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SFA BILL ANALYSIS

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House Bill 5763 (Substitute H-1 as passed by the House)
Sponsor: Representative Andrew Richner
House Committee: Family and Civil Law
Senate Committee: Financial Services

Date Completed: 12-6-00

CONTENT

The bill would amend the Uniform Securities Act to revise the regulation of, and registration requirements for investment advisers; require Federally covered advisers to file a notice and fee to provide service; extend securities offerings to Canadian companies; establish renewal fees of a notice filing; and eliminate references to commodity and commodity contracts.

Investment Advisers

Unless waived by the administrator (the Office of Financial and Insurance Services), an investment adviser registered or required to be registered under the Act would have to furnish each advisory client and prospective advisory client with a written disclosure statement in a form established by the administrator by rule or order. An investment advisor would have to deliver the disclosure statement to a client or prospective client no less than 48 hours before entering into an investment advisory contract with the client or prospective client, or at the time of entering into the contract if the advisory client had a right to rescind the contract without penalty within five business days of entering into it. An investment adviser annually and without charge would have to deliver or offer to deliver each of its clients the disclosure statement. Any disclosure statement requested in writing by an advisory client under an offer to deliver would have to be mailed or delivered within five business days of the request. The delivery or offer to deliver would not have to be made to advisory clients receiving advisory services solely under a contract with an investment company.

The Act provides that a person may not transact business in this State as an investment adviser unless the person meets one or more of the conditions listed in the Act (e.g., is registered under the Act). Under the bill, a person also could transact business as an investment adviser if the person were not required to be registered as one under the Federal Investment Advisors Act and if the investment adviser's only clients in this State were other investment advisers, Federally covered advisers, broker-dealers, or institutional investors; the investment adviser had no place of business in this State and directed business communications in the State to a person who was an existing customer and whose principal place of residence was not in the State; or the investment adviser had no place of business in this State and during the preceding 12-month period had no more than five clients, who were Michigan residents.

Federally Covered Adviser

The bill provides that before conducting business in this State, a Federally covered adviser would have to file with the administrator or through the investment adviser registration depository, a complete and current copy of the adviser's form as filed with the Securities and Exchange Commission (SEC). A notice filing would have to be accompanied by a consent to service of process and a $150 fee. A notice filing, however, would not be required if the adviser were a registered broker-dealer who was not prohibited from transacting business as an investment broker, or if the adviser's only clients in the State were individuals who accessed his or her services through a toll-free telephone number and the services were generic in nature, were not customized or specific to an individual, and were not otherwise the offering of investment advice.

A notice filing would be effective upon receipt by the administrator and would expire on December 31 of the year of filing. It could be renewed by the Federally covered adviser's filing with the administrator, either directly or through the investment adviser registration depository, a copy of the last annual update to SEC's form ADV, together with a $150 annual renewal fee.

A Federally covered adviser could terminate or withdraw a notice of filing by notifying the administrator. A termination or withdrawal would be effective upon receipt by the administrator.

A Federally covered adviser who acquired a business of an investment adviser or another Federally covered adviser, or an investment adviser who acquired a business of a Federally covered adviser, would have to make a notice filing.

If a Federally covered adviser filed an amendment with the Securities and Exchange Commission to correct information that was or became inaccurate or incomplete in a document filed with the administrator, the Federally covered adviser would have to file a copy of the amendment with the administrator.

Small Company Offerings

Under the bill, the Act's provisions regarding securities offerings by small companies would apply to Canadian companies. The minimum offering price for the stock or securities would be $1 per share, instead of $5 as currently provided. The issuer would have to enter into an agreement with the administrator that the issuer could not split any class of security or declare a dividend for two years after the registration if such action had the effect of lowering the price below $1 per share.

Financial statements would have to be prepared pursuant to generally accepted accounting principles or the Canadian equivalent. Statements of receipts and disbursements could be accepted instead of statements of income. Annual financial statements would have to be audited by independent certified public accountants or chartered accountants as appropriate, but interim financial statements would not have to be audited. Annual financial statements could be reviewed instead of audited pursuant to the American Institute of Certified Public Accountants or the Canadian equivalent if all of the following conditions were satisfied:

-- The issuer had not previously sold securities through an offering involving general advertising or the solicitation of prospective investors.
-- The issuer had not been previously required under Federal, State, provincial, or territorial securities laws to provide audited financial statements in connection with any sale of its securities.
-- The aggregate amount of all previous sales of securities by the issuer within the last 24 months did not exceed $1 million.
-- The amount of the small company offering for which a small company registration was sought did not exceed $1 million.

Securities

Under the bill, any security issued by an investment company, other than a unit investment trust, could be offered for sale and sold into, from, or within the State by the administrator upon receiving a notice, payment of a $500 fee, or a consent to service of process. A notice filing would be effective for one year, could be renewed for an additional one-year period, and could be terminated by filing with the administrator.

In addition, any security issued by a unit investment trust could be offered for sale and sold into, from, or within the State for an indefinite period starting on the later of the trust's effectiveness with the SEC or the administrator's receipt of a notice as prescribed by the administrator and a one-time $500 notice filing fee.

An issuer of a Federally covered security would have to file a notice on the SEC's form D or another form approved by the administrator no later than 15 days after the first sale of a covered security together with a $100 filing fee.

The administrator could require the filing of any documents filed with the SEC, with respect to a Federally covered security, together with a $100 filing fee. The administrator also could issue a stop order suspending the offer and sale of a Federally covered security if it found that the order was in the public interest and there was a failure to comply.

Renewal Fee

The renewal fee of a notice filing would be the following:

-- $100, if the issuer projected nonexempt sales of the security in this State during the one-year renewal period of $250,000 or less.
-- $400, if the issuer projected nonexempt sales of the security in this State during the one-year renewal period between $250,001 and $700,000.
-- $800, if the issuer projected nonexempt sales of the security in this State during the one-year renewal period between $700,001 and $1 million.
-- $1,400, if the issuer projected nonexempt sales of the security in this State during the one-year renewal period of more than $1 million.

If an issuer's nonexempt sales of a security exceeded the projections, the issuer would not be required to amend its projections or pay an additional fee for that notice filing period. The fee would have to be greater than the renewal fee or the renewal fee using actual sales during the current notice filing period as the projected sales for the renewal notice filing period. If an issuer's nonexempt sales of a security were less than the projections, the issuer would not be entitled to a refund of any part of the renewal fee or adjustment. If the administrator determined that for two consecutive one-year notice filing periods an issuer's nonexempt sales of a security exceeded the issuer's sales projections for that period, the administrator could assess the issuer a penalty in the amount of the renewal fees the issuer would have paid.

Other Provisions

Under the bill, the administrator could not require a registered broker-dealer, an investment adviser, a broker-dealer, or an investment adviser to make, maintain, or preserve any records other than those required to be made, maintained, and preserved or to file a financial report.

Currently, the administrator may require registered broker-dealers, commodity issuers, principals, agents, and investment advisers to post surety bonds. The bill provides, instead, that the administrator could require a fidelity bond.

MCL 451.501 et al.

Legislative Analyst: N. Nagata

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Tyszkiewicz

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