

SENATE BILL NO. 20

INTRODUCED BY L. JENT

BY REQUEST OF THE STATE AUDITOR

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5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR REGISTRATION OF MULTILEVEL
6 DISTRIBUTION COMPANIES; REQUIRING A REGISTRATION FEE; ESTABLISHING WHAT CONSTITUTES
7 FRAUDULENT OR PROHIBITED PRACTICES FOR MULTILEVEL DISTRIBUTION COMPANIES; REVISING
8 THE DEFINITION OF "MULTILEVEL DISTRIBUTION COMPANY"; DEFINING "TRANSACTING BUSINESS";
9 CLARIFYING WHICH FUNDS MUST BE PLACED IN THE SECURITIES RESTITUTION ASSISTANCE FUND;
10 AMENDING SECTIONS 30-10-209, 30-10-301, 30-10-303, 30-10-324, AND 30-10-1004, MCA; REPEALING
11 SECTION 30-10-326, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

14
15 **NEW SECTION. Section 1. Registration requirements for multilevel distribution companies. (1)**

16 It is unlawful for a person to transact business in this state as a multilevel distribution company unless the person
17 is registered under this section.

18 (2) A multilevel distribution company may apply for registration by filing an application in the form
19 prescribed by the commissioner and payment of the fee required in 30-10-209.

20 (3) The commissioner shall make a registration effective when the registration requirements are met.
21 An effective registration of a multilevel distribution company may not be withdrawn or terminated without the
22 express written consent of the commissioner.

23 (4) Registration of a multilevel distribution company:
24 (a) is effective until December 31 following the registration; and
25 (b) may be renewed pursuant to subsection (5).

26 (5) Registration of a multilevel distribution company may be renewed by filing, prior to the expiration of
27 the registration, an application containing information that the commissioner may require to indicate any material
28 change in the information contained in the original application or any material change in a renewal application
29 for registration and by payment of the fee required by 30-10-209.

30 (6) The commissioner may by order deny, suspend, or revoke registration of any multilevel distribution

1 company if the commissioner finds that the order is in the public interest and that the applicant or registrant or
2 person directly or indirectly controlling the applicant or registrant:

3 (a) has filed an application for registration under this section that, as of its effective date or as of any date
4 after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any
5 statement that was, in light of the circumstances under which it was made, false or misleading with respect to any
6 material fact;

7 (b) has willfully violated or willfully failed to comply with any provision of this part;

8 (c) is permanently or temporarily enjoined by any court of competent jurisdiction from transacting
9 business as a multilevel distribution company;

10 (d) is the subject of an order of the commissioner denying, suspending, or revoking registration as a
11 multilevel distribution company;

12 (e) has engaged in dishonest or unethical business practices;

13 (f) is insolvent, either in the sense that the person's liabilities exceed the person's assets or in the sense
14 that the person cannot meet obligations as they mature, but the commissioner may not enter an order against
15 a multilevel distribution company without a finding of insolvency as to the multilevel distribution company;

16 (g) has not complied with a condition imposed by the commissioner under this section; or

17 (h) has failed to pay the proper registration or renewal fee, but the commissioner may enter a denial
18 order only for failure to pay a required fee, and the commissioner shall vacate the order when the deficiency has
19 been corrected.

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21 **Section 2.** Section 30-10-209, MCA, is amended to read:

22 **"30-10-209. Fees.** The following fees must be paid in advance under the provisions of parts 1 through
23 3 of this chapter:

24 (1) (a) For the registration of securities by notification, coordination, or qualification or for notice filing of
25 a federal covered security, there must be paid to the commissioner for the initial year of registration or notice filing
26 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
27 price, plus 1/10 of 1% for any excess over \$100,000, with a maximum fee of \$1,000.

28 (b) Each succeeding year, a registration of securities or a notice filing of a federal covered security may
29 be renewed, prior to its termination date, for an additional year upon consent of the commissioner and payment
30 of a renewal fee to be computed at 1/10 of 1% of the aggregate offering price of the securities that are to be

1 offered in this state during that year. The renewal fee may not be less than \$200 or more than \$1,000. The
2 registration or the notice filing may be amended to increase the amount of securities to be offered.

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

10 (d) Each series, portfolio, or other subdivision of an investment company or similar issuer is treated as
11 a separate issuer of securities. The issuer shall pay a notice filing fee to be calculated as provided in subsections
12 (1)(a) through (1)(c). The notice filing fee collected by the commissioner must be deposited in the state special
13 revenue account provided for in 30-10-115. The issuer shall pay a fee of \$50 for each filing made for the purpose
14 of changing the name of a series, portfolio, or other subdivision of an investment company or similar issuer.

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

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

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

23 (d) For registration of a multilevel distribution company, the fee is \$200 for original registration and \$200
24 for each annual renewal.

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

27 (4) For a request for an exemption under 30-10-105(15), the fee must be established by the
28 commissioner by rule. For a request for any other exemption or an exception to the provisions of parts 1 through
29 3 of this chapter, the fee is \$50.

30 (5) All fees are considered fully earned when received. In the event of overpayment, only those amounts

1 in excess of \$10 may be refunded.

2 (6) Except for notice filing fees established in subsection (1)(d) and examination costs collected under
3 30-10-210, all fees, miscellaneous charges, fines, and penalties collected by the commissioner pursuant to parts
4 1 through 3 of this chapter and the rules adopted under parts 1 through 3 of this chapter must be deposited in
5 the general fund."

6

7 **Section 3.** Section 30-10-301, MCA, is amended to read:

8 **"30-10-301. Fraudulent and other prohibited practices.** (1) It is unlawful for any person, in connection
9 with the offer, sale, or purchase of any security, directly or indirectly, in, into, or from this state, to:

10 (a) employ any device, scheme, or artifice to defraud;

11 (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to
12 make the statements made, in the light of the circumstances under which they are made, not misleading; or

13 (c) engage in any act, practice, or course of business that operates or would operate as a fraud or deceit
14 upon any person.

15 (2) (a) It is unlawful for any person who receives, directly or indirectly, any consideration from another
16 person for advising the other person as to the value of securities or their purchase or sale, whether through the
17 issuance of analysis or reports or otherwise:

18 (i) to employ any device, scheme, or artifice to defraud the other person;

19 (ii) to engage in any act, practice, or course of business that operates or would operate as a fraud or
20 deceit upon the other person; or

21 (iii) without disclosing to the client in writing before the completion of the transaction the capacity in which
22 the person is acting and obtaining the consent of the client to the transaction:

23 (A) acting as principal for the person's own account, to knowingly sell any security to or purchase any
24 security from a client; or

25 (B) acting as agent for a person other than the client, to knowingly effect the sale or purchase of any
26 security for the account of the client.

27 (b) The prohibitions of subsection (2)(a)(iii) do not apply to any transaction with a customer of a
28 broker-dealer if the broker-dealer is not being compensated for rendering investment advice in relation to the
29 transaction.

30 (3) In the solicitation of advisory clients, it is unlawful for a person to:

1 (a) make a false statement of a material fact; or
2 (b) omit a material fact necessary to make a statement not misleading in light of the circumstances under
3 which it is made.

4 (4) Except as permitted by rule or order of the commissioner, it is unlawful for any investment adviser
5 who is registered or required to be registered to enter into, extend, or renew any investment advisory contract
6 unless it provides in writing that:

7 (a) the investment adviser may not be compensated on the basis of a share of capital gains upon or
8 capital appreciation of the funds or any portion of the funds of the client;

9 (b) an assignment of the contract may not be made by the investment adviser without the consent of the
10 other party to the contract; and

11 (c) the investment adviser, if a partnership, shall notify the other party to the contract of any change in
12 the membership of the partnership within a reasonable time after the change.

13 (5) Subsection (4)(a) does not prohibit an investment advisory contract that provides for compensation
14 based upon the total value of a fund averaged over a definite period or as of definite dates or taken as of a
15 definite date. "Assignment", as used in subsection (4)(b), includes any direct or indirect transfer or hypothecation
16 of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting
17 securities by a security holder of the assignor; but if the investment adviser is a partnership, an assignment of
18 an investment advisory contract is not considered to result from the death or withdrawal of a minority of the
19 members of the investment adviser having only a minority interest in the business of the investment adviser or
20 from the admission to the investment adviser of one or more members who, after admission, will be only a
21 minority of the members and will have only a minority interest in the business.

22 (6) It is unlawful for an investment adviser to take or have custody of any securities or funds of any client
23 if:

24 (a) the commissioner by rule prohibits custody; or

25 (b) in the absence of rule, the investment adviser fails to notify the commissioner that the investment
26 adviser has or may have custody.

27 (7) It is unlawful for a multilevel distribution company or a person who directly or indirectly controls a
28 multilevel distribution company, in the course of transacting business in, into, or from this state, to:

29 (a) employ any device, scheme, or artifice to defraud;

30 (b) make a false statement of a material fact;

1 (c) omit a material fact necessary to make a statement not misleading in light of the circumstances under
 2 which it is made; or

3 (d) engage in any other act, practice, or course of business that operates or would operate as a fraud
 4 or deceit upon any person."

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6 **Section 4.** Section 30-10-303, MCA, is amended to read:

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

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

18

19 **Section 5.** Section 30-10-324, MCA, is amended to read:

20 **"30-10-324. Definitions.** As used in [section 1], 30-10-209, 30-10-301, 30-10-324, and 30-10-325
 21 ~~through 30-10-326~~, the following definitions apply:

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

23 (b) Compensation does not include:

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

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

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

30 (b) Consideration does not include:

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

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

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

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

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

8 ~~(iii)~~(c) is eligible for commissions, cross-commissions, override commissions, bonuses, refunds,
9 dividends, or other consideration that is or may be paid as a result of the sale of goods or services or the
10 recruitment of or the performance or actions of other participants.

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

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

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

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

21 (b) A pyramid promotional scheme includes a Ponzi scheme, in which a person makes payments to
22 investors from money obtained from later investors, rather than from any profits or other income of an underlying
23 or purported underlying business venture.

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

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

30 (ii) does not require a participant to purchase goods or services in an amount that unreasonably exceeds

- 1 an amount that can be expected to be resold or consumed within a reasonable period of time;
- 2 (iii) is authorized to use a federally registered trademark or servicemark that identifies the company
3 promoting the sales plan or operation, the goods or services sold, or the sales plan or operation;
- 4 (iv) (A) provides each person joining the sales plan or operation with a written agreement containing or
5 a written statement describing the material terms of participating in the sales plan or operation;
- 6 (B) allows a person at least 15 days to cancel the person's participation in the sales plan or operation;
- 7 and
- 8 (C) provides that if the person cancels participation within the time provided and returns any ~~required~~
9 items given to the person to assist in marketing goods or services under the plan, the person is entitled to a
10 refund of any consideration given to participate in the sales plan or operation; and
- 11 (v) (A) upon the request of a participant deciding to terminate participation in the sales plan or operation,
12 provides for the repurchase, at not less than 90% of the amount paid by the participant, of any currently
13 marketable goods or services sold to the participant within 12 months of the request that have not been resold
14 or consumed by the participant; and
- 15 (B) if disclosed to the participant at the time of purchase, provides that goods or services are not
16 considered currently marketable if the goods have been consumed or the services rendered or if the goods or
17 services are seasonal, discontinued, or special promotional items. Sales plan or operation promotional materials,
18 sales aids, and sales kits are subject to the provisions of this subsection (6)(c)(v) if they are a required purchase
19 for the participant or if the participant has received or may receive a financial benefit from their purchase.
- 20 (7) "Transacting business" means to directly or indirectly:
- 21 (a) offer, sell, distribute, or supply goods or services through independent agents, contractors, or
22 distributors at different levels of distribution; or
- 23 (b) recruit or attempt to recruit participants in a multilevel distribution company."
- 24

25 **Section 6.** Section 30-10-1004, MCA, is amended to read:

26 **"30-10-1004. (Temporary) Creation of securities restitution assistance fund.** (1) There is an account
27 in the state special revenue fund to the credit of the commissioner for use only for securities restitution
28 assistance. This account may be referred to as the "securities restitution assistance fund" or "fund". The money
29 in the fund is statutorily appropriated, as provided in 17-7-502, to the commissioner for the purposes provided
30 in subsection (4) of this section.

1 (2) (a) The fund consists of amounts received by the commissioner from persons who have ~~committed~~
2 ~~securities violations~~ violated any provision of parts 1 through 3 of this chapter and from persons who have
3 voluntarily contributed to the fund.

4 (b) Amounts received by the commissioner for deposit in the fund do not include administrative penalties
5 or fines imposed under this chapter and as referenced under the Montana Administrative Procedure Act, Title
6 2, chapter 4, part 6.

7 (c) The amounts received for the fund may not be placed in the general fund.

8 (3) Amounts received by the commissioner for deposit in the fund must be promptly turned over to the
9 state treasurer for deposit in the fund created under subsection (1).

10 (4) The fund may be used by the commissioner only to pay awards of restitution assistance under this
11 part. (Terminates June 30, 2017--sec. 16, Ch. 58, L. 2011.)"

12

13 NEW SECTION. **Section 7. Repealer.** The following section of the Montana Code Annotated is
14 repealed:

15 30-10-326. Notice of activity -- consent to service.

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17 NEW SECTION. **Section 8. Codification instruction.** [Section 1] is intended to be codified as an
18 integral part of Title 30, chapter 10, part 2, and the provisions of Title 30, chapter 10, part 2, apply to [section 1].

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20 NEW SECTION. **Section 9. Effective date.** [This act] is effective on passage and approval.

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