



TESTIMONY OF DAVE MACIVER
North Dakota Chamber of Commerce
HB 1340
March 5, 2007

Mr. Chairman and members of the committee, my name is Dave MacIver and I represent the ND Chamber of Commerce, in addition to 16 chambers of commerce representing 7,236 members. The North Dakota Chamber of Commerce would like to oppose HB 1340.

Several North Dakota Chamber members have contacted me expressing their concern about HB 1340 and the affects it could have if passed by our legislature. After discussing it with a number of attorneys and accountants, it was their opinion that instead of bringing new corporations to North Dakota this would be a deterrent.

As you are aware, there are only two publicly traded companies in North Dakota – Integrity Mutual Funds and Dakota Growers Pasta. I did call Mark Anderson, CEO of Integrity Mutual Funds in Minot, and his initial reaction was one of disbelief.

When his attorney informed him that it would not apply to them, he was very pleased, however was still concerned for new business that may be looking at North Dakota for incorporation and would hope that legislators would give a do not pass to HB 1340.

I have included with my testimony copies of e-mails sent to Mr. Anderson from his legal advisors for you to review as you consider this bill.

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The North Dakota Chamber would ask that the Judiciary Committee give HB 1340 a do not pass.

Thank you Mr. Chairman and members of the Committee, and I will stand for any questions.

FROM: Gordon Dihle, Esquire
6041 S. Syracuse Way, Suite 305
Greenwood Village, CO 80111

March 2, 2007

RE: Engrossed House Bill No. 1340 - Proposed "North Dakota Publicly Traded Corporations Act" NDCC 10-35

TO: Ladies and Gentlemen of the North Dakota Legislature:

As a person who grew up and was educated in western North Dakota and still feel a strong bond to the state of North Dakota, I feel compelled to comment on Engrossed House Bill NO. 1340, Proposed "North Dakota Publicly Traded Corporations Act" NDCC 10-35. My background is that I am a securities attorney and investment banking professional working out of Denver, Colorado. I work with a large number of public companies, securities brokerage firms and shareholders of public companies on daily basis. As a former North Dakotan, I regular promote and extol the virtues and work ethic of the people of North Dakota and its resources whenever I can.

I read the proposed provisions of Engrossed House Bill NO. 1340, Proposed as the "North Dakota Publicly Traded Corporations Act" NDCC 10-35 with horror. The provisions of this bill are such that no competent attorney would ever allow a public company to incorporate in North Dakota. The board of director provisions, the "poison pill" restrictions and the outlandish franchise fees are simply senseless. With the current federal regulatory system in place with respect to public corporations, small public companies are already struggling to comply with federal regulations. Huge sums which could be shareholder dividends and corporate growth are already being spent on excessive legal and accounting costs mandated by existing federal law. Every public corporation I am involved with or know of has more than 13,333,333 authorized shares and would therefore be subject to the maximum \$80,000 franchise fee. Compared to similar fees of approximately \$500 a year in most other states, this alone would deter any company from incorporating in North Dakota. The other provisions are cumbersome and restrict logical and efficient corporate governance which are necessary to operate a profitable entity. The proposed provisions also invite predatory litigation.

The only result I can see from this bill is the harassment and ultimate destruction of the few public corporations which are incorporated in North Dakota by predatory attorneys and professional plaintiffs from outside of the state of North Dakota. This certainly does nothing but harm the citizens of North Dakota, particularly those employed by the public companies or doing business with those public companies. The only result I can envision from this patently anti-business bill is Corporate America fleeing from the state of North Dakota together with what few non-agricultural or mining jobs remain there.

Thank you for your consideration of my views.

Sincerely,
Gordon Dihle
Gordon Dihle

-----Original Message-----

From: Walt Draney [mailto:draney@chapman.com]

Sent: Friday, March 02, 2007 5:18 PM

To: Mark Anderson

Cc: Mark J Kneedy; Jonathan A Koff

Subject: ND Publicly Traded Corporations Act

We have had an opportunity to conduct a preliminary review of the proposed "North Dakota Publicly Traded Corporation Act" and would like to pass along the following observations:

1. Although an interpretation of the statute is not entirely clear, it appears that, pursuant to Sections 10-35-02 and 10-35-03, the Act would not apply to a North Dakota Corporation unless it becomes subject to the Act after July 1, 2007 AND its articles of incorporation specifically state that it is governed by the Act. As such, the Company would not be subject to the Act, even after it was passed into law, unless its board of directors and shareholders elected to amend its articles of incorporation to "opt into" the statute.

2. Notwithstanding the question of the Act's applicability to the Company, it is worth noting that the Act attempts to eliminate many of the corporate governance measures available to a public company to protect itself from unsolicited and unwarranted attempts to change the management and/or ownership of the Company as well as impose certain corporate governance measures typically viewed as within the purview of the board of directors. These provisions are numerous, and include:

- the inability to institute a "staggered board"
- the inability to change the size of the board during a contested election
- the prohibition of appointing a Chairman of the Board that is an executive officer of the Company
- the elimination of advance notice provisions for shareholder director nominees
- a requirement that the Company include a shareholder's director nominee and statement (up to 500 words) in the Company's proxy statement (the cost of which must be reimbursed to the shareholder)
- the inability of the Company to adjourn the shareholder meeting and seek more Company slate votes prior to opening the polls for the meeting
- the requirement that a director candidate must receive an affirmative vote of at least a majority of the votes cast for a candidate to be elected (rather than a plurality)
- the elimination of "super-majority" voting requirements for change of control transactions;
- the ability for shareholders to vote on an "advisory" basis on whether they accept the compensation committee's report on executive compensation
- limits on the use of poison pills
- the ability to make direct proposals to amend the Company's articles of incorporation without Board approval.

As you are aware, many of the above corporate governance changes are being instituted by companies on an issue by issue basis, under the direction of institutional shareholders. We believe that having the

statutory framework with these provision in place, although not necessarily applicable to the Company at this time, could create even more pressure for the Company to incorporate many of its provisions into its charter documents in the future. In addition, if enacted in its current form, the legislation would likely serve as a substantial deterrent for companies faced with the decision of incorporating in North Dakota.

Should you have any questions on any of the specific provisions of the proposed statute, please do not hesitate to give us a call.

Regards,

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From: Mark Anderson [mailto:MAAnderson@integrityfunds.com]
Sent: Monday, March 05, 2007 8:48 AM
To: Dave MacIver
Subject: HB 1340

Dave,

As you know from the emails I forwarded last week, this bill does not apply to Integrity Mutual Funds, as we were organized under a different statute and before July 2007. That being said, there are some areas of great concern for the State of North Dakota that should be brought to the attention of the Senate Judiciary Committee.

1. This bill does not protect Mom and Pop on Main Street. Rather, it is a political tool which would allow corporate raiders to more easily take over North Dakota publicly-traded companies. This bill will not be utilized by the general public.
2. The definition of "poison pill" include everything, including the kitchen sink. It strips away all forms of protection that a company currently (and legally) has to protect itself from unscrupulous raiders. One year terms, no staggering, independent director, stock issuance...it is all in there and, cumulatively, it is all bad.
3. If anyone in state government is waiting for the franchise fees to start rolling in, they should think again. Two of our corporate attorneys have said that we should immediately begin the process of reincorporating in another state, should this law pass. Not only will they never see another firm organized under this statute, any that might be on the books right now will be gone. Looking at our annual filing fee go from \$25 per year to \$80,000 per year speaks for itself. No firm would willingly agree to that.
4. This bill will effectively kill capital formation in the State of North Dakota. There are already too few publicly-traded companies being organized here. This will be the death knell for capital formation in the future.

Yours truly,

Mark R. Anderson
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