably exceeds an amount that can be expected to be resold or consumed within a reasonable period of time;~~

~~—— (iii) is authorized to use a federally registered trademark or servicemark that identifies the company promoting the sales plan or operation, the goods or services sold, or the sales plan or operation;~~

~~—— (iv) (A) provides each person joining the sales plan or operation with a written agreement containing or a written statement describing the material terms of participating in the sales plan or operation;~~

~~—— (B) allows a person at least 15 days to cancel the person's participation in the sales plan or operation plan; and~~

~~—— (C) provides that if the person cancels participation within the time provided and returns any required items, the person is entitled to a refund of any consideration given to participate in the sales plan or operation;~~

and

~~_____ (v) (A) provides for, upon the request of a participant deciding to terminate participation in the sales plan or operation, the repurchase, at not less than 90% of the amount paid by the participant, of any currently marketable goods or services sold to the participant within 12 months of the request that have not been resold or consumed by the participant; and~~

~~_____ (B) if disclosed to the participant at the time of purchase, provides that goods or services are not considered currently marketable if the goods have been consumed or the services rendered or if the goods or services are seasonal, discontinued, or special promotional items. Sales plan or operation promotional materials, sales aids, and sales kits are subject to the provisions of this subsection (6)(b)(v) if they are a required purchase for the participant or if the participant has received or may receive a financial benefit from their purchase."~~

Section 10. Section 30-10-326, MCA, is amended to read:

"30-10-326. Notice of activity -- consent to service renewal notice -- fees. (1) Prior to enrolling, recruiting, or soliciting agents, contractors, or distributors in this state, a A multilevel distribution company with a participant that is a resident of this state shall file the following with the securities commissioner ~~on a form prescribed by the commissioner:~~

(a) an ~~annual~~ initial notice of the company's operation in this state on a form prescribed by the commissioner; and

(b) an irrevocable consent designating the commissioner as its agent for service of process for any alleged violation of 30-10-325 on a form prescribed by the commissioner; and

(c) the fee prescribed in 30-10-209.

(2) Compliance with this section ~~may does~~ not by itself subject a company to the provisions of any other statute of this state or to any taxes, licenses, or fees.

(3) (a) The commissioner may require a multilevel distribution company to disclose the following substantive information:

(i) the names, home or business addresses, social security numbers and birth dates, and titles of the multilevel distribution company's officers, directors, and trustees;

(ii) the corporate name; the headquarters street, mailing, and e-mail addresses, as well as telephone and telefax numbers; and the state of domicile and state of incorporation of the multilevel distribution company; and

(iii) a detailed description of the levels of distribution in the multilevel distribution company, the manner of compensating ~~participants~~ agents, contractors, or distributors, and the compensation structure of the marketing

plan.

(b) The commissioner may not release to the public the social security numbers of officers, directors, or trustees of a multilevel distribution company.

(4) This section does not preclude the commissioner from obtaining additional information required of ~~participants~~ agents, contractors, or distributors or multilevel distribution companies during the course of an investigation or proceeding initiated under this chapter.

(5) Compliance with this chapter does not confer upon a multilevel distribution company any license or registration or signify that the state has sanctioned, approved, or endorsed a multilevel distribution company or its sales plan or operation.

(6) A multilevel distribution company or any individual or entity affiliated with a multilevel distribution company may not represent that the multilevel distribution company, individual, or entity is licensed, registered, sanctioned, approved, or endorsed in this state by virtue of compliance with 30-10-325 and this section.

(7) A multilevel distribution company or any individual or entity affiliated with a multilevel distribution company that violates ~~subsection (6)~~ a provision of this section is subject to the fines, injunctions, and other remedies specified in 30-10-305.

(8) (a) An initial notice required in subsection (1)(a) is effective until December 31 following the filing unless the commissioner designates another date.

(b) A multilevel distribution company shall:

(i) file an annual renewal notice that must include any information that the commissioner may require;

(ii) indicate any material change from the information contained in the initial notice or subsequent renewal notices; and

(iii) include payment of the renewal fee prescribed in 30-10-209 with the renewal notice."

NEW SECTION. Section 11. Codification instruction. [Section 2] is intended to be codified as an integral part of Title 30, chapter 10, and the provisions of Title 30, chapter 10, apply to [section 2].

- END -