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State of Minnesota
HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH SESSION

H. F. No. **2876**

03/14/2012 Authored by Knuth, Simon, Murray and Atkins

The bill was read for the first time and referred to the Committee on Commerce and Regulatory Reform

1.1 A bill for an act
1.2 relating to commerce; providing financial protection for Minnesota investors who
1.3 invest through self-directed IRA custodians; requiring registration; amending
1.4 Minnesota Statutes 2010, section 80A.76; proposing coding for new law in
1.5 Minnesota Statutes, chapter 80A.

1.6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.7 Section 1. **[80A.605] CUSTODIAN OF SELF-DIRECTED IRA; REGISTRATION**
1.8 **REQUIRED; EXEMPTIONS.**

1.9 **(a) Registration requirement. It is unlawful for a person to transact business in**
1.10 **this state as a custodian of a self-directed IRA unless the person is registered under this**
1.11 **chapter as a custodian of self-directed IRAs or is exempt from registration as a custodian**
1.12 **of self-directed IRAs under subsection (b).**

1.13 **(b) Exemptions from registration. The following persons are exempt from the**
1.14 **registration requirement of subsection (a):**

1.15 **(1) any person whose only clients in this state are:**

1.16 **(A) federal covered investment advisers, investment advisers registered under this**
1.17 **chapter, or broker-dealers registered under this chapter;**

1.18 **(B) institutional investors;**

1.19 **(C) accredited investors;**

1.20 **(D) bona fide preexisting clients whose principal places of residence are not in this**
1.21 **state if the investment adviser is registered under the securities act of the state in which the**
1.22 **clients maintain principal places of residence; or**

1.23 **(E) any other client exempted by rule adopted or order issued under this chapter;**

2.1 (2) a person without a place of business in this state if the person has had, during the
 2.2 preceding 12 months, not more than five clients that are resident in this state in addition
 2.3 to those specified under paragraph (1); or

2.4 (3) any other person exempted by rule adopted or order issued under this chapter.

2.5 (c) **Limits on employment or association.** It is unlawful for a custodian of
 2.6 self-directed IRAs, directly or indirectly, to employ or associate with an individual to
 2.7 engage in an activity related to the custodian's functions in this state if the registration of
 2.8 the individual is suspended or revoked or the individual is barred from employment or
 2.9 association with an investment adviser, federal covered investment adviser, broker-dealer,
 2.10 or custodian of self-directed IRAs by an order under this chapter, the Securities and
 2.11 Exchange Commission, or a self-regulatory organization, unless the custodian of
 2.12 self-directed IRAs did not know, and in the exercise of reasonable care could not have
 2.13 known, of the suspension, revocation, or bar. Upon request from the custodian of
 2.14 self-directed IRAs and for good cause, the administrator, by order, may waive, in whole
 2.15 or in part, the application of the prohibitions of this subsection to the custodian of
 2.16 self-directed IRAs.

2.17 **Sec. 2. [80A.615] REGISTRATION BY CUSTODIAN OF SELF-DIRECTED**
 2.18 **IRAS.**

2.19 (a) **Application for initial registration.** A person shall register as a custodian of
 2.20 self-directed IRAs by filing an application and a consent to service of process complying
 2.21 with section 80A.88, and paying the fee specified in section 80A.65 and any reasonable
 2.22 fees charged by the designee of the administrator for processing the filing. The application
 2.23 must contain:

2.24 (1) the information or record required for the filing of a uniform application; and

2.25 (2) upon request by the administrator, any other financial or other information or
 2.26 record that the administrator determines is appropriate.

2.27 (b) **Amendment.** If the information or record contained in an application filed under
 2.28 subsection (a) is or becomes inaccurate or incomplete in a material respect, the registrant
 2.29 shall promptly file a correcting amendment.

2.30 (c) **Effectiveness of registration.** If an order is not in effect and a proceeding is not
 2.31 pending under section 80A.67, registration becomes effective at noon on the 45th day after
 2.32 a completed application is filed, unless the registration is denied. A rule adopted or order
 2.33 issued under this chapter may set an earlier effective date or may defer the effective date
 2.34 until noon on the 45th day after the filing of any amendment completing the application.

3.1 (d) **Registration renewal.** A registration is effective until midnight on December
 3.2 31 of the year for which the application for registration is filed. Unless an order is in
 3.3 effect under section 80A.67, a registration may be automatically renewed each year by
 3.4 filing such records as are required by rule adopted or order issued under this chapter, by
 3.5 paying the fee specified in section 80A.65, and by paying costs charged by the designee of
 3.6 the administrator for processing the filings.

3.7 (e) **Additional conditions or waivers.** A rule adopted or order issued under this
 3.8 chapter may impose such other conditions, not inconsistent with the National Securities
 3.9 Markets Improvement Act of 1996. An order issued under this chapter may waive, in
 3.10 whole or in part, specific requirements in connection with registration that are in the public
 3.11 interest and for the protection of investors.

3.12 **Sec. 3. [80A.645] WITHDRAWAL OF REGISTRATION OF CUSTODIAN OF**
 3.13 **SELF-DIRECTED IRA.**

3.14 Withdrawal of registration by a custodian of a self-directed IRA becomes effective
 3.15 60 days after the filing of the application to withdraw or within any shorter period as
 3.16 provided by rule adopted or order issued under this chapter unless a revocation or
 3.17 suspension proceeding is pending when the application is filed. If a proceeding is pending,
 3.18 withdrawal becomes effective when and upon such conditions as required by rule adopted
 3.19 or order issued under this chapter. The administrator may institute a revocation or
 3.20 suspension proceeding under section 80A.67 within one year after the withdrawal became
 3.21 effective automatically and issue a revocation or suspension order as of the last date on
 3.22 which registration was effective if a proceeding is not pending.

3.23 Sec. 4. Minnesota Statutes 2010, section 80A.76, is amended to read:

3.24 **80A.76 SECTION 509; CIVIL LIABILITY.**

3.25 (a) **Securities Litigation Uniform Standards Act.** Enforcement of civil liability
 3.26 under this section is subject to the Securities Litigation Uniform Standards Act of 1998.

3.27 (b) **Liability of seller to purchaser.** A person is liable to the purchaser if the person
 3.28 sells a security in violation of section 80A.49 or, by means of an untrue statement of a
 3.29 material fact or an omission to state a material fact necessary in order to make the statement
 3.30 made, in light of the circumstances under which it is made, not misleading, the purchaser
 3.31 not knowing the untruth or omission and the seller not sustaining the burden of proof that
 3.32 the seller did not know and, in the exercise of reasonable care, could not have known of
 3.33 the untruth or omission. An action under this subsection is governed by the following:

4.1 (1) The purchaser may maintain an action to recover the consideration paid for the
4.2 security, less the amount of any income received on the security, and interest from the date
4.3 of the purchase, costs, and reasonable attorneys' fees determined by the court, upon the
4.4 tender of the security, or for actual damages as provided in paragraph (3).

4.5 (2) The tender referred to in paragraph (1) may be made any time before entry
4.6 of judgment. Tender requires only notice in a record of ownership of the security and
4.7 willingness to exchange the security for the amount specified. A purchaser that no longer
4.8 owns the security may recover actual damages as provided in paragraph (3).

4.9 (3) Actual damages in an action arising under this subsection are the amount that
4.10 would be recoverable upon a tender less the value of the security when the purchaser
4.11 disposed of it, and interest from the date of the purchase, costs, and reasonable attorneys'
4.12 fees determined by the court.

4.13 (c) **Liability of purchaser to seller.** A person is liable to the seller if the person
4.14 buys a security by means of an untrue statement of a material fact or omission to state a
4.15 material fact necessary in order to make the statement made, in light of the circumstances
4.16 under which it is made, not misleading, the seller not knowing of the untruth or omission,
4.17 and the purchaser not sustaining the burden of proof that the purchaser did not know, and
4.18 in the exercise of reasonable care, could not have known of the untruth or omission. An
4.19 action under this subsection is governed by the following:

4.20 (1) The seller may maintain an action to recover the security, and any income
4.21 received on the security, costs, and reasonable attorneys' fees determined by the court,
4.22 upon the tender of the purchase price, or for actual damages as provided in paragraph (3).

4.23 (2) The tender referred to in paragraph (1) may be made any time before entry
4.24 of judgment. Tender requires only notice in a record of the present ability to pay the
4.25 amount tendered and willingness to take delivery of the security for the amount specified.
4.26 If the purchaser no longer owns the security, the seller may recover actual damages as
4.27 provided in paragraph (3).

4.28 (3) Actual damages in an action arising under this subsection are the difference
4.29 between the price at which the security was sold and the value the security would have
4.30 had at the time of the sale in the absence of the purchaser's conduct causing liability, and
4.31 interest from the date of the sale of the security, costs, and reasonable attorneys' fees
4.32 determined by the court.

4.33 (d) **Liability of unregistered broker-dealer and agent.** A person acting as a
4.34 broker-dealer or agent that sells or buys a security in violation of section 80A.56(a),
4.35 80A.57(a), or 80A.73 is liable to the customer. The customer, if a purchaser, may maintain

5.1 an action for recovery of actual damages as specified in subsections (b)(1) through (3), or,
5.2 if a seller, for a remedy as specified in subsections (c)(1) through (3).

5.3 (e) **Liability of unregistered investment adviser.** A person acting as an investment
5.4 adviser that provides investment advice for compensation in violation of section 80A.58(a)
5.5 or 80A.73 is liable to the client. The client may maintain an action to recover the
5.6 consideration paid for the advice, interest from the date of payment, costs, and reasonable
5.7 attorneys' fees determined by the court.

5.8 (f) **Liability for investment advice.** A person that receives directly or indirectly
5.9 any consideration for providing investment advice to another person and that employs a
5.10 device, scheme, or artifice to defraud the other person or engages in an act, practice, or
5.11 course of business that operates or would operate as a fraud or deceit on the other person,
5.12 is liable to the other person. An action under this subsection is governed by the following:

5.13 (1) The person defrauded may maintain an action to recover the consideration
5.14 paid for the advice and the amount of any actual damages caused by the fraudulent
5.15 conduct, interest from the date of the fraudulent conduct, costs, and reasonable attorneys'
5.16 fees determined by the court, less the amount of any income received as a result of the
5.17 fraudulent conduct.

5.18 (2) This subsection does not apply to a broker-dealer or its agents if the investment
5.19 advice provided is solely incidental to transacting business as a broker-dealer and no
5.20 special compensation is received for the investment advice.

5.21 (g) **Joint and several liability.** The following persons are liable jointly and severally
5.22 with and to the same extent as persons liable under subsections (b) through (f):

5.23 (1) a person that directly or indirectly controls a person liable under subsections (b)
5.24 through (f), unless the controlling person sustains the burden of proof that the person did
5.25 not know, and in the exercise of reasonable care could not have known, of the existence of
5.26 conduct by reason of which the liability is alleged to exist;

5.27 (2) an individual who is a managing partner, executive officer, or director of a person
5.28 liable under subsections (b) through (f), including an individual having a similar status or
5.29 performing similar functions, unless the individual sustains the burden of proof that the
5.30 individual did not know and, in the exercise of reasonable care could have known, of the
5.31 existence of conduct by reason of which the liability is alleged to exist;

5.32 (3) an individual who is an employee of or associated with a person liable under
5.33 subsections (b) through (f) and who materially aids the conduct giving rise to the liability,
5.34 unless the individual sustains the burden of proof that the individual did not know and,
5.35 in the exercise of reasonable care could not have known, of the existence of conduct by
5.36 reason of which the liability is alleged to exist; and

6.1 (4) a person that is a broker-dealer, agent, investment adviser, or investment adviser
6.2 representative that materially aids the conduct giving rise to the liability under subsections
6.3 (b) through (f), unless the person sustains the burden of proof that the person did not know
6.4 and, in the exercise of reasonable care could not have known, of the existence of conduct
6.5 by reason of which liability is alleged to exist.

6.6 (h) **Right of contribution.** A person liable under this section has a right of
6.7 contribution as in cases of tort against any other person liable under this section for the
6.8 same conduct.

6.9 (i) **Survival of cause of action.** A cause of action under this section survives the
6.10 death of an individual who might have been a plaintiff or defendant.

6.11 (j) **Statute of limitations.** A person may not obtain relief:

6.12 (1) under subsection (b) for violation of section 80A.49, or under subsection (d) or
6.13 (e), unless the action is instituted within one year after the violation occurred; or

6.14 (2) under subsection (b), other than for violation of section 80A.49, or under
6.15 subsection (c) or (f), unless the action is instituted within the earlier of two years after
6.16 discovery of the facts constituting the violation or five years after the violation.

6.17 (k) **No enforcement of violative contract.** A person that has made, or has engaged
6.18 in the performance of, a contract in violation of this chapter or a rule adopted or order
6.19 issued under this chapter, or that has acquired a purported right under the contract with
6.20 knowledge of conduct by reason of which its making or performance was in violation of
6.21 this chapter, may not base an action on the contract.

6.22 (l) **No contractual waiver.** A condition, stipulation, or provision binding a person
6.23 purchasing or selling a security or receiving investment advice to waive compliance with
6.24 this chapter or a rule adopted or order issued under this chapter is void.

6.25 (m) **Survival of other right or remedies.** The rights and remedies provided by this
6.26 chapter are in addition to any other rights or remedies that may exist, but this chapter does
6.27 not create a cause of action not specified in this section or section 80A.66(e).

6.28 (n) **Liability of custodians of self-directed IRAs.** A custodian of a self-directed
6.29 IRA owned by a resident of this state is liable under this chapter to the owner of the
6.30 self-directed IRA for financial loss incurred by the owner as a result of intentional or
6.31 negligent actions or inactions by the custodian that cause financial loss to the owner
6.32 of the self-directed IRA. The commissioner shall adopt rules specifying the type and
6.33 amounts of financial security required to protect residents of this state from the financial
6.34 loss described in this paragraph.

6.35 Sec. 5. **EFFECTIVE DATE.**

7.1 Sections 1 to 4 are effective August 1, 2012.