

PROPOSED RULES

**NORTH DAKOTA ADMINISTRATIVE CODE
CHAPTER 45-03-23
CUSTODIAL AGREEMENTS AND THE USE OF CLEARING CORPORATIONS**

Section 45-03-23-02 is amended as follows:

45-03-23-02. Custody of agreement - Requirements.

1. An insurance company may provide, by written agreement with a custodian, for the custody of its securities with a custodian. The securities that are the subject of the agreement may be held by the custodian or its agent or in a clearing corporation.
2. The agreement must be in writing and must be authorized by the resolution of the board of directors of the insurance company or of an authorized committee of the board. The terms of the agreement must comply with the following:
 - a. Securities certificates held by the custodian must be held separate from the securities of the custodian and of all of its other customers.
 - b. Securities held indirectly by the custodian and securities in a clearing corporation must be separately identified on the custodian's official records as being owned by the insurance company. The records must identify which securities are held by the custodian or by its agent and which securities are in a clearing corporation. If the securities are in a clearing corporation, the records must also identify where the securities are and, if in a clearing corporation, the name of the clearing corporation and, if through an agent, the name of the agent.
 - c. All custodied securities that are registered must be registered in the name of the company or in the name of a nominee of the company or in the name of the custodian or its nominee or, if in a clearing corporation, in the name of the clearing corporation or its nominee.
 - d. Custodied securities shall be held subject to the instructions of the insurance company and shall be withdrawable upon the demand of the insurance company, except that custodied securities used to meet the deposit requirements set forth in North Dakota Century

Code section 26.1-05-23 must, to the extent required by that section, be under the control of the insurance commissioner and must not be withdrawn by the insurance company without the commissioner's approval.

- e. The custodian shall be required to send or cause to be sent to the insurance company a confirmation of all transfers of custodied securities to or from the account of the insurance company. In addition, the custodian shall be required to furnish no less than monthly the insurance company with reports of holdings of custodied securities at such times and containing information as may be reasonably requested by the insurance company. The custodian's trust committee's annual reports of its review of the insurer's trust accounts shall also be provided to the insurer. Reports and verifications may be transmitted in electronic or paper form.
- f. During the course of the custodian's regular business hours, any officer or employee of the insurance company, any independent accountant selected by the insurance company, and any representative of an appropriate regulatory body shall be entitled to examine, on the premises of the custodian, the custodian's records relating to custodied securities, but only upon furnishing the custodian with written instructions to that effect from an appropriate officer of the insurance company.
- g. The custodian and its agents shall be required to send to the insurance company:
 - (1) All reports which they receive from a clearing corporation on their respective systems of internal accounting control; and
 - (2) Any reports prepared by outside auditors on the custodians or its agent's internal accounting control of custodied securities that the insurance company may reasonably request.
- h. The custodian shall maintain records sufficient to determine and verify information relating to custodied securities that may be reported in the insurance company's annual statement and supporting schedules and information required in any audit of the financial statements of the insurance company.
- i. The custodian shall provide, upon written request from an appropriate officer of the insurance company, the appropriate

affidavits, substantially in the form described in the appendices to this chapter, with respect to custodied securities.

- j. A national bank, state bank, or trust company shall secure and maintain insurance protection in an adequate amount covering the bank's or trust company's duties and activities as custodian for the insurer's assets and shall state in the custody agreement that protection is in compliance with the requirements of the custodian's banking regulator. A broker-dealer shall secure and maintain insurance protection for each insurance company's custodied securities in excess of that provided by the securities investor protection corporation in an amount equal to or greater than the market value of each respective insurance company's custodied securities. The commissioner may determine whether the type of insurance is appropriate and the amount of coverage is adequate.
- k. The custodian shall be obligated to indemnify the insurance company for any loss of custodied securities, except that the custodian shall not be so obligated to the extent that the loss was caused by other than the negligence or dishonesty of the custodian.
- l. The custodian shall be obligated to indemnify the insurance company for any loss of custodied securities occasioned by the negligence or dishonesty of the custodian's officers or employees, or burglary, robbery, holdup, theft, or mysterious disappearance, including loss by damage or destruction.
- m. In the event that there is a loss of custodied securities for which the custodian shall be obligated to indemnify the insurance company, the custodian shall promptly replace the securities or their value thereof and the value of any loss of rights or privileges resulting from the loss of securities.
- n. The agreement may provide that the custodian will not be liable for any failure to take any action required to be taken under the agreement in the event and to the extent that the taking of such action is prevented or delayed by war (whether declared or not and including existing wars), revolution, insurrection, riot, civil commotion, act of God, accident, fire, explosion, stoppage of labor, strikes or other differences with employees, laws, rules, orders, or other acts of any governmental authority, or any other cause whatever beyond its reasonable control.
- o. In the event that the custodian gains entry in a clearing corporation through an agent, there shall be an agreement between the custodian and the agent under which the agent shall be subject to

the same liability for loss of custodied securities as the custodian; provided, however, that if the agent shall be subject to regulation under the laws of a jurisdiction which is different from the jurisdiction the laws of which regulate the custodian, the insurance commissioner of the state of domicile of the insurance company may accept a standard of liability applicable to the agent which is different from the standard of liability applicable to the custodian.

- p. The custodian shall provide written notification to the insurer's domiciliary commissioner if the custodial agreement with the insurer has been terminated or if one hundred percent of the account assets in any one custody account have been withdrawn. This notification shall be remitted to the insurance commissioner within three business days of the receipt by the custodian of the insurer's written notice of termination or within three business days of the withdrawal of one hundred percent of the account assets.

- 3. An insurer having direct written and assumed premiums of less than three million dollars in any calendar year may request an exemption from the requirements of this section. The insurer must file with the commissioner a written statement explaining the reasons why the insurer should be exempt. The commissioner may grant an exemption if the commissioner finds that compliance with this section would constitute a financial or organizational hardship upon the insurer.

History: Effective March 1, 2004; amended effective April 1, 2010; _____, 2012.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 26.1-05-35