

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7096 HOUSE LABOR & COMMERCE

HB

461

(7)

HOUSE COMMITTEE REPORT

Date Referred: February 26, 1992

FURTHER REFERRALS:

Date of Committee Action: 3-3-92

The LABOR AND COMMERCE Committee considered:

HB 461

HOUSE BILL NO. 461

MINORS UNDER 14 IN ENTERTAINMENT JOBS

"An Act permitting the employment of certain minors in the entertainment industry."

RECOMMENDATIONS:

be replaced with HB the same title a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) Dept of Labor

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				

[Signature]
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : HB 461

Revision Date: _____
 Title: "An Act relating to employment of certain minors in the entertainment industry..."
 Sponsor: Representative Parnell
 Requestor: House HES

Department Affected: Labor
 BRU: Labor Standards & Safety
 Component: Wage & Hour

COMPONENT SERIAL NO. 345

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS.CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Randy Carr, Acting Director Phone: 264-2452

Division: Labor Standards & Safety Date: 2/24/92

Approved by Commissioner: John Abshire, Acting Commissioner

Agency: Department of Labor Date: 2/24/92

BILL NO: House Bill No. 461

DATE: February 26, 1992

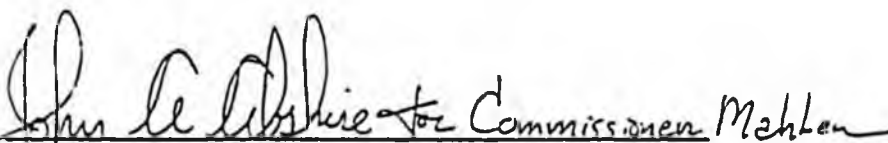
TITLE: "An Act permitting the employment of certain minors in the entertainment industry; and providing for effective date."

CONTACT: Arbe Williams
465-2700

House Bill No. 461 amends AS 23.10.335 to allow minor children under the age of 14 to be employed as performers in the entertainment industry pursuant to regulations developed by the Department.

The Department of Labor supports this legislation in order to correct the current circumstances faced by the entertainment industry in Alaska. At present, there is no flexibility in the law to allow the employment of children under 14 as performers.

This legislation is not expected to require additional program support.

Handwritten signature of John A. Libshie for Commissioner Mahlon

Commissioner
Department of Labor

POSITION PAPER/Department of Labor



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

465-2647

Room 128

State Capitol
Juneau, AK 99801-1182

LIST OF MATERIALS FOR HB461

1. Sponsor statement.
2. Sectional Analysis.
3. Fiscal Note, with Position Paper, from the Department of Labor.
4. News article.
5. Support Letters.
 - a. Carol Carlson, Owner of Carlson's Co. of Models & Talent.
 - b. Roger Miller, President of Alaska Chapter of Association of Independent Commercial Producers.
 - c. Ben & Tamara Krzykowski, Parents of Mindy, child not allowed to work in "Rescue 911" television series.
6. Child labor laws from the State of California, Department of Commerce.
7. List of film production projects in Alaska, with expenditures and local hire costs.



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol
Juneau, AK 99801-1182

465-2647

SPONSOR STATEMENT FOR HOUSE BILL 461

House Bill 461 would allow children under the age of 14 to work as actors in film projects being produced in Alaska. Under the current law, these children unless they are employed in domestic employment; newspaper delivery or sales; or in canneries in warehouse work casing cans.

This was brought to my attention by a constituent and then by the State of Alaska Division of Tourism. They cited the example of a young four-year-old girl who was offered a role in the CBS television series "Rescue 911." She was all set to do the role when the State of Alaska Department of Labor informed her parents that she could not do the work because of existing laws.

The current statute was the law borrowed from the federal child labor laws that first came into effect in this country. It was instituted as territorial law, and then realized in the statutes in 1949.

HB 461 will allow for the Department of Labor to enable child actors to perform in a safe setting in Alaska, and that department has given full support to this bill, and has issued a zero fiscal note concerning it.

With film projects in Alaska having over \$9 million dollars in expenditures during the years of 1990-91, this legislation will ensure that nothing hinders those seeking to capture the greatness of Alaska and its citizens on film, including offering the chances of a lifetime to our young children.

I would appreciate your support in passing this legislation out of the House Labor and Commerce Committee.



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

Room 128

State Capitol
Juneau, AK 99801-1182

465-2647

SECTIONAL ANALYSIS FOR HOUSE BILL 461

Section 1 amends AS 23.10.335 by adding the line (3) employment as a performer in the entertainment industry. This would give the Alaska Department of Labor the authority, under AS 23.10.360 (REGULATIONS FOR MINIMUM STANDARDS AND WORK OPPORTUNITIES), to establish guidelines for safety, working conditions, kinds of work allowed in that field of employment, maximum hours or work, minimum pay, etc.



ALASKA
(Affiliate of Northwest)
880 7th Street - Suite 304
Anchorage, AK 99501
(907) 258-0188
FAX (907) 276-0388

February 14, 1992

Representative Pat Parnell
Room 128, Capitol
P.O. Box V
Juneau, AK 99811

Dear Representative Parnell:

I am writing in support of the amendment to the existing House Bill, permitting the employment of certain minors in the entertainment industry.

As an elected officer to the Association of Independent Commercial Producers (AICP), Alaska chapter, it has come to my attention the need to address an important segment of film making in Alaska . . . child labor. Often times the opportunity arises to focus on minor children as principals or extra's in commercial, documentary and feature film making in Alaska.

With a lack of labor guidelines addressing this segment of film entertainment, producers in Alaska and their counterparts from the Lower 48 states and abroad are met with an archaic labor interpretation which clearly does not address Alaska's new and growing industry.

This brings me to the second point of writing this particular letter. When the time comes to rewrite or revise guidelines in regard to minor children, AICP-Alaska would appreciate being included in the process in an advisory capacity. We feel our involvement will ensure a strong partnership with the State of Alaska and allow a solid foundation for future growth.

I look forward to future correspondence and discussion concerning all aspects of film making in Alaska.

Sincerely,
AICP-Alaska

Roger Miller

Roger Miller
President

RM/kc

cc: John Abshire
Dennis Geary

February 4, 1992

Ms. Mary Pignalberi
State of Alaska Film Office
3601 C Street, Suite 700
Anchorage, Alaska 99503

**Carlson's Co. of Models
& Talent
P.O. Box 240065
Anchorage, Alaska 99524-0065**

258-2154

Dear Mary,

As you know, for the past three years I have owned and operated a model and talent agency in Anchorage. I represent approximately seventy-five independent contractors who have done local and national commercials, film projects as well as special events and modeling for shows and print.

Last week I was asked to supply a make-up artist a young actor for a Rescue 911 project that was to be filmed in North Pole. Rescue needed a four year old girl who would be required to get in a dogsled and be pulled by a couple of dogs, as well as being in the cold for a short period of time as if she were lost.

While acting experience was not a big priority, there was a height requirement and she obviously needed to be up for a challenge or two. Instead of flying one of my actors to Fairbanks, I initiated a casting call in Fairbanks. A young girl was selected from a group of girls and filming was to start on February 1, 1992.

On Friday, January 31, I received a call from Rescue 911 saying that Monte Jordan, Regional Supervisor of the Department of Labor had contacted them saying that this little girl was not allowed to work under the labor laws of Alaska. This law in effect says no one under the age of fourteen may work, unless they are an independent contractor.

If this child had been allowed to work, the project could have been shut down and the Department of Labor could have come after my agency.

The people at Rescue 911 were ready to fly a child from California with her parent to do the shoot if that was what would work under Alaska Law. Instead after several more conversations with the Department of Labor, I convinced them that I had a little girl who would qualify.

As a result I, along with a young talent that I represent in Anchorage, flew to Fairbanks on Friday evening, she worked two days and we flew back Sunday night. The reason this child was allowed to do the work was because she is an established independent contractor (as I understand the law). She has had training, done commercials, has been listed with my agency for six months and has her composite cards.

Carlson's Co. of Models

is Agent

P.O. Box 240965

Anchorage, Alaska 99524-0965

In the meantime, we had a very disappointed child in Fairbanks who was told she would get to be part of an exciting project and then told she could not.

Mary, we are living in exciting times in Alaska as far as the potential of national projects coming into our state. Over the past year my agency alone has been part of two national Toyota commercials, three Rescue 911 projects, one CBS project called Real Life Heros and a feature film with a Korean company. Without these above mentioned projects my business would have been lucky to break even. As it is, we have managed to make a little money, put a few people to work and been encouraged to keep working at building my business.

I know how much work you have done to promote Alaska as a film and commercial location and how much money the State has expended in this effort. To have all of this effort undermined by a law which prevents childrens employment seems a travesty. This must be corrected.

I am convinced, we are either in the game or we are not. If film companies express a desire to come up here, it is up to us as a state and an industry to make that happen. If we can't, then they will go somewhere else.

When I was on location, I was told by a member of the crew that this would be the last project Rescue 911 would shoot in Alaska until we got our labor laws straightened out. I believe this is a great loss. Rescue has done four projects in the past year. One in Valdez, one in Anchorage and two in North Pole.

Each time they have brought at least six people up, hired support people once they arrived, rented equipment, as well as rental vehicles and in some cases rented arctic gear, stayed in our hotels, eaten in our restaurants, hired catering companies and taken home Alaskan gifts for their families. The figure that was quoted to me on location was that each person that comes up means about \$200 a day to our Alaskan economy. Now this is just one company, CBS.

National commercial projects can involve much bigger budgets and usually require resident support.

On a local level, we are also greatly impacted. I am sure you have noticed that children are often used in commercials. I know that they are not all hired through my agency and I would be willing to bet that many do not meet the independent contractor requirement. I believe many production houses and advertising agencies are in violation of the law, as it is now written.

Carlson's Co. of Mo-
& Talent
P.O. Box 240065
Anchorage, Alaska 99524-0065

Children need to be protected and as a mother of two child actors, no one understands this better than I. At the same time children deserve the opportunity to be able to work in an area that greatly impacts their lives. They are inundated with television, radio and print media. Many of them are curious about the process and can indeed, at times, relate a story or sell a product much more effectively than an adult. In other states they are given this opportunity. Why not Alaska?

Mary, I can only restate that as an industry, we are either in the game or we aren't. It either has to include all ages or none. We need to get the ball rolling to change the labor laws. I am willing to be a voice. I hope the film office will also do its part in at least educating the powers that be to the problems that face us. We all need to be on the same team, speaking one voice. "Shoot Alaska" should mean not only its scenery but all of its talent as well.

Most Sincerely,

Carol Carlson

cc: Mr. Pat Parnell, State Representative
Mr. Roger Miller, President - AK. Chapter, AICP

FEB-10-92 SAT 16:44

SOA DIV OF TOURISM/ATMC

FAX NO. 9075633575

FEBRUARY 10, 1992

I AM WRITING TO TELL YOU OF MY FAMILY'S RECENT EXPERIENCE WITH OUR STATE'S CHILD LABOR LAWS AND THE ENTERTAINMENT INDUSTRY.

MY 5 YEAR OLD DAUGHTER MINDY ATTENDED AN AUDITION FOR A PART IN A "RESCUE 911" TELEVISION SEGMENT. THE SEGMENT WAS BEING FILMED IN THE FAIRBANKS AREA ABOUT A RECENT LOCAL INCIDENT. THE DIRECTOR AND FIELD COORDINATOR INTERVIEWED EACH CHILD INDIVIDUALLY AS PART OF THE AUDITION PROCESS. THE NEXT DAY I WAS INFORMED BY ALICIA ALEXANDER, THE FIELD COORDINATOR THAT MINDY HAD BEEN SELECTED. I WAS TOLD THAT HER SELECTION HAD BEEN BASED ON HER ABILITY TO PORTRAY THE PART AND FOLLOW DIRECTION. I EXPLAINED TO MINDY AND THE REST OF MY FAMILY WHAT SHE WOULD BE DOING. WE WERE ALL EXCITED ABOUT THE UPCOMING PART.

ABOUT 11 A.M. THE NEXT DAY MS. ALEXANDER PHONED US AGAIN. THIS TIME THE NEWS WAS NOT SO GOOD. MS. ALEXANDER SAID SHE HAD BEEN NOTIFIED BY THE STATE DEPT. OF LABOR THAT ACCORDING TO OUR LAWS NO CHILD UNDER THE AGE OF 14 IS ALLOWED TO WORK IN ALASKA. SINCE THE T.V. CREW COULD NOT RISK BREAKING THE LAW THEY WOULD NOT BE ABLE TO USE MY DAUGHTER. WE THEN CONTACTED THE DEPT. OF LABOR OURSELVES AND WERE TOLD THAT MINDY WOULD NOT BE ALLOWED TO DO THE PART WHETHER SHE WORKED WITH A TALENT AGENCY, UNDER HER OWN BUSINESS LICENSE, OR AS A VOLUNTEER. WE ALSO CALLED SEVERAL STATE OFFICES AND POLITICAL OFFICIALS BUT COULD NOT FIND ANY EXEMPTION FOR MINDY TO DO 4 DAYS WORK.

SINCE ACCORDING TO THE LAW MY DAUGHTER WAS NOT ABLE TO ACCEPT THE PART, THE T.V. CREW BROUGHT ANOTHER 4-5 YEAR OLD GIRL INTO TOWN TO TAKE HER PLACE. THIS ADDED TO THE EXPENSE OF MAKING THE FILM SEGMENT. IN ADDITION TO PAYING THE OTHER LITTLE GIRL A WAGE, HER AND HER AGENTS AIRFARE, HOTEL ROOM, MEALS AND POSSIBLY TRAVEL TIME ALSO HAD TO BE PAID.

THOUGH I'M SORRY FOR THE T.V. CREW'S INCONVENIENCE THE WORST PART OF THE SITUATION FOR ME WAS HAVING TO DISAPPOINT MY DAUGHTER. IT WAS ALSO HARD TO BE TOLD THAT MINDY HAD NATURAL TALENT AFTER LOSING HER CHANCE TO SHOW US.

THE EFFECTS OF WHAT HAPPENED HERE COULD BE MORE WIDESPREAD IF RUMORS THAT CBS WILL NOT FILM IN ALASKA AGAIN UNTIL MATTERS WHICH LED TO THIS TYPE OF SITUATION ARE RESOLVED. THE ENTERTAINMENT INDUSTRY, WHICH CAN BRING MONEY INTO OUR ECONOMY, MAY BEGIN TO FEEL THAT FILMING IN ALASKA IS NOT WORTH THE RISK. RESTAURANTS, HOTELS, CAR AND EQUIPMENT RENTALS, AND OTHERS WHICH COULD HAVE BENEFITTED FROM THE INDUSTRY'S PRESENCE MAY LOSE THEIR CHANCE LIKE MINDY DID.

I FULLY SUPPORT LAWS THAT PROTECT CHILDREN IN REGARDS TO LABOR BUT IT IS WELL KNOWN THAT MANY STATES HAVE EXEMPTIONS TO THEIR CHILD LABOR LAWS WHICH ALLOW FOR SOME WORK IN ENTERTAINMENT. I BELIEVE OUR LAWS CAN AND SHOULD BE AMENDED TO ALLOW OUR CHILDREN TO WORK SAFELY IN THE ENTERTAINMENT FIELD.

I SINCERELY SUPPORT YOU IN YOUR EFFORTS TO BRING FORTH JUST SUCH AN AMENDMENT AND THANK YOU FOR ALL YOUR HELP.

RESPECTFULLY,

Attachment D-1

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

PETE WILSON, Governor

DEPARTMENT OF COMMERCE



CALIFORNIA FILM COMMISSION
HOLLYWOOD BLVD., SUITE 600
HOLLYWOOD, CA 90028
(213) 736-2465

CHILD LABOR LAWS

On April 3, 1986, new regulations governing the employment of minors went into effect. These revisions, the first significant changes in almost 50 years, lend more flexibility to production companies without compromising the safety, welfare, or morals of the minors. The major changes involve lengthening the hours in a day minors are allowed to work in film, television, and commercial production. Knowledge of these regulations will better enable you to respond to child labor inquiries as they pertain to location production.

The Major Changes

In summary: minors in the age group 9 - 16 years, have had their maximum working hours increased from 4 hours to 5 hours on camera (7 hours on non-school days). Minors in the age group 16-17 years, have had their hours increased from 4 hours to 6 hours on camera (8 hours on non-school days). Furthermore, studio teachers, (a teacher holding California teaching credentials that are certified by the State of California in labor law supervision), are not required on the set when performers ages 16-17 are working on non-school days.

In addition, the new regulations will increase the safety standards by requiring teachers to pass a test on the state's labor laws before receiving a studio teacher's permit. The new regulations also more clearly define the teacher's right to stop production if a child's welfare is endangered.

Obtaining a permit & studio teacher

Initially, minors wishing to obtain work in the industry answer requests for actors in the trade publications (e.g., Drama-Logue) or are contacted by casting agents who schedule casting calls in which minors audition for a part. Work permits are not required until the minor is hired by a production company. Although securing a permit is not difficult, it is important that the process be completed thoroughly.

-2-

First, a production company wishing to hire a minor must obtain a Permit to Employ Minors from the Division of Labor Standards Enforcement in their district (see attachment for office in your area). Secondly, minors must obtain an Entertainment Work Permit from the Division of Labor Standards Enforcement and written verification from their school of the minors' record and attendance. If all the appropriate documents are in order, the production company can receive the permit in one day by walking it through one of the district offices. The permit, once issued, is valid for up to 6 months and application for renewal may be made in the same manner as the original permit. Production companies may also obtain blanket permits for larger groups of minors needed for crowd scenes or as extras, otherwise each minor must have his/her own employment permit.

A studio teacher is required on the set for all minors under the age of 18 during the school year, with the exception of those between the ages of 16 - 17 who have already received a high school diploma. During the summer months, a studio teacher is required only for those under 16 years of age. Even though minors are not attending school during the summer months, the studio teacher is still required on the set to provide supervision and to protect the interest of the minors.

Studio teachers may be hired by contacting the Studio Teachers-Welfare Workers Union (IATSE LOCAL 884) in Los Angeles, 213/876-5228. The cost of a studio teacher ranges from approximately \$150-200 for a 9 hour day.

Consult the Department of Labor Standards Enforcement for additional details, rules and regulations: in Los Angeles, 213/620-⁶⁰⁹⁰~~2639~~. In San Francisco, 415/557-2347. If you have any questions, please do not hesitate to call the California Film Commission at 213/736-2465.

A full list of the maximum hours minors are allowed to work under the new regulation are as follows:

<u>Age of child</u>	<u>Allowed work hours</u>
15 days - 6 months	2 hours on set 20 minutes on camera-1
6 months - 2 years	4 hours on set 2 hours on camera*
2 years - 6 years	6 hours on set 3 hours on camera*
6 years - 9 years	8 hours on set 4 hours on camera* (non-school days: 6 hours on camera)
9 years - 16 years	9 hours on set 5 hours on camera* (non-school days: 7 hours on camera)
16 - 17 years	10 hours on set 6 hours on camera*-2 (non-school days: 8 hours on camera)

*Balance of time spent on education and recreation

1-Child cannot be exposed to light of more than 100 foot-candle intensity for more than 30 seconds at a time.

2-No studio teacher/welfare worker required on non-school days

Minors are allowed to work between the hours of 5:00 am and 10:00 pm only. Special requests can be made to extend the hours until 12:30 am, on nights not preceding schooldays.

hc\child

02/07/92 13:25

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Attachment D-2

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

PETE WILSON, Governor

DEPARTMENT OF COMMERCE

CALIFORNIA FILM COMMISSION

2 HOLLYWOOD BLVD., SUITE 600

HOLLYWOOD, CA 90028

(213) 736-2463

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

DISTRICT OFFICES

Bakersfield5555 California Ave., Suite 200
Bakersfield, CA 93309

805/681-2717

El Centro1699 West Main St., Ste. E.
El Centro, CA 42243

619/353-0505

Eureka619 Second St., Room 109
Eureka, CA 95501

707/538-6518

Fresno666 W. Shaw St., Room C131
Fresno, CA 93704

209/221-5005

Hollywood6430 Sunset Blvd., Suite 301
Hollywood, CA 90028

213/464-8268

InglewoodOne Manchester Blvd., Suite 604
Inglewood, CA 90301

213/412-6380

Long Beach245 W. Broadway, Room 450
Long Beach, CA 90802

213/590-5044

Los Angeles107 S. Broadway, Room 5015
Los Angeles, CA 90012

213/620-5130

Marysville922 G St
Marysville, CA 95901

916/741-4061

-2-

Napa
3273 Claremont Way, Room 206
Napa, CA 94558 707/257-0660

Oakland
7700 Edgewater Dr. Ste. 275
Oakland, CA 94621 415/729-5150

Pomona
300 S. Park Ave., Room 830
Pomona, CA 91769 714/622-4236

Redding
2115 Akard Ave., Room 17
Redding, CA 9 916/225-2654

Sacramento
2422 Arden Way, Suite B-50
Sacramento, CA 95825 916/920-6116

Salinas
21 W. Laurel Dr., Suite 69
Salinas, Ca 93901 408/443-3040

San Bernardino
303 W. Third St., Room 140
San Bernardino, CA 92401 714/383-4333

San Diego
8765 Aero Dr., Suite 120
San Diego, CA 92123 619/237-7334

San Francisco
30 Van Ness, Ste. 3400
San Francisco, CA 941 415/557-0860

San Jose
100 Paseo de San Antonio, Room 120
San Jose, CA 95113 408/277-1265

San Mateo
1900 S. Norfolk Blvd., Room 219
San Mateo, CA 94403 415/572-9451

Santa Ana
28 Civic Center Plaza, Room 625
Santa Ana, CA 92701 714/558-4115

02/07/92 13:26

0408 2DE 37

SJ CON VIS BUR

0007/010

-3-

Santa Barbara411 E. Canon Perdido, Room 3
Santa Barbara, CA 93101-1597

805/963-1438

Santa Rosa50 D St., Suite 360
Santa Rosa, CA 95404

707/576-2390

Stockton31 E Channel St., Room 328
Stockton, CA 95202

209/948-7770

Van Nuys6150 Van Nuys Blvd., Room 200
Van Nuys, CA 91402

818/901-5312

Ventura5720 Ralston St., Room 103
Ventura, CA 93003

805/654-4538

Whittier15215 E. Penn, Suite 300
Whittier, CA 90602

213/698-2278

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Attachment I

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

PETE WILSON, Governor

DEPARTMENT OF COMMERCE

CALIFORNIA FILM COMMISSION
HOLLYWOOD BLVD., SUITE 600
HOLLYWOOD, CA 90028
(213) 776-2444



LABOR

Due to the large number of entertainment industry unions operating in a wide range of jurisdictions in California, it will be helpful for your office to be familiar with the various unions and guilds, their specialization, size, crew requirements, and where they can be found. This paper will provide you with a brief overview of the labor system which will enable you to respond to production company inquiries in your area.

The Unions

To begin, there are three major unions which operate on a nationwide basis: the Directors Guild of America (DGA) with 9,000 members, Screen Actors Guild (SAG) with 62,000 members, and American Federation of Television and Radio Artists (AFTRA) with 70,000 members. These unions, the first representing the directors and the remaining two representing actors, have nationwide jurisdiction; thus the rules, regulations, and pay rates are standardized throughout the 50 states. In addition, another organization is the International Photographers Guild (cameramen), which is split into three regions - western, central, and eastern locals. The region which you will deal with most frequently is Local 659 which represents the 13 western states.

The remainder of the unions and guilds work on local jurisdictional levels. These include: The International Association of Theatrical and Stage Employees (IATSE) unions such as the Property Craftsmen, Grips, Sound Technicians, and Electrical and Lighting Technicians. Additionally, there is the Teamsters Union, which includes drivers, location managers and animal trainers.

Jurisdiction

If the production is a union show originating from the Los Angeles area, then a Los Angeles crew may be contracted to work the shoot. In many cases the production company will hire from local unions in the area where they are filming. Therefore, it may be San Francisco labor which is hired for filming in the Bay Area. Not all productions are union. If they are "non-union," it usually means they are not employing members of IATSE. Most non-union shows use DGA, SAG and Teamster members.

-2-

A "union company" signatory is a company which has signed a contract (making them a "signatory") with the major union organizations (e.g., IATSE) and has agreed to hire their union crews. Many productions may be signatory to some unions and not others (DGA and SAG and Teamsters but not IATSE for example).

It is important to note that there are a number of union jurisdictional zones operating on a statewide basis. Firstly, there is The Studio Zone extending 30 miles in all directions from Hollywood. Within this zone crews are paid regular scale and can be required to drive to any location within this zone without additional compensation. Once beyond this zone, either transportation must be provided by the production company, or the company must pay a per diem (a daily expense account) to the crew members. Since the majority of filming done outside of the Los Angeles area is well beyond the 30 mile Studio Zone, you can expect the production companies which shoot on location in your area to pay the crew a per diem and provide room and board.

There are three zones associated with the Screen Extras Guild (SEG), which is the guild that provides extras and atmosphere players. In the Southern California area, the SEG zones extends 300 miles from Hollywood.

The second SEG zone operates in the San Francisco area, which extends 75 miles from the city; the third zone encompasses the City of San Diego. Within these two zones, production companies who are SEG signatories are required to hire from the guild. There are also non-union services which will supply extras for non-union shoots.

If your office has any question about where union locals can be found in your specific area. Listed on the next page are the minimum crew requirements for a Los Angeles-based company. If you have further questions concerning union regulations, please call the California Film Commission.

-3-

Crew Requirements

The minimum staffing requirements for an L.A.-based crew are as follows:

Photographers (IATSE Local 659)	Director of Photography, camera operator, 1st assistant, 2nd assistant, & still cameraperson
Property Craftsmen (IATSE Local 80)	Property master & assistant
Grips (IATSE Local 80)	Key grip, 2nd grip, & dolly grip
Sound Technicians (IATSE Local 695)	Mixer, microphone boom operator, and utility sound technician
Electrical and Lighting (IATSE Local 728)	Chief lighting technician & 1st assistant
Teamsters (Local 399)	Must be used for all driving and transportation The union location managers also belong to this local
Wardrobe (IATSE Local 705)	Costumer, wardrobe mistress, seamstress
Editors (IATSE Local 776)	Editor, assistant editor
Make-up (IATSE Local 706)	Make-up person, hairstylist (no minimum)
Art Directors (IATSE Local 876)	One required
Script Supervisor (IATSE Local 871)	When shooting with a script, one is required
Studio Teachers (IATSE Local 884)	As needed where minors are employed

H/wp/labor/rev.3-90

(1)

PRODUCTION ACTIVITY 1990-1991

Year	Project Title	Total Spent in Alaska	Total Spent on Local Hire	No. of Locals Hired
FEATURE FILM ACTIVITY				
1990	Salmonberries	\$1,000,000.00	\$280,000.00	100
1990	White Fang	\$4,000,000.00	\$1,120,000.00	200
1990	The Great Hunters	\$1,200,000.00	\$336,000.00	100
1991	Arrowtooth Waltz	\$377,000.00	\$40,000.00	25
1991	Star Trek VI	\$61,998.09	\$10,478.68	5
1991	Leaving Normal	Pending		
1991	Lovers on Edge of Earth	In production		
SUBTOTAL:		\$6,638,998.09	\$1,786,478.68	430
COMMERCIAL PRODUCTION ACTIVITY				
1990	Mazda	\$19,400.00	\$1,200.00	6
1990	Miller Beer	\$270,500.00	\$36,000.00	23
1990	BMW	\$90,930.00	\$28,830.00	21
1990	McDonalds	\$190,200.00	\$11,100.00	75
1990	Maritime Cowboy	\$160,000.00	\$44,800.00	23
1990	Daikin Air Conditioner	\$60,700.00	\$4,500.00	2
1990	Cadbury Chocolate	\$150,000.00	\$37,500.00	16
1991	Jeep Wrangler	\$153,543.00	\$17,055.00	12
1991	Pro-Plan Pet Food	\$45,000.00	NA	NA
1991	Royal Caribbean Cruise - 1	\$7,100.00	\$0.00	0
1991	Royal Caribbean Cruise - 2	\$41,955.00	\$2,800.00	13
1991	Saturn	\$111,200.00	\$26,200.00	32
1991	Sekesui Kagaku	\$36,150.00	\$25,000.00	2
1991	Sierra	\$30,200.00	\$22,000.00	5
1991	Toyota	\$96,052.00	\$27,000.00	20
1991	Snickers	\$42,396.00	\$14,580.00	13
1991	Colgate	Pending		
1991	US Postal Service	Pending		
1991	Alka Seltzer	\$83,500.00	\$24,000.00	20
SUBTOTAL:		\$1,588,826.00	\$322,565.00	283

2

P.03

FAX NO. 9075623575

SUB DIVISION YUUKISTV/AIMC

FEB-10-92 SHI 10:42

Year	Project Title	Total Spent in Alaska	Total Spent on Local Hire	No. of Locals Hired
TELEVISION/VIDEO PRODUCTION				
1990	Alaska Men Magazine	\$22,300.00	\$0.00	0
1990	Alaska's Nature and People	\$32,700.00	\$0.00	0
1990	Dinosaurs TV special	\$20,100.00	\$0.00	0
1990	Nat'l Geographic Braving Alaska	\$217,811.00	\$49,022.00	35
1990	See the World by Train	\$100,000.00	\$22,000.00	19
1990	Pure Insanity	\$30,000.00	\$6,600.00	8
1990	Cops	\$100,000.00	\$23,000.00	23
1991	Alaska the Last Frontier	\$6,880.00	\$2,500.00	30
1991	American Detective	\$44,700.00	\$300.00	1
1991	American Outdoor Adventures	\$6,880.00	\$2,500.00	30
1991	American Road Trips	\$3,490.00	\$0.00	0
1991	Amway Alaska	\$13,220.00	\$720.00	3
1991	Art Linkletter Show	\$28,300.00	\$2,000.00	2
1991	Baidarka Story	\$6,200.00	\$0.00	0
1991	Fuji Quiz Show	\$70,000.00	NA	20
1991	Horizon	\$2,959.00	\$674.58	2
1991	Klondike Gold Rush	\$5,215.00	\$800.00	4
1991	Real Life Heroes	\$11,293.00	\$2,071.00	NA
1991	Rescue 911	\$81,580.00	\$14,280.00	21
1991	Severly Handicapped	\$2,500.00	NA	NA
1991	Simple Pleasures	\$19,600.00	\$2,000.00	3
1991	Superwings	\$11,300.00	\$0.00	0
1991	The Hiro Project	\$8,780.00	\$1,000.00	2
1991	The Human Language	\$10,635.00	\$1,300.00	2
1991	Storage Tek	\$50,000.00		3
1991	America's Funniest People	\$9,826.14	\$1,875.00	8
1991	Vacation America	\$1,900.00	\$0.00	0
1991	Nickey Mouse Club	\$13,020.00	\$700.00	1
SUBTOTAL:		\$931,089.14	\$133,342.58	217

(3)

Project Title	Total Spent in Alaska	Total Spent on Local Hire	No. of Locals Hired
.L SHOOTS			
?1 Johnny K clothing	\$20,000.00	NA	8
?1 Saab	\$10,100.00	\$0.00	0
?1 County Seat Jeans	\$8,002.26	\$0.00	0
?1 IBM	\$5,000.00	\$0.00	0
?1 Flayboy	\$6,338.00	\$1,300.00	1
?1 Toyota	\$8,800.00	\$3,400.00	4
?1 Banana Republic .	pending	NA	NA
TOTAL:	\$58,240.26	\$4,700.00	13
ID TOTAL:	\$9,217,153.49	\$2,247,086.26	943

Alaska mystique could pique interest of filmmakers

FAX NO:

#521 P03

By PATRICIA SOLOVEICHIK
TIMES BUSINESS WRITER

Alaska is caught up in a whirlwind of circumstance that is creating a very marketable mystique to draw filmmakers seeking unique footage or an exotic angle, the director of the state film office said Thursday.

As evidence of that claim, Alaska Film Office coordinator Mary

Pignalberi cited CBS This Morning's "85 percent sure" plans to broadcast live from Alaska for a week in May, placing its bets on the "last frontier" for sweeps week.

The morning news show wanted an unusual American location that would draw viewers at that important time, the film director told about 50 members of the Alaska Press Women

gathered at the Golden Lion Hotel in Anchorage.

"It is sweeps week, so they will be pumping promotions about Alaska," she said. "This is a drop-in-the-lap kind of thing right before tourist season starts."

How much of the CBS show's decision is attributable to luck and how
See Film, back page

Times 2/7/92

Film

Continued from page C1

much to Pignalberi's promotions is not known, but credit also may go to the popular television series "Northern Exposure."

"That kind of publicity is priceless. They say the word 'Alaska' six or seven times in the show," she told a packed banquet room.

Most people do not know the 2-year-old series is not filmed in Alaska, and filmmakers suddenly see that it is possible to film in Alaska, she said.

In addition to the series, Alaska's film industry may be benefiting from the "greening of the industry."

"In the film community, there is a much higher level of awareness about the environment, and this is the last frontier," Pignalberi said. "Alaska is the panacea in that regard. We're in a good position in this next 10-year period."

Combined efforts of tourism and film industry marketing also can be credited with gains in the past few years, which have included the filming of "White Fang," "Salmonberries," "Star Trek VI," and a variety of com-

mercials.

"In terms of a very unusual look that hasn't been overdone on the screen, our accessibility is very good. Our challenge is to get that message out there," Pignalberi said.

The latest message is a new billboard on Sunset Boulevard in Los Angeles that will be presented in three parts. The first part will be an Alaska landscape, followed next month with the addition of bear claws on either side, as though the animal were climbing up the back. The final month shows the bear head breaking through the canvas.

Pignalberi said the previous billboard created a bit of a sensation, as have the Alaska Film Office advertisements placed in such publications as Advertising Age and Variety.

Possibilities for future films in Alaska are on the drawing board and may come to fruition this year, she said.

But Alaska is competing with exotic European locations preferred by film companies following the trendy places to be, and also with domestic Northwest locations and Canada.

Alaska's mystique is a state of mind based on what people grow up thinking and hearing about

ley, North America's tallest mountain, glaciers larger than some states, and miles and miles of coastline.

"It is the mystique of the unknown. Coming to Alaska is seen as something people want to achieve," she said.

It is perceived as isolated and remote, which both adds to the allure and makes filmmakers think twice about the idea.

Carol Carlson, owner of Carlson Company Models and Talent in Anchorage, said the state also has to be prepared for the interest drawn from marketing efforts.

"There is a lot of potential. We have to keep up and be ready. We can't operate like a small town business. It's not enough to have a nice look," she said.

One good start would be to change labor laws to make it easier for children to work in the industry, she said. A limit on human resources is a major flaw in the state's film package.

She said the series "Rescue 911" recently visited Alaska for a shoot and vowed not to return again until changes had been made in the labor laws.

"We have to grow up and be ready for whatever projects come up," Carlson said.

HB

468

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO : HB468

Revision Date: _____
 Title: "An Act relating to unfair trade practices by construction contractors."
 Sponsor: House Judiciary Committee
 Requestor: House Labor & Commerce

Department Affected: Labor
 BRU: Workers' Compensation
 Component: Workers' Compensation
COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
-----------------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Linda Rexwinkel, Director Phone: 264-2452
 Division: Workers' Compensation Date: 2/24/92
 Approved by Commissioner: John Abshire, Acting Commissioner
 Agency: Department of Labor Date: 2/24/92

REPRESENTATIVE DAVE DONLEY

ALASKA STATE LEGISLATURE
DISTRICT ELEVEN
SEAT A

3111 "C" STREET, SUITE 450
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ALASKA LANDINGS • BENTZEN • BIRCHWOOD • CHESTER CREEK • HEATHER MEADOWS • LINCOLN PARK • MIDTOWN • NORTHSTAR
NORTHWOOD • ROMIG • ROOSEVELT PARK • SPENARD • THOMPSON • TURNAGAEN • WINDEMERE • WOODLAND PARK



CHAIRMAN
JUDICIARY COMMITTEE
VICE CHAIRMAN
REGULATION REVIEW COMMITTEE
MEMBER
RULES COMMITTEE
LABOR AND COMMERCE COMMITTEE

MEMORANDUM

To: Members of the House Labor and Commerce Committee

From: Representative Dave Donley 
Chair, House Judiciary Committee

Re: HB 468, An act relating to unfair trade practices by
construction contractors

Date: February 25, 1992

Thank you for hearing HB 468, an act relating to unfair trade practices by noncomplying contractors. This legislation addresses concerns both contractors and the labor community have about unfair bidding practices of contractors who are attempting to reduce their bids by misclassifying employees as independent contractors. Misclassification allows the bidder to escape payment of FICA taxes, workers' compensation, and unemployment contributions and resultingly reduce their bid.

The bili has two main provisions.

1. It provides a private cause of action to contractors workers, and unions that suffer damages by loss of a bid to sue winning bidders who reduced their bid by knowingly misclassifying employees as independent contractors. One exception to this provision is that a person who brings an action against a winning bidder may not collect damages if the defendant to the case establishes that the plaintiff also knowingly violated employment law by misclassifying an employee as an independent contractor in their bid for the same contract.



2. It gives the attorney general authority to bring an action for civil penalties and injunctive relief against a person who knowingly violates the workers' compensation, unemployment contributions, and FICA withholdings by misclassifying an employee as an independent contractor.

While the State presently has the authority to address this misclassification in the bids it receives, many are concerned that the State is too overburdened to discover every case. For example, the IRS has recently estimated that 38% of employers misclassify workers as contractors. Therefore, HB 468 provides this private cause of action. It is similar to a bill presently introduced at the federal level to address this same concern.

HB 468 has the support of the Labor community and is not opposed by the Associated General Contractors.

DD/jmn



UNITED BROTHERHOOD OF
Carpenters and Joiners of America

LOCAL UNION NO. 1281

407 DENALI

PHONE 276-3533

ANCHORAGE, ALASKA 99501

Fax: 276-7962



February 19, 1992

Representative David Finkelstein
State Capitol
Juneau, AK 99801

Dear Representative Finkelstein,

Carpenters Local 1281 is in 100% support of House Bill 468. This Bill will stop unscrupulous contractors from cheating the working man, the I.R.S., The Social Security Administration, Workmans Comp., and contractors that are willing to play by the law.

The Federal Government is in the process of passing a similar law, but it will only apply on Federal jobs. HB 468 will cover all projects.

If you have any questions, or concerns, please call.

Sincerely,

Royce R. Rock
Business Agent
Carpenters Local 1281

RRR/sh

NFIB Alaska

National Federation of
Independent Business

POSITION PAPER

OF

NATIONAL FEDERATION OF INDEPENDENT BUSINESS
(NFIB/ALASKA)

TO THE

HOUSE LABOR AND COMMERCE COMMITTEE

ON

HB 468

AN ACT RELATING TO UNFAIR TRADE PRACTICES BY
CONSTRUCTION CONTRACTORS.

State Office
9159 Skywood Lane
Juneau, AK 99801
(907) 789-4278



The Guardian of
Small Business

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS RESA JERREL, AND I REPRESENT THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS - NFIB/ALASKA. I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO COMMENT ON HB 468.

WE BELIEVE THAT IF YOU WANT TO ALLOW A PERSON THAT HAS SUFFERED DAMAGES TO SEEK INJUNCTIVE RELIEF, AS THE RESULT OF A COMPETITIVE BID WHERE THE SUCCESSFUL BIDDER KNOWINGLY TREATED AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR - YOU SHOULD ALSO CONSIDER CLARIFYING THE DEFINITION OF AN "INDEPENDENT CONTRACTOR".

FOR SOME BACKGROUND INFORMATION: NFIB/ALASKA IS COMPRISED OF 5,240 SMALL AND INDEPENDENT BUSINESS OWNERS. THE LEGISLATIVE AGENDA OF NFIB/ALASKA IS DETERMINED BY OUR BALLOT. THE BALLOT IS OUR ANNUAL POLL OF OUR MEMBERSHIP ON A SERIES OF ISSUES DEEMED CRITICAL TO SMALL BUSINESS. A MAJORITY VOTE, OF THE MEMBERS IN RESPONSE TO THE POLL, SETS OUR POLICY AND POSITION ON LEGISLATIVE ISSUES.

THE FOLLOWING ARE PART OF THE RESULTS OF THE 1992 NFIB/ALASKA BALLOT QUESTIONS REGARDING INDEPENDENT CONTRACTORS:

1. SHOULD THERE BE A STANDARD DEFINITION OF INDEPENDENT CONTRACTOR FOR USE BY ALL STATE AGENCIES?

85% YES 7% NO 8% UNDECIDED

2. SHOULD THERE BE A SINGLE FORM USED TO REGISTER A PERSON'S INDEPENDENT CONTRACTOR STATUS WITH THE STATE THAT WOULD SERVE AS A DECLARATION OF HIS OR HER STATUS TO ALL STATE AGENCIES?

82% YES 10% NO 8% UNDECIDED

THE IRS USES TWENTY COMMON LAW FACTORS TO DETERMINE WHAT IS CONSIDERED AN "EMPLOYEE." THESE FACTORS ARE USED TO ASSESS TO WHAT EXTENT AN EMPLOYER HAS CONTROL OVER THOSE THAT WORK FOR HIM OR HER. BUT, THERE STILL IS CONFUSION AND MANY INCONSISTENCIES AMONG STATE AGENCIES REGARDING THE DEFINITION OF AN INDEPENDENT CONTRACTOR. THE

RESULT IS THAT WHILE A BUSINESS PERSON MAY BE CONSIDERED TO BE AN INDEPENDENT CONTRACTOR BY ONE STATE AGENCY, THAT PERSON MAY NOT QUALIFY FOR SUCH STATUS WHEN AUDITED BY ANOTHER DIVISION OF THE DEPARTMENT OF LABOR.

REQUIRING A SIMPLE FORM TO REGISTER A PERSON'S INDEPENDENT CONTRACTOR STATUS WOULD HELP TO END THE CONFUSION OVER WHO IS AND WHO IS NOT AN INDEPENDENT CONTRACTOR. THE CONFUSION HAS MADE IT DIFFICULT FOR LAWFUL BUSINESS OWNERS TO KNOW WHEN TO WITHHOLD AND PAY PAYROLL TAXES ON PERSONS PERFORMING SERVICES FOR THEM. IF AN INDEPENDENT CONTRACTOR COULD SIMPLY REGISTER THEMSELVES WITH THE STATE, THE CURRENT CONFUSION COULD BE MINIMIZED.

ATTACHED ARE THE TWENTY COMMON LAW FACTORS USED BY THE IRS, A RECENT NFIB WHITE PAPER ON THOSE GUIDELINES AND A SUMMARY AND COPY OF A LAW PASSED IN OREGON.

I LOOK FORWARD TO WORKING WITH YOU TO HELP CLARIFY THE DEFINITION OF AN INDEPENDENT CONTRACTOR.

THANK YOU FOR THE OPPORTUNITY TO TESTIFY ON THIS VERY IMPORTANT BILL.

NFIB

National Federation of
Independent Business

December 1, 1989

MEMORANDUM

TO: State Directors
FROM: David Stephenson *ds*
SUBJ: Independent Contractor Status

In the last couple of months several State Directors have made inquiries on the issue of independent contractor status. Apparently, there are efforts in some states to more precisely define independent contractor status statutorily. Questions have been raised with respect to the method used by IRS to determine whether a worker is an employee or an independent contractor.

The IRS uses 20 common law factors to determine what constitutes an employee. These common law factors seek to assess to what extent an "employer" has control, or the right to control, those who work for him or her. These control factors include such things as hours of work, training, work premises, work tools, methods of payment and so forth.

Determining employee status is not a science. It is highly subjective and subject to individual interpretation. As GAO noted in a recent report to Congress, "...each [common law] factor may not apply, and if a factor does apply, its degree of importance can vary both from occupation to occupation and with the related facts and circumstances."

In short, IRS does not offer us a precise definition. Nor is it likely that any state will be able to construct a precise definition. That is not to say, however, that no state can improve upon the IRS method.

I have attached for your consideration excerpts from the September 1989 GAO report on the determination of independent contractor status. It includes a listing of the 20 common law factors used by the IRS. If your state has developed any novel approach to this issue, please share it with the group.

Suite 700
600 Maryland Ave. S.W.
Washington, DC 20024
(202) 554-9000
FAX (202) 554-0496



The Guardian of
Small Business

DES
cc: Steve Woods
Don Robinson
Barry Stephenson
Jim Buente

Attachments
4415g

Background

Employers decide whether to classify workers as independent contractors or employees. While both types of workers may provide similar services, employees do so under the direct control of the employer. Conversely, independent contractors, organized as sole proprietorships, partnerships, or corporations, provide services without the employers' direct control.

IRS guidance provides employers with criteria for classifying their workers, including 20 common law factors. (See app. I.) These factors revolve around the degree of, or right of, control an employer has over workers, such as their hours, space, and training. However, in determining the proper classification, these factors can be subjective; each factor may not apply, and if a factor does apply, its degree of importance can vary both from occupation to occupation and with the related facts and circumstances. Because of the subjective nature of the classification criteria, misclassification of workers can occur.

Employers also have economic incentives to misclassify. When employers classify employees as independent contractors, they can reduce their tax liability by not having to pay social security and federal unemployment compensation taxes. They also may avoid the costs from withholding income taxes or providing fringe benefits, as they do for employees. Other incentives for not treating workers as employees include the costs associated with minimum wage laws, worker's compensation insurance, state unemployment taxes, and collective bargaining.

When an employee is misclassified, federal tax revenues are lost. IRS studies show that independent contractors tend to underreport their income because they do not have their taxes withheld. For 1987, IRS estimated that sole proprietors, many of whom are independent contractors according to IRS officials, accounted for \$16 billion, or 34 percent, of the \$48.3 billion tax gap caused by individuals who did not fully report their income.²

Revenues are also lost because noncompliant employers and misclassified employees pay less tax. As previously mentioned, employers who misclassify employees as independent contractors do not pay social security or unemployment compensation taxes. Also, employees misclassified as independent contractors can reduce their tax liability by deducting business expenses that employees are not usually entitled to deduct. For example, independent contractors can deduct expenses for automobiles, homes, medical insurance, retirement plans, and business trips. If employees are entitled to a deduction, they can only deduct limited amounts.

IRS relies primarily on third-party leads to identify employers who misclassify. Leads on apparent cases of misclassification come from such sources as (1) workers who complain about their classifications, (2) IRS' examinations of business income tax returns, and (3) referrals by other

²IRS defines the tax gap as the difference between the amount of income taxes voluntarily paid by taxpayers and the amount of income taxes that are owed.

federal and state agencies. To confirm whether the apparent misclassification exists, IRS must first interview employers on their classification practices, using the 20 common law factors. If misclassification seems evident, IRS then must do employment tax examinations to verify whether the employers misclassified workers.

IRS has historically relied on the Examination Division to do employment tax examinations but over the years the Division's examinations have declined. In 1979, Examination did about 109,000 examinations, or 0.43 percent, of the employment tax returns filed. In 1988, Examination did about 24,000, or 0.09 percent, of the returns filed. According to National Office Examination officials, the decline in these examinations occurred because of restrictions on IRS' authority to correct all misclassifications, due to Section 530 of the Revenue Act of 1978.

Because of the decline in examinations and IRS' belief that misclassification is a serious problem, IRS' Collection Division instituted a nationwide employment tax examination program in 1987, which generally focuses on employers whose assets are \$3 million or less. In 1988, Collection did 1,120 examinations of which about 90 percent resulted in proposed tax assessments of over \$50 million and in the reclassification of 46,258 workers as employees. Reclassification places these employees under the income tax withholding system, which increases the likelihood that their tax liabilities will be identified and paid.

While third-party leads that initiated these employment tax examinations have proven to be helpful in identifying misclassification and generating proposed taxes, Collection officials recognize that the leads do not systematically cover the universe of employers who may be misclassifying workers. For example, the leads may not be identifying certain types of employers who have been most noncompliant in classifying workers. These officials said they have been exploring various methods to more systematically identify such employers and believed that using information returns could improve the identification process.

Common Law Factors Used to Determine Workers' Classification

IRS uses 20 common law factors to determine whether workers are employees or independent contractors (see Internal Revenue Manual, 4600 Employment Tax Procedure, Exhibit 4640-1). Workers are generally employees if they:

1. Must comply with employer's instructions about the work.
2. Receive training from or at the direction of the employer.
3. Provide services that are intergrated into the business.
4. Provide services that must be rendered personally.
5. Hire, supervise, and pay assistants for the employer.
6. Have a continuing working relationship with the employer.
7. Must follow set hours of work.
8. Work full-time for an employer.
9. Do their work on the employer's premises.
10. Must do their work in a sequence set by the employer.
11. Must submit regular reports to the employer.
12. Receive payments of regular amounts at set intervals.
13. Receive payments for business and/or travelling expenses.
14. Rely on the employer to furnish tools and materials.
15. Lack a major investment in facilities used to perform the service.
16. Cannot make a profit or suffer a loss from their services.
17. Work for one employer at a time.
18. Do not offer their services to the general public.
19. Can be fired by the employer.
20. May quit work at any time without incurring liability.

Independent Contractor Status

Under FICA and FUTA

For federal tax purposes (FICA and FUTA) the determination of whether an individual is an employee or an independent contractor is derived from three tests.

Test I--Corporate Officers

For purposes of FICA and FUTA corporate officers are generally considered to be employees of the corporation, even if they are equity holders. There are some exceptions, however. Corporate officers who perform little or no services for the corporation and receive little or no remuneration (either directly or indirectly) may not be considered as employees.

Test II--The Common Law Rules For Determining Employee or Independent Contractor Status.

The common law rules of the IRS are used to determine employee or independent contractor status for purposes of FICA and FUTA. Generally, an individual is an employee if the person for whom he or she works has the right to direct and control that individual as to the way the individual works in terms of the final results and the details of when, where and how the work gets done. It should be noted that the employer need not actually exercise control for an employer-employee relationship to exist. The fact that the employer has the right to do so usually results in a determination of employee status. The IRS uses 20 common law factors to determine the extent of control exercised and therefore the status of the worker. Workers are generally considered to be employees if they:

*Must comply with the employer's instructions about the work in terms of when, where and how the work is to be performed. These instructions may be oral or in the form of written procedures such as a personnel manual.

*Receive training from or at the direction of the employer. Training by the employer or an experienced employee of the employer denotes a certain amount of control. This training can take several forms, including attendance at meetings, use of company policy and procedure manuals, and written correspondence.

*Provide services that are integrated into the business. In those cases where the success or continuation of the business is dependent upon the provision of certain kinds of services by an individual then it is assumed that the business owner exerts some control over the provision of these services.

*Provide services that are rendered personally. If an individual who is providing a service to a business has the right to hire a substitute without the permission of the business owner, it suggests a lack of control on the part of the owner. A service that must be rendered personally, however, indicates that the business owner has interest in the methods of delivering the

service as well as the end result.

*Hire, supervise, and pay assistants for the employer. An individual who performs these services for an employer is generally considered to be under the control of the employer, unless this is done under a contract that specifies that the individual is responsible for labor, materials and the end result of the work--not the methods of attainment.

*Have a continuing working relationship with the employer. The existence of such a relationship over a period of time indicates an employer-employee relationship, even if the work is part-time or seasonal.

*Must follow set hours of work. An individual who cannot control his own time is almost always an employee--not an independent contractor.

*Work full-time for an employer. Full-time work by an individual is considered indicative of control by the employer, since the individual is not free to offer his services to other parties. If, for example, an employer requires a certain volume of work that consumes all of the individual's working time, it is generally considered an employer-employee relationship. By contrast, an independent contractor is free to work whenever he chooses for whomever he chooses.

*Do their work on the employer's premises. This circumstance implies employer control especially if the work could be done off the premises. The use of office space, desk space, office equipment and services provided by the employer generally places the individual under the direction of the employer unless the worker has the option to use other space and facilities. Working off the employer's premises, on the other hand, does not imply independent contractor status if the work must be performed off the premises (construction work, for example).

*Must do their work in a sequence set by the employer. If the employer determines, or has the right to determine, the order of the work to be performed control may be implied.

*Must submit regular reports to the employer. Any type of oral or written reports indicates that the worker must account for his actions to the employer and this may imply control and direction.

*Receive payments of regular amounts at set intervals. Whenever payments to a worker are made on an hourly, weekly or monthly basis it is likely that an employee-employer relationship exists. Independent contractors are usually paid on a job basis or by commission. A guarantee by the employer of a minimum salary may give rise to an employer-employee relationship. The establishment of a drawing account by the employer for the benefit of the worker+ may imply an employment relationship if the worker is allowed to draw from the account at stated intervals and is not required to reimburse for any amount exceeding earnings.

*Receive payments for business and/or travel expenses. Payment of such expenses is indicative of control by the employer.

*Rely on the employer to furnish tools and materials. Independent contractors usually supply their own tools and materials. The furnishing of such items by the employer implies control.

*Lack a major investment in facilities used to perform the service. If the worker has a major investment in the work premises or equipment used to perform the work it is indicative of independent status. Employers routinely supply employees with items such as tools, manuals, instruction books, clothing, etc. and these are not considered facilities.

*Cannot make a profit or suffer a loss from their services. The possibility that the worker may profit or suffer a loss as a result of services performed is indicative of independent contractor status. An independent contractor has recurring liabilities and obligations and profit or loss is dependent on the relation between his receipts and expenditures.

*Work for one employer at a time. An individual who works for a number of employers at one time is usually thought to be free from the control of any employer thereby achieving independent status.

*Do not offer their services to the general public. Offering services to the general public usually connotes independent contractor status, especially if the individual has a place of business, advertises his services, and generally seeks to attract customers.

*Can be fired by the employer. An individual who can be fired from his or her employment position by the employer is an employee. Independent contractors cannot be fired, except to the extent that they do not adhere to some contractual obligation or specification.

*May quit work at any time without incurring liability. If a worker has the right to leave the employment at any time without incurring liability, then an employer-employee relationship exists. An independent contractor usually agrees to do a specific job for a specified commission, and if the contractor does not fulfill that obligation he can be held liable.

Test III--Statutory Employees

Four occupations that could not meet the employee-status test under the IRS common-law rules have been designated employees by congressional statute (agent-drivers or commission-drivers, full-time life insurance salespeople, homeworkers, and full-time traveling or city salespeople).

In order for an individual to be designated as a Test III statutory he or she must meet the specifications for one of the four designated occupations, as well as the following conditions:

*The worker must perform substantially all of the work personally;

*The worker must have no substantial investment in the facilities used to perform the work; and

*The work must be performed in a continuing relationship.

Statutory Nonemployees

In the Revenue Act of 1978 the Congress created a "safe haven" for taxpayers who had previously classified certain workers as independent contractors, but who might not actually meet the IRS test. This safe haven would extended by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). These actions were taken to minimize employers' confusion about employment status while the Congress continued to seek a more definitive method of determining classifications.

Another provision of the TEFRA legislation designated qualified real estate agents and direct sellers as statutory nonemployees, thereby granting self-employed status to these individuals.

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and Labor Committee and S. 1622 to the Labor and Human Resources Committee.

MISCLASSIFICATION OF WORKERS/INDEPENDENT CONTRACTORS - H.R. 3813 - This bill would allow legitimate contractors bidding on federal jobs to bring a private right of action against successful bidders who have fraudulently misclassified their employees as independent contractors in order to avoid the payment of taxes and fringe benefits. H.R. 3813 has been referred to the Ways and Means Committee.

TIMBER HARVESTING - H.R. 2463 AND S. 1156 - Both bills provide a balanced approach to problems of timber harvesting on old growth federal lands. H.R. 2463 was reported by the National Parks and Public Lands Subcommittee and hearings have been held on S. 1156 by the Public Lands, National Parks and Forests Subcommittee.

LEAD ABATEMENT -Numerous bills related to reducing the risk of lead exposure have been introduced in the Congress. These bills generally seek to improve monitoring, detection and abatement of lead exposure hazards.

AMERICAN JOBS PROTECTION ACT - H.R. 3878 - This bill provides that when work is transferred to another country where the average wage is less than 50% of the average U.S. wage, or employment standards are substantially less effective than our own, the employer is required to provide protection to the U.S. workers left behind. H.S. 3878 was referred to the Education and Labor Committee.

TRADE - FAST TRACK FOR MEXICO - In the last session of Congress resolutions in the House and Senate to deny President Bush "fast track" authority for free trade negotiations with Mexico were defeated. S. Res. 109 has been introduced to allow the Congress the right to amend certain areas of an agreement which might be reached with Mexico. The free trade agreement with Mexico threatens the loss of thousands of American jobs.

EXTENSION OF UNEMPLOYMENT BENEFITS - Congress is pushing for extension of unemployment benefits, which are set to expire on June 13, to October 3, 1992. All states would be allowed to pay an additional 13 weeks of benefits through June 13, according to the plan being discussed. The House may also consider legislation permanently changing the formula for determining when unemployment benefits beyond the regular 26 weeks (so called "extended benefits") become available. President Bush agreed to an extension in his State of the Union speech.

HEALTH CARE REFORM - Over 30 bills have been introduced to provide for comprehensive health care reform. Some of these proposals include measures to place controls on health care costs, which are growing at over 10% per year and are projected to reach over \$750

REPRINT

B-Engrossed
House Bill 2320

Ordered by the Senate June 19
Including House Amendments dated February 10
and Senate Amendments dated June 19

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Joint Interim Committee on Labor)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Defines "independent contractor" for purposes of laws regarding income taxation, workers' compensation, unemployment compensation and registration of builders. Requires agencies which administer those areas jointly to adopt rules to carry out provisions of Act.
Repeals Enrolled House Bill 20-18 (1989 regular session).

A BILL FOR AN ACT

1
2 Relating to independent contractors; creating new provisions; amending ORS 316.162, 656.005,
3 656.027, 656.029, 657.040 and 701.005; and repealing ORS 657.042 and section 1, chapter
4 _____, Oregon Laws 1989 (Enrolled House Bill 20-18).

5 **Be It Enacted by the People of the State of Oregon:**

6 **SECTION 1.** As used in various provisions of ORS chapters 316, 656, 657 and 701, an individual
7 or business entity that performs labor or services for remuneration shall be considered to perform
8 the labor or services as an "independent contractor" if the standards of this section are met:

9 (1) The individual or business entity providing the labor or services is free from direction and
10 control over the means and manner of providing the labor or services, subject only to the right of
11 the person for whom the labor or services are provided to specify the desired results;

12 (2) The individual or business entity providing labor or services is responsible for obtaining all
13 assumed business registrations or professional occupation licenses required by state law or local
14 government ordinance for the individual or business entity to conduct the business;

15 (3) The individual or business entity providing labor or services furnishes the tools or equip-
16 ment necessary for performance of the contracted labor or services;

17 (4) The individual or business entity providing labor or services has the authority to hire and
18 fire employees to perform the labor or services;

19 (5) Payment for the labor or services is made upon completion of the performance of specific
20 portions of the project or is made on the basis of an annual or periodic retainer;

21 (6) The individual or business entity providing labor or services is registered under ORS chap-
22 ter 701, if the individual or business entity provides labor or services for which such registration is
23 required;

24 (7) Federal and state income tax returns in the name of the business or a business Schedule
25 C or farm Schedule F as part of the personal income tax return were filed for the previous year if
26 the individual or business entity performed labor or services as an independent contractor in the
27 previous year; and

NOTE: Matter in bold face in an amended section is new; matter [italic and bracketed] is existing law to be omitted.

1 (8) The individual or business entity represents to the public that the labor or services are to
2 be provided by an independently established business. An individual or business entity is considered
3 to be engaged in an independently established business when four or more of the following circum-
4 stances exist:

5 (a) The labor or services are primarily carried out at a location that is separate from the res-
6 idence of an individual who performs the labor or services, or are primarily carried out in a specific
7 portion of the residence, which portion is set aside as the location of the business;

8 (b) Commercial advertising or business cards as is customary in operating similar businesses
9 are purchased for the business, or the individual or business entity has a trade association mem-
10 bership;

11 (c) Telephone listing and service are used for the business that is separate from the personal
12 residence listing and service used by an individual who performs the labor or services;

13 (d) Labor or services are performed only pursuant to written contracts;

14 (e) Labor or services are performed for two or more different persons within a period of one
15 year; or

16 (f) The individual or business entity assumes financial responsibility for defective workmanship
17 or for service not provided as evidenced by the ownership of performance bonds, warranties, errors
18 and omission insurance or liability insurance relating to the labor or services to be provided.

19 **SECTION 1a.** In accordance with ORS 183.310 to 183.550, those agencies responsible for the
20 administration of ORS chapters 316, 656, 657 and 701, jointly shall adopt rules to carry out the
21 provisions of section 1 of this Act.

22 **SECTION 2.** ORS 316.162 is amended to read:

23 316.162. As used in ORS 316.162 to 316.212:

24 (1) "Number of withholding exemptions claimed" means the number of withholding exemptions
25 claimed in a withholding exemption certificate in effect under ORS 316.182, except that if no such
26 certificate is in effect, the number of withholding exemptions claimed is considered to be zero.

27 (2) "Wages" means remuneration for services performed by an employe for an employer, includ-
28 ing the cash value of all remuneration paid in any medium other than cash, except that "wages"
29 does not include remuneration paid:

30 (a) For active service in the Armed Forces of the United States as to which no withholding is
31 required by the Internal Revenue Code.

32 (b) To an employe of a common carrier to the extent that sections 1512 and 11504, title 49,
33 United States Code prohibits the remuneration from withholding for state income taxes.

34 (c) For domestic service in a private home, a local college club or a local chapter of a college
35 fraternity or sorority.

36 (d) For casual labor not in the course of the employer's trade or business.

37 (e) To an employe whose services to the employer consist solely of labor in connection with the
38 planting, cultivating or harvesting of seasonal agricultural crops if the total amount paid to such
39 employe is less than \$300 annually.

40 (f) To seamen who are exempt from garnishment, attachment or execution under title 46 of the
41 United States Code.

42 (g) To persons temporarily employed as emergency forest fire fighters.

43 (h) To employes' trusts exempt from tax under provisions of the federal Internal Revenue Code.

44 (i) For services performed by a duly ordained, commissioned or licensed minister of a church in

1 the exercise of the minister's ministry or by a member of a religious order in the exercise of reli-
2 gious duties required by such order, which duties are not commercial in nature.

3 (j) For services performed by an independent contractor, as that term is defined in sec-
4 tion 1 of this 1980 Act.

5 (3) "Employer" means:

6 (a) A person who is in such relation to another person that the person may control the work
7 of that other person and direct the manner in which it is to be done; or

8 (b) An officer or employe of a corporation, or a member or employe of a partnership, who as
9 such officer, employe or member is under a duty to perform the acts required of employers by ORS
10 316.167, 316.182, 316.197, 316.202 and 316.207.

11 SECTION 3. ORS 656.005 is amended to read:

12 656.005. (1) "Average weekly wage" means the Oregon average weekly wage in covered em-
13 ployment, as determined by the Employment Division of the Department of Human Resources, for
14 the last quarter of the calendar year preceding the fiscal year in which the injury occurred.

15 (2) "Beneficiary" means an injured worker, and the husband, wife, child or dependent of a
16 worker, who is entitled to receive payments under this chapter. However, a spouse of an injured
17 worker living in a state of abandonment for more than one year at the time of the injury or subse-
18 quently is not a beneficiary. A spouse who has lived separate and apart from the worker for a period
19 of two years and who has not during that time, received or attempted by process of law to collect
20 funds for support or maintenance, is considered living in a state of abandonment.

21 (3) "Board" means the Workers' Compensation Board.

22 (4) "Carrier-insured employer" means an employer who provides workers' compensation cover-
23 age with a guaranty contract insurer.

24 (5) "Child" includes a posthumous child, a child legally adopted prior to the injury, a child to-
25 ward whom the worker stands in loco parentis, an illegitimate child and a stepchild, if such
26 stepchild was, at the time of the injury, a member of the worker's family and substantially dependent
27 upon the worker for support. An invalid dependent child is a child, for purposes of benefits, re-
28 gardless of age, so long as the child was an invalid at the time of the accident and thereafter re-
29 mains an invalid substantially dependent on the worker for support. For purposes of this chapter,
30 an invalid dependent child is considered to be a child under 18 years of age.

31 (6) "Claim" means a written request for compensation from a subject worker or someone on the
32 worker's behalf, or any compensable injury of which a subject employer has notice or knowledge.

33 (7)(a) A "compensable injury" is an accidental injury, or accidental injury to prosthetic appli-
34 ances, arising out of and in the course of employment requiring medical services or resulting in
35 disability or death; an injury is accidental if the result is an accident, whether or not due to acci-
36 dental means. However, "compensable injury" does not include:

37 (A) Injury to any active participant in assaults or combats which are not connected to the job
38 assignment and which amount to a deviation from customary duties; or

39 (B) Injury incurred while engaging in or performing, or as the result of engaging in or per-
40 forming, any recreational or social activities solely for the worker's personal pleasure.

41 (b) A "disabling compensable injury" is an injury which entitles the worker to compensation for
42 disability or death.

43 (c) A "nondisabling compensable injury" is any injury which requires medical services only.

44 (8) "Compensation" includes all benefits, including medical services, provided for a compensable

1 injury to a subject worker or the worker's beneficiaries by an insurer or self-insured employer pur-
2 suant to this chapter.

3 (9) "Department" means the Department of Insurance and Finance.

4 (10) "Dependent" means any of the following-named relatives of a worker whose death results
5 from any injury and who leaves surviving no widow, widower or child under the age of 18 years:
6 Father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, brother,
7 sister, half sister, half brother, niece or nephew, who at the time of the accident, are dependent in
8 whole or in part for their support upon the earnings of the worker. Unless otherwise provided by
9 treaty, aliens not residing within the United States at the time of the accident other than father,
10 mother, husband, wife or children are not included within the term "dependent."

11 (11) "Director" means the Director of the Department of Insurance and Finance.

12 (12) "Doctor" or "physician" means a person duly licensed to practice one or more of the heal-
13 ing arts in this state within the limits of the license of the licentiate. "Attending physician" means
14 a doctor or physician who is primarily responsible for the treatment of a worker's compensable in-
15 jury. "Consulting physician" means a doctor or physician who examines a worker or the worker's
16 medical record to advise the attending physician regarding treatment of a worker's compensable
17 injury.

18 (13) "Employer" means any person, including receiver, administrator, executor or trustee, and
19 the state, state agencies, counties, municipal corporations, school districts and other public corpo-
20 rations or political subdivisions, who contracts to pay a remuneration for and secures the right to
21 direct and control the services of any person.

22 (14) "Guaranty contract insurer" and "insurer" mean the State Accident Insurance Fund Cor-
23 poration or an insurer authorized under ORS chapter 731 to transact workers' compensation insur-
24 ance in this state.

25 (15) "Insurance and Finance Fund" means the fund created by ORS 705.145.

26 (16) "Invalid" means one who is physically or mentally incapacitated from earning a livelihood.

27 (17) "Medically stationary" means that no further material improvement would reasonably be
28 expected from medical treatment, or the passage of time.

29 (18) "Noncomplying employer" means a subject employer who has failed to comply with ORS
30 656.017.

31 (19) "Party" means a claimant for compensation, the employer of the injured worker at the time
32 of injury and the insurer, if any, of such employer.

33 (20) "Payroll" means a record of wages payable to workers for their services and includes
34 commissions, value of exchange labor and the reasonable value of board, rent, housing, lodging or
35 similar advantage received from the employer. However, "payroll" does not include overtime pay,
36 vacation pay, bonus pay, tips, amounts payable under profit-sharing agreements or bonus payments
37 to reward workers for safe working practices. Bonus pay is limited to payments which are not an-
38 ticipated under the contract of employment and which are paid at the sole discretion of the em-
39 ployer. The exclusion from payroll of bonus payments to reward workers for safe working practices
40 is only for the purpose of calculations based on payroll to determine premium for workers' com-
41 pensation insurance, and does not affect any other calculation or determination based on payroll for
42 the purposes of this chapter.

43 (21) "Person" includes partnership, joint venture, association and corporation.

44 (22) "Self-insured employer" means an employer or group of employers certified under ORS

1 656.430 as meeting the qualifications set out by ORS 656.407.

2 (23) "State Accident Insurance Fund Corporation" and "corporation" mean the State Accident
3 Insurance Fund Corporation created under ORS 656.752.

4 (24) "Subject employer" means an employer who is subject to this chapter as provided by ORS
5 656.023.

6 (25) "Subject worker" means a worker who is subject to this chapter as provided by ORS
7 656.027.

8 (26) "Wages" means the money rate at which the service rendered is recompensed under the
9 contract of hiring in force at the time of the accident, including reasonable value of board, rent,
10 housing, lodging or similar advantage received from the employer, and includes the amount of tips
11 required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of
12 1954, as amended, and the regulations promulgated pursuant thereto, or the amount of actual tips
13 reported, whichever amount is greater. The State Accident Insurance Fund Corporation may estab-
14 lish assumed minimum and maximum wages, in conformity with recognized insurance principles, at
15 which any worker shall be carried upon the payroll of the employer for the purpose of determining
16 the premium of the employer.

17 (27) "Worker" means any person, including a minor whether lawfully or unlawfully employed,
18 who engages to furnish services for a remuneration, subject to the direction and control of an em-
19 ployer and includes salaried, elected and appointed officials of the state, state agencies, counties,
20 cities, school districts and other public corporations, but does not include any person whose services
21 are performed as an inmate or ward of a state institution.

22 (28) "Independent contractor" has the meaning for that term provided in section 1 of this
23 1989 Act.

24 SECTION 4. ORS 656.027 is amended to read:

25 656.027. All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers de-
26 scribed in the following subsections:

27 (1) A worker employed as a domestic servant in or about a private home. For the purposes of
28 this subsection "domestic servant" means any worker engaged in household domestic service.

29 (2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or
30 about the private home of the person employing the worker.

31 (3)(a) A worker whose employment is casual and either:

32 (A) The employment is not in the course of the trade, business or profession of the employer;

33 or

34 (B) The employment is in the course of the trade, business or profession of a nonsubject em-
35 ployer.

36 (b) For the purpose of this subsection, "casual" refers only to employments where the work in
37 any 30 day period, without regard to the number of workers employed, involves a total labor cost
38 of less than \$200.

39 (4) A person for whom a rule of liability for injury or death arising out of and in the course of
40 employment is provided by the laws of the United States.

41 (5) A worker engaged in the transportation in interstate commerce of goods, persons or property
42 for hire by rail, water, aircraft or motor vehicle, and whose employer has no fixed place of business
43 in this state.

44 (6) Workers of any city having a population of more than 200,000 that provides by ordinance or

1 charter compensation equivalent to compensation under ORS 656.001 to 656.794.

2 (7) Sole proprietors. When labor or services are performed under contract, the sole pro-
3 prietor must qualify as an independent contractor.

4 (8) Partners who are not engaged in work performed in direct connection with the construction,
5 alteration, repair, improvement, moving or demolition of an improvement on real property or
6 appurtenances thereto. When labor or services are performed under contract, the partnership
7 must qualify as an independent contractor.

8 (9) A corporate officer who is also a director of the corporation and has a substantial ownership
9 interest in the corporation, regardless of the nature of the work performed by such officer. However,
10 if the activities of the corporation are conducted on land that receives farm use tax assessment
11 pursuant to ORS 215.203 and ORS chapter 308, corporate officer includes all individuals identified
12 as directors in the corporate bylaws, regardless of ownership interest, and who are members of the
13 same family, whether related by blood, marriage or adoption. When labor or services are per-
14 formed under contract, the corporation must qualify as an independent contractor.

15 (10) A person performing services primarily for board and lodging received from any religious,
16 charitable or relief organization.

17 (11) A newspaper carrier utilized in compliance with the provisions of ORS 656.070 and 656.075.

18 (12) A person who has been declared an amateur athlete under the rules of the United States
19 Olympic Committee or the Canadian Olympic Committee and who receives no remuneration for
20 performance of services as an athlete other than board, room, rent, housing, lodging or other rea-
21 sonable incidental subsistence allowance, or any amateur sports official who is certified by a re-
22 cognized Oregon or national certifying authority, which requires or provides liability and accident
23 insurance for such officials. A roster of recognized Oregon and national certifying authorities will
24 be maintained by the Department of Insurance and Finance, from lists of certifying organizations
25 submitted by the Oregon School Activities Association and the Oregon Park and Recreation Society.

26 (13) Volunteer personnel participating in the ACTION programs, organized under the Domestic
27 Volunteer Service Act of 1973, P.L. 93-113, known as the Foster Grandparent Program and the
28 Senior Companion Program, whether or not the volunteers receive a stipend or nominal reimburse-
29 ment for time and travel expenses.

30 (14) A person who has an ownership or leasehold interest in equipment and who furnishes,
31 maintains and operates the equipment. As used in this subsection "equipment" means:

32 (a) A motor vehicle used in the transportation of logs, poles or piling.

33 (b) A motor vehicle used in the transportation of rocks, gravel, sand, dirt or asphalt concrete.

34 (c) A motor vehicle operated as a taxicab as defined in ORS 767.025.

35 (15) A person engaged in the transportation of the public for recreational down-river boating
36 activities on the waters of this state pursuant to a federal permit when the person furnishes the
37 equipment necessary for the activity. As used in this subsection, "recreational down-river boating
38 activities" means those boating activities for the purpose of recreational fishing, swimming or
39 sightseeing utilizing a float craft with oars or paddles as the primary source of power.

40 (16) A person who performs volunteer ski patrol activities who receives no wage other than
41 noncash remuneration.

42 (17) A person 19 years of age or older who contracts with a newspaper publishing company or
43 independent newspaper dealer or contractor to distribute newspapers to the general public and
44 perform or undertake any necessary or attendant functions related thereto.

1 **SECTION 5.** ORS 656.029 is amended to read:

2 656.029. (1) If a person awards a contract involving the performance of labor where such labor
3 is a normal and customary part or process of the person's trade or business, the person awarding
4 the contract is responsible for providing workers' compensation insurance coverage for all individ-
5 uals, other than those exempt under ORS 656.027, who perform labor under the contract unless the
6 person to whom the contract is awarded provides such coverage for those individuals before labor
7 under the contract commences. If an individual who performs labor under the contract incurs a
8 compensable injury, and no workers' compensation insurance coverage is provided for that individ-
9 ual by the person who is charged with the responsibility for providing such coverage before labor
10 under the contract commences, that person shall be treated as a noncomplying employer and bene-
11 fits shall be paid to the injured worker in the manner provided in ORS 656.001 to 656.794 for the
12 payment of benefits to the worker of a noncomplying employer.

13 (2) If a person to whom the contract is awarded is exempt from coverage under ORS 656.027,
14 and that person engages individuals who are not exempt under ORS 656.027 in the performance of
15 the contract, that person shall provide workers' compensation insurance coverage for all such indi-
16 viduals. If an individual who performs labor under the contract incurs a compensable injury, and
17 no workers' compensation insurance coverage is provided for that individual by the person to whom
18 the contract is awarded, that person shall be treated as a noncomplying employer and benefits shall
19 be paid to the injured worker in the manner provided in ORS 656.001 to 656.794 for the payment of
20 benefits to the worker of a noncomplying employer.

21 *[(3) A person, other than a partnership engaged in work performed in direct connection with the*
22 *construction, alteration, repair, improvement, moving or demolition of an improvement on real property*
23 *or appurtenances thereto, who submits proof of compliance with ORS 657.042, is conclusively presumed*
24 *to be an independent contractor and is not eligible to receive benefits under this chapter unless the*
25 *person has obtained coverage for such benefits pursuant to ORS 656.128.]*

26 *[(4)]* (3) As used in this section:

27 (a) "Person" includes partnerships, joint ventures, associations, corporations, governmental
28 agencies and sole proprietorships.

29 (b) "Sole proprietorship" means a business entity or individual who performs labor without the
30 assistance of others.

31 **SECTION 6.** ORS 657.040 is amended to read:

32 657.040. (1) Services performed by an individual for remuneration are deemed to be employment
33 subject to this chapter unless and until it is shown to the satisfaction of the assistant director that:

34 (a) Such individual is an independent contractor, as that term is defined in section 1 of
35 this 1989 Act; or

36 *[(1)]* (b) Such individual has been and will continue to be free from control or direction over the
37 performance of such services, both under a contract of service and in fact; and

38 *[(2)(a)]* (c) Such individual customarily is engaged in an independently established business of
39 the same nature as that involved in the contract of service. (; or)

40 *[(b)]* Such individual holds oneself out as a contractor and employs one or more individuals to as-
41 sist in the actual performance of services and who meets the following criteria shall be deemed to have
42 an independently established business:)

43 *[(A)]* The individual customarily has two or more effective contracts except when the individual
44 performs services as a faller or buckler in the logging industry.)

1 *{(B) The individual as a normal business practice utilizes separate telephone service, business*
2 *cards and engages in such commercial advertising as is customary in operating similar businesses.}*

3 *{(C) The individual is recognized by the Department of Revenue as an employer.}*

4 *{(D) The individual furnishes substantially all of the equipment, tools and supplies necessary in*
5 *carrying out the contractual obligations.}*

6 **[(3)] (2)** A finding that an individual performed services for an employing unit and earned less
7 than the minimum amount necessary to qualify for benefits under ORS 657.150 based on earnings
8 from that employing unit shall not be considered in determining whether such service is employment
9 under subsection (1) of this section.

10 **SECTION 7.** ORS 701.005 is amended to read:

11 701.005. As used in this chapter:

12 (1) "Board" means the Builders Board.

13 (2) "Builder" means a person who, *[in the pursuit of an independent business]* for
14 compensation, undertakes or offers to undertake or submits a bid, or for compensation and with
15 the intent to sell the structure arranges to construct, alter, repair, improve, move over public
16 highways, roads or streets or demolish a structure or to perform any work in connection with the
17 construction, alteration, repair, improvement, moving over public highways, roads or streets or
18 demolition of a structure, and the appurtenances thereto. "Builder" includes, but is not limited to:

19 (a) A person who purchases or owns property and constructs or for compensation arranges for
20 the construction of one or more structures with the intent of selling the structure or structures;

21 (b) A school district, as defined in ORS 332.002, that permits students to construct a structure
22 as an educational experience to learn building techniques and, upon completion of the structure, the
23 district sells the completed structure; *[or]*

24 (c) A community college district, as defined in ORS 341.005, that permits students to construct
25 a structure as an educational experience
26 to learn building techniques and upon completion of the structure, the district sells the completed
27 structure; *or [.]*

28 (d) An individual or business entity that is an independent contractor, as that term is
29 defined in section 1 of this 1989 Act.

30 (3) If a builder is registered for residential work only, "structure" means a residence, including
31 a site-built home, a modular home constructed off-site, a condominium and a mobile home, a duplex
32 or multiunit residential building consisting of four units or less. If a builder has extended registra-
33 tion to include work performed on buildings of all types as provided in ORS 701.060, "structure"
34 means all types of buildings, regardless of use.

35 **SECTION 8.** ORS 657.042 and section 1, chapter _____, Oregon Laws 1989 (Enrolled House
36 Bill 2048), are repealed.

37

Oregon 1989

Independent Contractor Status Clarified

Responding to requests from NFIB/Oregon members and other business groups, the 1989 Oregon Legislature eliminated multiple and conflicting state agency definitions of "independent contractor" status. HB 2320, which was signed by the governor and will go into effect on October 3, 1989, establishes a uniform definition of independent contractor status that is to be used by all state agencies.

NFIB/Oregon resisted early attempts by organized labor to unfairly limit the ability of independent business owners to qualify as independent contractors. NFIB/Oregon members voted 79 percent in favor of a single definition for determining independent contractor status on the 1989 State Ballot.

Guardian Advisory Council member Greg Etchison of Vail Northwest Trucking, Springfield, helped the NFIB/Oregon lobbyists with amendments to the bill, making its implementation more practical for small businesses. Etchison also testified before the Senate Labor Committee and was a key influence behind moving the measure out of committee.

Under the provisions of HB 2320, all independent contractors will be required to meet each of the seven criteria listed below:

- Be free from direction and control over the means and manner of providing the labor and services;
- Be responsible for obtaining all assumed business registrations or professional occupation licenses required by state and local laws;

- Furnish all tools and equipment needed to perform contracted labor and services;

- Be the authority to hire and fire employees used to perform labor or services;

- Receive payment upon completion of the performance of specific portions of a project, or have payment arrangements on the basis of a periodic or annual retainer;

- Register with the state as required in Oregon Revised Statutes 701 (only for those industries that require registration with the Builders' Board); and

- File a tax return in the name of the business, or the individual's name, and include a schedule C, or farm schedule F.

An independent contractor must also meet the requirements of four out of the following six items. Due to NFIB/Oregon member input, the final language in this section of the bill was changed considerably in order to accommodate member positions taken in the 1989 State Ballot.

An independent contractor must:

- Carry out work at a location that is separate from the residence, or in a specific portion of the residence that is set aside as the location of the business;

- Provide commercial advertising, or business cards, or have a trade association membership;

- Have a telephone listing and service that is separate from the residence;

- Provide labor and services that are pursuant to written contracts;

- Provide labor and services that are for two or more different people in a year's time, and

- Assume financial responsibility for defective workmanship, or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance, or liability insurance related to the labor or services to be provided.

For further information in regard to the new independent contractor provisions, please contact the NFIB/Oregon Government Relations Office at 364-4450 in Salem. ■

THE WALL STREET JOURNAL.

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VOL. CCXVI NO. 41

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EASTERN EDITION

TUESDAY, AUGUST 28, 1990

CHICOFFE, MASSACHUSETTS

50 CENTS

Labor Letter

A Special News Report on People
And Their Jobs in Offices,
Fields and Factories

A NEW CONNECTICUT LAW targets construction-firm cheaters.

Companies that lose contracts can sue winning bidders who evade paying unemployment and workers' compensation, under a law taking effect Oct. 1. James Lohr, director of the Carpentry Industry Partnership, a labor-industry group based in Norwalk, says such practices are "a severe problem for legitimate contractors" who make the required payments.

"I can now make the enforcement people do their job," says Michael Hobbs, a New Canaan contractor. The IRS says that at least \$1.6 billion a year in tax revenue has been lost nationally; it estimates that 38% of employers misclassify workers as contractors, avoiding unemployment, workers' compensation and Social Security taxes. Joint union-industry groups in California and Illinois show interest in similar legislation.

hurdle to industrial development in New Mexico. We've had people who have left the state and others who say they won't come here because of this law." Carruthers says he will not sign a purely cosmetic bill, and he wants a measure that cleans up the law.

WORKERS' COMPENSATION

Connecticut takes aim at workers' comp fraud

The State of Connecticut is cracking down on firms and individuals that knowingly misrepresent workers as independent contractors in order to save on unemployment and workers' compensation insurance costs when bidding construction projects.

A new law that takes effect Oct. 1 gives "any person, firm, association or corporation" injured by the skimping the right to sue for damages in state court. Previously, only the state and workers could sue. Public Act 90-273 covers any "competitive bid for a project involving construction, repair, remodeling, alteration, rehabilitation, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure."

"This is a severe problem for legitimate contractors that are paying benefits, as required by law, but are at a competitive disadvantage when bidding against companies that do not pay benefits," says Jim Lohr, executive director of the Carpentry Industry Partnership, a Norwalk-based labor-management organization that supported the legislation.

According to the group, the typical Connecticut commercial contractor has hourly labor costs of \$27.78. Such firms can save 25% by misclassifying workers as independent contractors because they do not have to pay unemployment taxes (\$1.08), workers' compensation insurance (\$4.57) and Social Security (\$1.33).

Under the new law, employee status will be determined according to the federal tax code. It generally treats an individual as an employee if the employer "has the right to discharge the employee and the employer supplies the employee with tools and a place to work." In an independent contractor situation, the Internal Revenue Service says the employer has "the right to control or direct only the result of the work and not the means and methods of accomplishing the result."

RIGGING

Masts take a chopper ride

Chicago's year-old AT&T Corporate Center redefined itself on the city skyline last week when a crew of riggers, with a big lift by a helicopter, topped off its 60-story frame with four new decorative steel spires.

Each of the spires was broken down into three interlocking sections and airlifted from a nearby parking lot with a helicopter crane. Two of them reach 170 ft and the others are 167 ft tall. The five-hour operation required 12 lifts and cost the building's owner, Steir Co., Chicago, about \$565,000.

"In all, we probably lifted about 170,000 lb of iron up there," says Pat Higgins, president of Higgins Tower Service Inc., Muskego, Wis. "It's the heaviest lift we've been involved with since the Sears Tower."

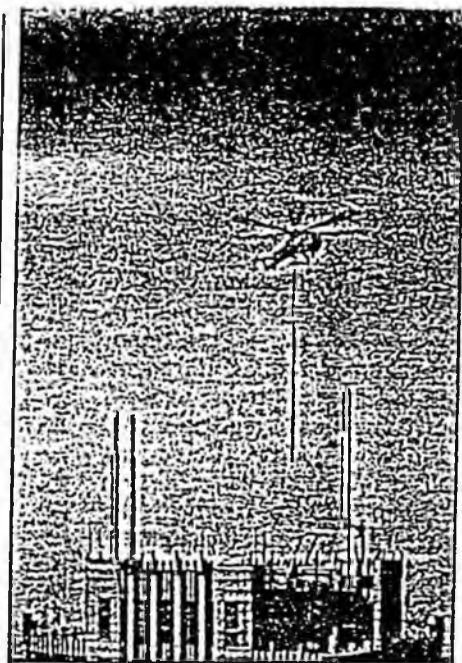
Two of the four lower sections of the spires weighed roughly 19,000 lb, bumping right up against the helicopter's lifting capacity. "Our limit is 20,000 lb," notes David Horton, manager of heavy lift operations for Erickson Air Crane Co., Central Point, Ore.

The firm often lifts at or near capacity, says Horton, but usually not on downtown high-rise projects like AT&T. "That's what makes this job unique," he says.

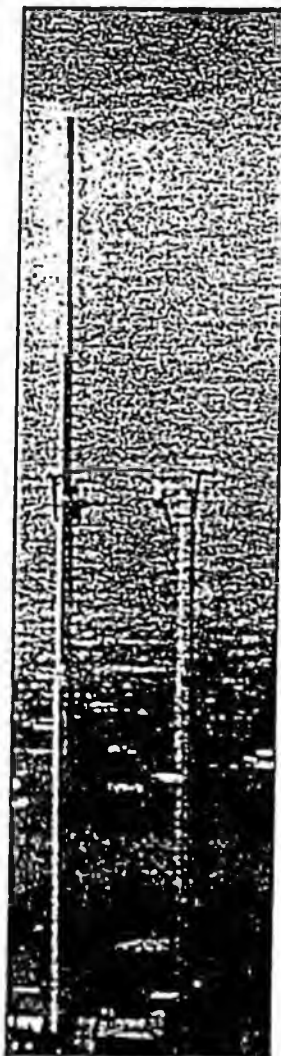
The chopper first lifted the bottom sections, lowering them into 34-ft-deep wells in the tower. Dampening devices were installed about 23 ft up the sections to reduce the amplitude and acceleration of wind sway. Two of the bottom sections are 57 ft tall. The other two are 54 ft tall. All have a 36-in. base diameter and taper gradually to 12 in. at the top of the third section.

The helicopter crane then lifted each of the four 68-ft-tall middle sections, setting them onto the bases where crews made connections. The spires were topped by 45-ft-long peak sections.

"It requires an exper-



Helicopter crane topped off the roof of Chicago's AT&T Corporate Center with four new steel spires last week. The job required 12 lifts and was done early on Sunday morning, when the bustling Loop district is relatively empty of bystanders.



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Illegal 'Subcontracting'

To the Editor:

"New Rows to Hoe in the 'Harvest of Shame'" (Week in Review, July 29) attributes many of the problems afflicting the farm sector to "the growing practice of defining migrant laborers as independent subcontractors, rather than employees."

Unfortunately, farmers aren't the only employers who misclassify employees as "independent" subcontractors. More and more contractors in the construction industry are employing workers as independent subcontractors to avoid paying legally mandated benefits — workers' compensation, unemployment insurance and Social Security — to gain a competitive bidding advantage, according to industry witnesses who testified before Congress last April.

The General Accounting Office estimated that in 1984 alone the Federal Government lost \$1.6 billion in tax revenues because of employee misclassification. The lost revenues represent nearly 10 percent of the entire Department of Housing and Urban Development budget for that year. This scheme not only cheats taxpayers, but also hurts employees who do not receive their benefits, and contractors, both union and nonunion, who lose jobs to unscrupulous employers who knowingly break the law.

Misclassifying employees is a national epidemic in the construction industry that involves an alarming number of large contractors who do business with major corporations and the Federal Government. Recently, for example, a large Massachusetts contractor, Total Property Services of New England, was convicted in Connecticut for labor violations related to employee misclassification while remodeling a General Mills Red Lobster restaurant. The contractor, which also does millions of dollars of business with the Federal Government, is under investigation by the General Services Administration.

Fortunately, in the last year several states have passed legislation allowing contractors to sue competitors who win bids by misclassifying employees as independent subcontractors. Congress has also held hearings on employee misclassification that are likely to generate legislative proposals.

If the practice of misclassifying employees as independent subcontractors continues to grow, more employees will lose their benefits and be exempted from Federal and state labor law protection; more employers who properly classify their employees will lose work to competitors who do not, and the taxpayers' burden will grow.

JOHN CUNNINGHAM
MICHAEL D. HOBBS

Norwalk, Conn., Aug. 1, 1991

The writers are, respectively, labor and management co-chairmen, Carpentry Industry Partnership.

H B

4 6 9

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 469

Revision Date: 03/11/92 Department Affected: Alaska Court System
 Title: An Act relating to common trust funds... BRU: Trial Courts
 Sponsor: Gruenberg Components: _____
 Requestor: House Labor & Commerce COMPONENT SERIAL NO.

000 000	000 768
-----------	-----------

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0


POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None.

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel  Phone: 264-8228
 Division: Alaska Court System Date: _____

Approved by: Arthur H. Snowden, II, Administrative Director 
 Agency: Alaska Court System Date: _____

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

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M E M O R A N D U M

February 19, 1992

TO: Members of the House Labor and Commerce Committee
FROM: Representative Max F. Gruenberg, Jr. *MAX*
RE: HB 469, "An Act relating to common trust funds of banks and trust companies."

I would very much appreciate your support for HB 469.

HB 469 allows banks and trust companies to establish common trust funds that merge trusts they hold as trustees with trusts held by their affiliates, such as their subsidiaries or parent company.

Common trust funds are funds that merge the assets of several trusts. Under existing state law, common trust funds between affiliates are not allowed. This change will allow banks and trust companies to manage trust funds more efficiently and to take advantage of economies of scale in order to earn a higher return on trust investments.

If you have any questions or comments, please contact me, or my legislative assistant, Mark Handley, at 465-4986.

Thank you.

HB469.SUP\MTH

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June 27, 1990

Mr. Terry L. Lutz
Chief Bank Examiner
Alaska Department of Commerce
& Economic Development
Division of Banking
P.O. Box D
9th Floor, State Office Building
Juneau, Alaska 99801-0800

RE: Affiliate Participation in Common Trust Funds

Dear Mr. Lutz:

Thank you for your reply to our inquiry regarding use of affiliate's common trust funds. Enclosure A. is a suggested regulation for adoption by the Department which would permit the establishment of and investment of fiduciary funds in Affiliate's Common Trust Funds.

I have also enclosed the common trust fund statutes of Washington, Oregon, Idaho, Utah and Wyoming (Enclosures B., C., D., E., and F. respectively) for your information. As you can see, while they are drafted somewhat differently from one another, all are based on the Uniform Common Trust Fund Act and provide for the investment of fiduciary funds by and in the common trust funds of affiliates. The Comptroller of the Currency regulations governing common trust funds (Enclosure G.) are contained in 12 CFR 9.18 and, read in connection with the 12 CFR 9.1(k) definition of "bank", likewise permit affiliate participation in common trust funds.¹ See OCC Trust Interpretation 131, December 3, 1987 and Trust Interpretive Letter No. 56, October 20, 1986 Enclosures H. and I., respectively.) Internal Revenue Code §584 (Enclosure J.) which provides for the tax exempt status of qualifying common trust funds also permits investments in an affiliated bank's or trust company's

¹. It should be noted that on February 8, 1990 at 55 F.R. 4814, the Comptroller published substantial proposed amendments to 12 CFR 9.18 which would significantly liberalize the current regulations in many respects. Those amendments, if adopted, would not restrict the competitive abilities of national banks in comparison to the authority granted Alaska fiduciaries by the proposed regulation.

Mr. Terry L. Lutz
Affiliates and Common Trust
Funds
June 27, 1990
Page 3

common trust fund.²

The suggested regulation addresses two aspects relating to the use of common trust funds - their establishment and investment in such funds. Section (a)(1) makes explicit: 1) that Alaska banks and trust companies may establish and administer common trust funds; 2) that they may do so either by themselves or jointly as co-trustor with any combination of affiliated banks or trust companies; and 3) that the Alaska common trust funds may accept the investment of fiduciary funds held by either (a) the Alaska fiduciary, (b) its affiliated banks or trust companies, (c) unrelated fiduciaries if the Alaska fiduciary or one of its affiliated banks or trust companies is also a co-fiduciary and (d) by the common trust funds established by the Alaska fiduciary or its affiliated banks and trust companies or both jointly.

Section (a)(2) makes explicit that the Alaska fiduciary may invest fiduciary funds it holds, either by itself or as a co-trustee, in not only its own common trust funds, but also in the common trust funds of its affiliated banks and trust companies.

Section (b) utilizes the Internal Revenue Code to define affiliated banks and trust companies to achieve consistency with the Comptroller's regulations, the Internal Revenue Code and the securities laws (See SEC No Action Letter May 19, 1986 to SunTrust Banks, available June 18, 1986, Enclosure K.) since both the tax exempt status of common trust funds and their exemption from registration under the securities laws is vital to their effectiveness for the trust customer. IRC §1504 (Enclosure L.) essentially defines affiliated banks and trust companies as those which are 80% or more owned and controlled by a common parent.

We would be please to discuss the proposed regulations with you further, respond to questions you may have and provide whatever

². Common trust funds maintained exclusively for qualified employee benefit plans are also tax exempt, but their exemption flows from the exempt status of the participating plans under §501 and §401(a) of the Internal Revenue Code rather than IRC §584.

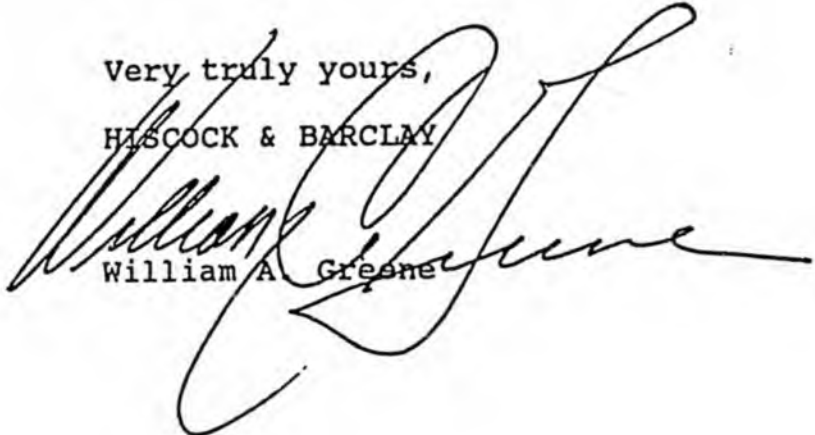
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Mr. Terry L. Lutz
Affiliates and Common Trust
Funds
June 27, 1990
Page 4

additional information you might desire. Thank you for your
consideration.

Very truly yours,

HISCOCK & BARCLAY


William A. Greene

WAG:jj
Enclosures

cc: Robert R. Nokes
Vernon Sayles

ENCLOSURE A

Register __, __, 1990

COMMERCE AND ECONOMIC
DEVELOPMENT

3 AAC __. __

3 AAC __ is amended by adding a new section to read:

3 AAC __. __ COMMON TRUST FUNDS

(a) Any bank or trust company, state or national, qualified to act as a fiduciary in this state, may:

(1) establish and administer, either solely or jointly with one or more affiliated banks, trust companies or a combination thereof, common trust funds to furnish investments to itself as a fiduciary, any affiliated bank or trust company as fiduciaries, itself or an affiliated bank or trust company and others as co-fiduciaries, or other common trust funds established and administered by itself, by any affiliated bank or trust company or by itself or any one or more affiliated banks or trust companies in any combination as co-fiduciaries; and

(2) invest, as fiduciary, affiliate of a fiduciary or co-fiduciary, or co-fiduciary, directly or by other common trust funds, those funds which it lawfully holds for investment, in interests in common trust funds established and administered by itself, by any affiliated bank or trust company or by itself or any affiliated bank or trust company as co-fiduciaries, if such investment is not prohibited by the instrument, judgment, decree, order or other document creating such fiduciary relationship and, in the case of co-fiduciaries, obtains the consent of its co-fiduciary to such investment.

(b) For purposes of paragraph (a) of this section, any two or more banks or trust companies in any combination of banks or trust companies are affiliated if they are members of the same affiliated group, within the meaning of Section 1504 of the United States Internal Revenue Code, as amended, regardless of whether the affiliate's place of charter or principal place of business is within or outside the State of Alaska.

Authority: AS 06.01.020
AS 06.05.005
AS 06.05.075
12 CFR 9.1(k) &
12 CFR 9.18

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May 11, 1990

Mr. Willis Kirkpatrick, Director
Division of Banking,
Securities & Corporations
Department of Commerce and
Economic Development
State of Alaska
Pouch D
9th Floor, State Office Building
Juneau, Alaska

RECEIVED
MAY 15 1990
Key Trust Company
of Alaska

Re: Key Trust Company of Alaska Participation
In Affiliates' Common Trust Funds

Dear Mr. Kirkpatrick:

This is to request that the authority granted by Alaska Banking Code's "Wild Card" statute, Alaska Statute 06.01.020, be invoked and regulations issued by the Department confirming the authority of Alaska chartered banks and trust companies to invest their fiduciary funds in the common trust funds established by affiliates both within and outside of Alaska. The purpose of this request is to equalize, promote and maintain the competitive equality of state-chartered banks and trust companies with other financial institutions conducting business in Alaska.

As you know, Key Trust Company of Alaska ("Key Trust Alaska"), is an Alaska trust company chartered under Alaska Statutes 06.25. It is an "affiliate" of Key Trust Company of the Northwest ("Key Trust Northwest"), a trust company chartered under the laws of the State of Washington. These trust companies are direct or indirect subsidiaries of KeyCorp, a registered bank holding company and ultimate parent of Key Bank of Alaska. The latter, of course, is the immediate parent of Key Trust Alaska.

Key Trust Northwest has established and manages common trust funds for the purpose of furnishing investment vehicles to itself as a fiduciary of trust funds primarily belonging to employee benefit trusts, usually exempt from federal income tax, and personal trusts. Qualifying common trust funds such as these are themselves authorized and exempt from federal income taxation under Internal Revenue Code §584 provided the common funds comply with Comptroller of the Currency Regulations §9.18. That regulation authorizes national banks to establish such funds. Generally speaking, these common trust funds are also provided exemptions from the federal securities laws. Key Trust Northwest desires to make its common trust funds available for investment

Willis Kirkpatrick
May 11, 1990
Page 2

by affiliates of the affiliate's fiduciary funds. The Comptroller of the Currency has stated that absent state law authorization, investment of fiduciary funds in another bank's common trust funds might be considered an unauthorized delegation of investment responsibility.

Authority to commingle trust funds in contravention of the common law prohibition against commingling was the purpose of the Uniform Common Trust Fund Act ("Uniform Act"), adopted in the large majority of the States. In Alaska it is Alaska Statute 06.35.010. Under Washington's version of the Uniform Act, Key Trust Northwest may establish and operate common trust funds not only for investment of its own fiduciary funds, but also for investment by affiliates of their fiduciary funds. (Investments by affiliates as fiduciaries is also contemplated and permitted by the Internal Revenue Code and federal securities laws.)

While the Alaska Statute authorizes Key Trust Alaska to establish and to invest in common trust funds "it establishes", the literal wording of the statute does not appear to authorize an Alaska trust company to invest its fiduciary funds in a common trust fund established by an affiliate either within or outside of Alaska. The Uniform Act version in most states permits investments by affiliates. The purpose of this apparently was to make state law consistent with and allow smaller affiliates to avail themselves of the federal tax benefits. The investment vehicle of common trust funds as well as affiliate investment in common trust funds has become quite common throughout the United States.

I am advised that, among others, Security Pacific Bank, First Interstate Bank, First Interstate Bank of Oregon, Bank of California, U.S. National Bank of Oregon, Seattle First National Bank, Columbia Trust Company of Portland, Oregon and Trust Company of the West of Los Angeles, California either have trust customers or trust or banking facilities in Alaska and directly compete with Key Trust Alaska by making available the use of their common trust funds as an investment vehicle for their Alaska trust customer's fiduciary funds. Common trust funds, if of a sufficient size, offer a cost effective and reduced risk vehicle for the safe investment of fiduciary funds with the opportunity for enhanced investment returns to the trust customer. The availability of common trust funds in the management of trust customer's funds is a significant part of the competitive service.

Since national banks and subsidiary banks of bank holding companies are permitted to invest their fiduciary funds in

HISCOCK & BARCLAY

Willis Kirkpatrick
May 10, 1990
Page 3

affiliates' common trust funds, regulations issued under Alaska Statute 06.01.020 would equalize and maintain the competitive equality of Alaska's state-chartered institutions with federally chartered financial institutions. We appreciate your consideration of this request and would be pleased to provide whatever additional information and support you may desire. Should you have any questions, please do not hesitate to contact me. Copies of the Alaska statute, the Comptroller's Regulation and the Washington statute are enclosed for your convenience.

Very truly yours,

HISCOCK & BARCLAY


WILLIAM A. GREENE

WAG:jj

cc: Robert Nokes
Vern Sayles
Carter Chase
John Mancuso

However, the cost to the financial institution in connection with an examination may not exceed \$7,500 per examination. The assessment shall be made by the commissioner as soon as feasible after the examination or investigation has been completed. All assessments shall be paid to and received by the department by each institution within 30 days after receipt of notice of the assessment.

(c) A financial institution that fails to make the payments required by the commissioner under (a) and (b) of this section within the time specified is subject to a penalty of not more than \$100 each day it is late. The penalty, together with the amount due under (a) of this section, may be recovered in a civil action brought by the department. (§ 42 ch 169 SLA 1978)

Sec. 06.01.020. General powers of department. (a) Notwithstanding other provisions of this title, the commissioner may by regulation authorize financial institutions, except licensees subject to AS 06.20 or AS 06.40, to exercise any of the powers conferred upon, or to be subject to any of the limitations imposed upon, a federally chartered bank, trust company, savings association, federally chartered credit union, or other federally chartered institution doing business in this state which is subject to the regulations of the United States Comptroller of the Currency, the Federal Reserve Board, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the National Credit Union Administrator, or the successor or successors of them, if the commissioner finds that the exercise of the power or imposition of the limitation both

(1) serves the public convenience and advantage; and

(2) equalizes and maintains the quality of competition between state-chartered financial institutions and corresponding federally chartered financial institutions.

(b) The authority granted to the commissioner by this section may not be limited by law unless that law expressly refers to this section. (§ 42 ch 169 SLA 1978; am § 1 ch 47 SLA 1980; am § 1 ch 63 SLA 1981)

Revisor's notes. — In 1981 the word "upon" was inserted after the word "imposed" in (a) of this section to correct a manifest error in § 1, ch. 63, SLA 1981.

Editor's notes. — Section 2, ch. 63, SLA 1981 provides that (b) of this section applies only to statutes enacted after October 8, 1981.

Opinions of attorney general. — The Administrative Procedure Act (AS 44.62) provides that the commissioner shall be subject to its provisions. 1960 Op. Atty. Gen. No. 7.

UNIFORM COMMON TRUST FUND ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Alabama	1943, p. 563	7-8-1943	Code 1975, §§ 5-12A-1 to 5-12A-15.
Alaska	1964, c. 14	7-1-1964	AS 06.35.010 to 06.35.050.
Arizona	1971, c. 160	1-1-1972	A.R.S. §§ 6-871 to 6-874.
Arkansas	1947, Act 394	7-1-1947	Ark.Stats. §§ 58-106 to 58-112.
California	1947, p. 903	9-19-1947	West's Ann.Cal.Fin.Code, § 1564.
Colorado	1947, c. 325	1-1-1948	C.R.S. 11-24-101 to 11-24-107.
Dist. of Columbia	1949, 63 Stat. 938	11-1-1949	D.C.Code 1981, §§ 26-301 to 26-304.
Florida	1941, c. 20353	5-19-1941	West's F.S.A. §§ 660.42 to 660.45.
Hawaii	1947, c. 130		HRS §§ 406-25 to 406-34.
Idaho	1949, c. 34	2-5-1949	I.C. §§ 68-701 to 68-703.
Illinois	1943, p. 230	7-29-1943	S.H.A. ch. 17, ¶¶ 2101 to 2108.
Iowa	1963, c. 326	1-1-1964	I.C.A. §§ 633.126 to 633.129.
Kansas	1951, c. 123	3-29-1951	K.S.A. 9-1609, 9-1610.
Maine	1954, c. 59	9-1-1951	18-A M.R.S.A. §§ 7-501, 7-502.
Massachusetts ...	1969, c. 417	6-16-1969	M.G.L.A. c. 203A, §§ 1 to 6.
Michigan	1941, No. 174	1-10-1942	M.C.L.A. §§ 555.101 to 555.113.
Mississippi	1950, c. 328	6-30-1950	Code 1972, § 81-5-37.
Missouri	1955, p. 253	5-24-1955	V.A.M.S. § 362.580.
Montana	1955, c. 64	3-4-1955	MCA 32-1-701 to 32-1-708.
Nebraska	1953, c. 67	3-28-1953	R.R.S.1943, §§ 24-601.01, 24-601.02.
Nevada	1955, c. 21	7-1-1955	N.R.S. 164.070 to 164.120.
New Hampshire ..	1953, c. 109	4-17-1953	RSA 391:1 to 391:8.
New Mexico	1955, c. 66	3-4-1955	NMSA 1978, §§ 46-1-13 to 46-1-16.
North Carolina ...	1939, c. 200	7-1-1939	G.S. §§ 36A-90 to 36A-94.
Ohio	1943, p. 209	5-14-1943	R.C. § 1109.20 et seq.
Oklahoma	1949, p. 412		60 Okl.St. Ann. § 162.
Oregon	1951, c. 79	2-22-1951	ORS 709.170.
Rhode Island	1956, c. 3839		Gen.Laws 1956, §§ 18-5-1 to 18-5-7.
South Dakota	1941, c. 20	3-14-1941	SDCL 55-6-1 to 55-6-7.
Tennessee	1953, c. 148	4-10-1953	T.C.A. §§ 35-4-101 to 35-4-105.
Texas	1947, c. 209, p. 371	1-1-1948	V.T.C.A. Property Code, §§ 113.171, 113.172.
Utah	1951, c. 9	3-1-1951	U.C.A.1953, 7-5-13.
Washington	1943, c. 55	3-3-1943	West's RCWA 11.102.010 to 11.102.050.
West Virginia	1945, c. 4	2-22-1945	Code, 44-6-6 to 44-6-8.
Wisconsin	1943, c. 274	6-10-1943	W.S.A. 223.055.
Wyoming	1955, c. 17	1-25-1955	W.S.1977, §§ 2-3-401 to 2-3-403.

Historical Note

The Uniform Common Trust Fund Act of Commissioners on Uniform State Laws, was approved by the National Conference and the American Bar Association, in 1938.

COMMON TRUST FUND ACT

PREFATORY NOTE

A common trust fund is a group of securities set aside by a trustee for investment by two or more trusts operated by the same trustee. It is almost invariably used by banks and trust companies, and not by individual trustees.

The purposes of such a common or joint investment fund are to diversify the investments of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble.

Such a common trust fund cannot legally be operated without statutory sanction, because its operation involves a mixture of trust funds which was not permitted by doctrines of equity. There is a strong sentiment among trust men that the great utility of these common trust funds justifies a statutory exception to the rule regarding the mixture of two or more trust funds.

The Uniform Common Trust Fund Act is a simple enabling statute suitable for adoption by any state which is willing to permit banks and trust companies to set up one or more common trust funds. The Uniform Act does not set out in detail the restrictions on the operation of such common trust funds, except that they must be composed of investments legal for trusts in that state. The reason for not covering in this proposed Uniform State Act the details of the operation of such a common trust fund is that as a practical matter such details are covered by the regulations issued by the Federal Reserve Board which went into effect December 31, 1937.

The Federal Revenue Act of 1936, § 169 [see 26 U.S.C.A.Int.Rev. Code § 584] provides that a common trust fund shall be taxed as an association on its income unless it is operated in accordance with the regulations issued by the Federal Reserve Board. Consequently, every bank or trust company, whether a national or a state institution, will have to operate its common trust funds in accordance with the Federal Reserve Board regulations if it wants to escape the federal corporation income tax, and the difference between such tax and the individual income taxes assessed against the different beneficiaries of the trusts would be so great that no trustee could afford to operate its fund otherwise than in accordance with the Federal Reserve Board regulations.

Therefore, the passage by a state of the Uniform Common Trust Fund Act will enable banks and trust companies in that state to set up one or more common trust funds composed entirely of legal trust investments for its fiduciary funds, these common trust funds necessarily being subject to restrictions and regulations of the Federal Reserve Board as they exist from time to time.

General Statutory Notes

Alabama. The Alabama Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Arizona. Title 6 of the Arizona Statutes, which includes the Uniform Common Trust

Fund Act (A.R.S. §§ 6-871 to 6-874) is repealed on Jan. 1, 1995. See A.R.S. § 41-2376.

Arkansas. Adds section as follows:

"58-112. Fiduciary defined.

"For the purposes of this Act [§§ 58-106—58-112] generally 'fiduciary' includes a trustee under any express trust, executor,

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administrator, guardian, curator or agent. For the purposes of section four [§ 58-109] hereof 'fiduciary' also includes a trustee under an implied, resulting or constructive trust, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, nominee, or any other person acting in a fiduciary capacity for any person, trust or estate."

Colorado. The Colorado Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

District of Columbia. Adds section which reads:

"§ 26-302. Taxability.

"(a) A common trust fund, as herein defined, shall not be subject to any tax imposed by Chapter 18 of Title 47, and for the purpose of said subchapter shall not be deemed to be a corporation.

"(b) The net income of a common trust fund shall be computed in the same manner and on the same basis as in the case of an individual. Each participant in a common trust fund shall include, in computing its net income, its proportionate share of the net income of such fund, whether or not distributed to it, and the amount so included in the net income of a participant shall be taxable to such participant, or its beneficiaries, in the manner and to the extent provided in Subchapter IX of Chapter 18 of Title 47, as if any amount not distributed to the participant during its taxable year actually had been so distributed.

"(c) No gain or loss shall be realized by a common trust fund upon the admission or withdrawal of a participant, or upon the admission or withdrawal of any interest of a participant. The withdrawal of any participating interest by a participant shall be treated as a sale or exchange of such interest by such participant.

"(d) Every bank or trust company maintaining a common trust fund shall make a return under oath for the taxable year of such fund.

"(e) If the taxable year of a common trust fund is different from that of a participant therein, the proportionate share of the

net income of such fund to be included in computing the net income of such participant for its taxable year shall be based upon the net income of such fund for its taxable year ending within the taxable year of such participant."

Florida. L.1981, c. 81-318, rewrote statutes providing for legislative review of laws regulating professions, occupations, business, industry and other endeavors in Florida as originally provided for under the Regulatory Reform Act of 1976, L.1976, c. 76-168, as amended. Hence, as a result of L.1981, c. 81-318, chapter 660 of the Florida Statutes is repealed Oct. 1, 1991, and shall be reviewed by the legislature pursuant to the Regulatory Sunset Act as contained in West's F.S.A. § 11.61.

Adds sections as follows:

"660.43. Common trust fund investments

"No bank association, or trust company shall mingle its own funds with any common trust fund managed by such trust company or trust department, and every investment of a common trust fund shall, at all times, be such as would be a proper investment for each fiduciary account owning an interest in such common trust fund."

"660.44. Common trust fund to be audited annually

"A trust company or trust department administering a common trust fund shall keep proper records, which in addition to all other necessary and proper matters shall show at all times the proportionate interest of each fiduciary account in the common trust fund, and, at least once during each period of 12 months, shall cause an audit to be made of the common trust fund by auditors responsible only to the board of directors of the trust company or trust department. The report of such audit shall include a list of the investments comprising the common trust fund at the time of the audit, which shall show the valuation placed on each item on such list by the board of directors or the trust investment committee of the trust company or trust department as of the date of the audit; a statement of purchases, sales, and any other investment changes and of income and disbursements since the last audit; and appropriate comments as to any investment in default as to payment of principal or interest. The reasonable expenses of any such audit made by independent public accountants may be

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charged to the common trust fund. The bank or association shall manage such common trust funds without charge, save necessary expenses, and shall send a copy of the latest report of such audit annually to each person to whom a regular periodic accounting of the fiduciary accounts participating in the common trust fund ordinarily would be rendered or shall send advice to each such person annually that the report is available and that a copy will be furnished without charge upon request."

Hawaii. Adds sections as follows:

"406-26 Investment of common trust funds. The funds of a common trust fund may be invested and reinvested in those investments in which trust companies are authorized to invest trust funds."

"406-27 Plan, approval, contents. Each common trust fund shall be established and maintained in accordance with a written plan approved by resolution of the board of directors of the trust company. The plan shall state the manner in which the fund is to be operated, the apportionment of income, capital gains and losses, the terms and conditions governing the admission and withdrawal of investments from or participation in the fund, the auditing and settlement of accounts with respect thereto, the basis and method of valuing assets therein, the basis upon which the fund may be terminated, and such other matters as may by the board of directors be deemed necessary to clearly define the rights of participants therein, or otherwise desirable. The plan, or a copy thereof, shall be available at the principal office of the trust company during regular business hours for inspection by any person having an interest in a fiduciary account any funds of which are invested in the common trust fund. The trust company shall designate clearly upon its records the names of the fiduciary accounts on behalf of which the trust company, as fiduciary or cofiduciary, owns a participation in the common trust fund and the extent of the interest of the fiduciary accounts therein."

"406-28 Participations in common trust fund. The following shall apply with respect to participations in a common trust fund:

"(1) Participations in a common trust fund shall be held only by fiduciary accounts of which the trust company is fiduciary or cofiduciary and shall be nontransferable.

"(2) No funds of any trust shall be invested in a participation in a common trust fund if the investment would cause the interest of the trust at the time of such investment to be in excess of ten per cent of the value of the assets of the common trust fund as determined in accordance with the plan. In applying the limitation stated in the foregoing sentence, if two or more trusts are created by the same settlor or settlors, and as much as one-half of the income or principal, or both, of each trust is payable or applicable to the use of the same person or persons, such trusts shall be considered as one.

"(3) Not less frequently than once each calendar quarter the trust company administering a common trust fund shall determine the value of the assets therein upon such basis as the plan provides. No participation shall be admitted to or withdrawn from the common trust fund except on the valuation date. A reasonable period, not to exceed seven days, following each valuation date may be used to make the computations necessary to determine the value of the fund and the participations therein.

"(4) Upon the withdrawal of a participation the trust company may make distribution in cash or ratably in kind, or partly in cash and partly in kind, but all distributions made at any one time shall be made on the same basis."

"406-29 Fiduciary not to participate. A trust company administering a common trust fund shall not invest any of its own funds therein and if, because of a creditor relationship or otherwise, it acquires an interest therein its participation shall be withdrawn on the first date on which a withdrawal can be effected in accordance with the plan."

"406-30 Title to assets. No fiduciary account owning an interest in a common trust fund shall be deemed to have individual ownership of any asset thereof but only a proportionate undivided equitable interest in the fund. Title to all assets of the fund shall at all times be vested in the trust company maintaining the same, as fiduciary for the participants therein."

"406-31 Mistakes. No mistakes made in good faith and in the exercise of care and prudence in connection with the administration of any common trust fund shall be held to exceed any power granted to or to violate any duty imposed upon a trust company as

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fiduciary if promptly after the discovery of the mistake the trust company takes such action as is practicable in the circumstances to remedy the mistake."

"406-33 Taxation. No common trust fund shall be subject to taxation as a corporation, association, partnership, or individual but it shall be deemed an estate or trust within the meaning of section 235-92, and the income therefrom and all capital gains or losses thereof shall be deemed to be income, gains, or losses, respectively, of the fiduciary accounts participating in the fund in accordance with their ratable participations."

"406-34 Management fees. No separate fee, commission, or compensation for the management of a common trust fund shall be charged by the trust company, but the compensation of the trust company for such management shall be limited to the fees, commissions, or compensation properly charged to the participating accounts. The trust company shall be entitled to charge against the fund the usual fee or commission for services rendered as a realtor or stockbroker in connection with the sale or purchase of any assets by or for a common trust fund, unless the plan otherwise provides and any expense incurred in the management thereof."

Illinois. The Illinois act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Iowa. Adds section as follows:

"633.126. Definitions

"1. 'Common trust fund' means a fund maintained by a bank or trust company exclusively for the collective investment and reinvestment of moneys contributed thereto by that bank or trust company, or by another bank or trust company at least eighty percent of the voting stock of which is owned or controlled by a bank holding company which owns or controls at least eighty percent of the voting stock of the bank or trust company maintaining the common trust fund, in its capacity as a fiduciary or co-fiduciary.

"2. 'Fiduciary', for the purposes of sections 633.126 to 633.129, inclusive, of this Code, means acting in any of the following capacities, namely: testamentary trustee appointed by any court, trustee under any written agreement, declaration or instru-

ment of trust, executor, administrator, guardian, or conservator."

Maine. L.1979, c. 540, repealed 18 M.R. S.A. §§ 4101 to 4103, which previously constituted the Uniform Common Trust Fund Act, and reenacted said Uniform Act as part of the Maine Probate Code in 18-A. M.R. S.A. §§ 7-501 and 7-502.

Massachusetts. Adds section as follows:

"Section 1A. Investments by national banking association or foreign corporation acting as fiduciary.

"Any national banking association or foreign corporation either alone or in conjunction with one or more other persons acting with it in a fiduciary capacity having qualified as fiduciary in this state pursuant to the provisions of section forty-three of chapter one hundred and sixty-seven, may invest any funds held by it as such fiduciary in any common trust fund which it maintains according to the laws of the state where its principal place of business is located, provided the instrument, judgment, decree or order creating such fiduciary relationship, does not specifically or otherwise prohibit such investment."

Michigan. The Michigan act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Montana. Adds sections as follows:

"32-1-706. Common trust funds established. Each common trust fund established hereunder is a separate and distinct entity from the fiduciary relationships participating in the fund. No fiduciary, in administering a participating fiduciary relationship, may be required to make any apportionment or allocation between the principal and income of such relationship different from that made for the common trust fund. No such participating fiduciary relationship or person having an interest in the relationship may have or be considered to have any ownership in any particular property of the common trust fund; but each participating fiduciary relationship shall have a proportionate undivided interest in the fund and its income; and the ownership of all property of the common trust fund shall be in the trustee of the fund."

"32-1-707. Affiliated defined. For purposes of this part, two or more banks or trust companies are affiliated if they are members of the same affiliated group, with-

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↓ in the meaning of section 1504 of the United States Internal Revenue Code."

"32-1-708. Limited application of insurance law—exemption. (1) Nothing in this part exempts a common trust fund or any fiduciary thereof from the requirements of Title 33 if such common trust fund or fiduciary is used for insurance purposes.

"(2) The establishment and maintenance of common trust funds under this part are exempt from the provisions of Title 30, chapter 10."

New Hampshire. Adds sections as follows:

"391:1-a. Establishment and Use of Common Trust by Bank Holding Company Affiliates. Any such bank or trust company which is an affiliate of a bank holding company, as defined by RSA 384-B:1, IV and V, may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, to other affiliates of the same bank holding company qualified to act as fiduciary in this state as fiduciary, or to itself and others as co-fiduciaries, or to such other affiliates and others as co-fiduciaries. Subject to the limitations upon the investment of funds held in a fiduciary capacity in common trust funds contained in RSA 391:1, the bank or trust company affiliate of a bank holding company establishing such common trust funds and other affiliates of the same bank holding company qualified to act as fiduciary in this state may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interest in such common trust funds. The bank or trust company establishing, maintaining, or so utilizing any such common trust fund shall comply with and be subject to all of the provisions of this chapter as though such bank or trust company and the other banks or trust companies participating in such common trust fund or funds were one and the same corporate entity. Any person acting as a co-fiduciary with any such bank or trust company is hereby authorized to consent to the investment in interest in a common trust fund or funds created hereunder."

"391:3 Taxability. A common trust fund shall not constitute a taxable entity within the meaning of RSA 77. Each estate having a participating interest in a common trust fund shall include in its return its proportionate share of any taxable income of the classes described in RSA 77:4, received by such common trust fund, whether

or not such income is distributed by the common trust fund."

North Carolina. The North Carolina act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Ohio. The Ohio Act is a substantial adoption of the major provisions of the Uniform Act but it contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Rhode Island. The Rhode Island act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions, and additional matter which cannot be clearly indicated by statutory notes.

South Dakota. Adds sections as follows:

"55-6-2.1. Establishment of common trust funds for funds held by affiliated bank or trust company—Chapter applicable. A bank or trust company qualified to act as a fiduciary in this state may:

- "(1) Establish and maintain common trust funds for the collective investment or funds held in any fiduciary capacity by it or by another bank or trust company which is owned or controlled by a corporation which owns or controls such bank or trust company;
- "(2) Invest funds which it holds in common trust funds established and maintained pursuant to subdivision (1).

"The provisions of §§ 55-6-1 to 55-6-6, inclusive, relating to common trust funds shall apply to the establishment and maintenance of common trust funds under this section.

"This section shall apply to all fiduciary relationships."

"55-6-3. Operation of common trust funds—Compliance with law governing administration of trust estates. The bank or trust company operating such common trust funds shall comply with the provisions of chapter 21-22 in the administration of the trust estate."

Texas. L.1983, chapters 576 and L.1983, c. 567, effective Jan. 1, 1984, repealed Vernon's Ann.Civ.St. art. 7425b-48, which constituted the Uniform Common Trust Fund Act, and reenacted the same as V.T.C.A. Property Code §§ 113.171, 113.172.

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Adds section as follows:

"§ 113.172. **AFFILIATED INSTITUTIONS.** A bank or trust company that is a member of an affiliated group under Section 1504, Internal Revenue Code of 1954 (26 U.S.C. 1504), with a bank or trust company maintaining common trust funds may participate in one or more of the funds."

Washington. The Washington Act is a substantial adoption of the major provisions of the Uniform Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Wisconsin. W.S.A. 223.055, constituting the entire Uniform Common Trust Fund Act, contains additional provisions in subsec. (3) thereof which reads as follows:

"(3) **Investments.** The bank or trust company operating such common trust fund may buy, sell, hold, invest and reinvest the funds and assets thereof in its discretion and shall not be limited or restricted by ch. 881 or any amendment thereof, but the bank or trust company shall not invest the funds of any fiduciary account in any common trust fund unless every investment in such fund is one that would then be a permissible investment for such fiduciary account."

UNIFORM COMMON TRUST FUND ACT

1938 ACT

An Act concerning common trust funds and to make uniform the law with reference thereto.

Section

1. Establishment of Common Trust Funds.
2. Court Accountings.
3. Uniformity of Interpretation.
4. Short Title.
5. Severability.
6. Repeal.
7. Time of Taking Effect.

Be it enacted

§ 1. Establishment of Common Trust Funds

Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as co-fiduciaries; and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to such investment.

Action in Adopting Jurisdictions

Variations from Official Text:

Arizona. Section reads:

"A. Any bank or trust company qualified to act as a fiduciary in this state may establish and administer common trust funds composed of property permitted by law for the investment of trust funds for the purpose of furnishing investments to any one or more of the following:

- "1. Itself as fiduciary.
- "2. Itself and others, as cofiduciaries.
- "3. Any affiliated bank or trust company, including any foreign affiliated bank or trust company, as fiduciary.
- "4. Any affiliated bank or trust company, including any foreign affiliated bank or trust company, and others, as cofiduciaries.

"Any bank or trust company may as such fiduciary or cofiduciary invest funds which it lawfully holds for investment in interests in such common trust funds administered by itself or by any affiliated bank or trust company, including any foreign affiliated bank or trust company, if such investment is not prohibited by the instrument, judgment, decree, order or statute creating and governing such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries for such investment.

"B. Each common trust fund established under this section is as a separate and distinct entity from the fiduciary relationships participating in the fund. A fiduciary in administering a participating fiduciary relationship is not required to make any

apportionment or allocation between the principal and income of the relationship different from that made for the common trust fund. A participating fiduciary relationship, or person having an interest in the relationship, is not deemed to have any ownership in particular property of the common trust fund, but each participating fiduciary relationship has a proportionate undivided interest in the fund and its income and the ownership of all property of the common trust fund is in the trustee of the fund.

"C. This section applies to all fiduciary relationships, including those established prior to the effective date of this subsection, whether the relationships are revocable or irrevocable. This section and § 6-872 apply to common trust funds established under this section and the banks and trust companies operating these common trust funds.

"D. For purposes of this section, two or more bank or trust companies are affiliated if they are members of the same affiliated group, within the meaning of § 1504 of the United States Internal Revenue Code.

"E. Nothing in this article shall exempt a common trust fund or any fiduciary thereof from the requirements of title 20, if such common trust fund or fiduciary is used for insurance purposes."

Arkansas. Specifies state or national bank.

California. Section reads:

"For purposes of this section, two or more trust companies shall be deemed to be affiliated if they are members of the same affiliated group, within the meaning of Section 1504 of the Internal Revenue Code.

"Any trust company may establish and administer common trust funds composed of property permitted by law for the investment of trust funds, for the purpose of furnishing investments to any one or more of the following: (1) itself, as fiduciary; (2) itself and others, as cofiduciaries; (3) any affiliated trust company (including, without limitation, any foreign affiliated trust company), as fiduciary; and (4) any affiliated trust company (including, without limitation, any foreign affiliated trust company) and others, as cofiduciaries. Any trust company may as such fiduciary or cofiduciary invest funds which it lawfully holds for investment in interests in such common trust funds administered by itself or by any affiliated trust company organized under

laws of this state, if such investment is not prohibited by the instrument, judgment, decree, order, or statute creating or governing such fiduciary relationship, and if, in the case of cofiduciaries, the trust company procures the consent of its cofiduciaries to such investment.

"Each common trust fund established hereunder shall be treated as an entity separate and distinct from the fiduciary relationships participating therein. No fiduciary in administering a participating fiduciary relationship shall be required to make any apportionment or allocation between the principal and income of such relationship different from that made for such common trust fund. No such participating fiduciary relationship, nor any person having an interest in such relationship, shall have or be deemed to have any ownership in any particular property of such common trust fund, but each such participating fiduciary relationship shall have a proportionate undivided interest in such fund and its income; and the ownership of all property of such common trust fund shall be in the trustee of such fund.

"This section shall apply to fiduciary relationships now in existence or hereafter established, whether the same be revocable or irrevocable. The superintendent, at his direction, may make an examination of any common trust fund established hereunder at such times and to such extent as he may deem advisable. The provisions of the Corporate Securities Law shall not apply to the creation, administration, or termination of common trust funds, nor to participation therein."

District of Columbia. Inserts "subject to such rules and regulations as may be promulgated from time to time by the Board of Governors of the Federal Reserve System under the provisions of § 92a of Title 12, United States Code, as amended, pertaining to the collective investment of trust funds by national banks" preceding "establish", and inserts "written" preceding "consent".

Florida. Section reads:

"(1) Any trust company or trust department may establish one or more common trust funds for the exclusive purpose of furnishing investments to itself as fiduciary, including estates, guardianships, managing agencies, and all other fiduciary relationships, now in existence or hereafter created, requiring or authorizing investment of

funds held as fiduciary including managing agencies, or to itself and others, as cofiduciaries. It may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship and if, in the case of cofiduciaries, the trust company or trust department procures the consent of its cofiduciary or cofiduciaries to such investment, which consent such cofiduciary is hereby authorized to grant. The full management of the fund shall at all times be in full charge of such trust company or trust department, and no cofiduciary shall have any right to interfere in the management of such common trust funds.

"(2) For the purposes of this section, the term 'trust company or trust department' shall include two or more trust companies or trust departments which are members of the same affiliated group as defined in s. 1504 of the Internal Revenue Code of 1954, as amended, with respect to any fund established pursuant to this section of which any of such trust companies or trust departments is trustee or of which two or more of such trust companies or trust departments are cotrustees. The fiduciary relationship that exists between an individual trust company or trust department and its customer shall not be altered due to the fact of the enactment of this subsection."

Hawaii. Section reads: "Any trust company may establish one or more common trust funds for the collective investment and reinvestment of moneys contributed thereto by it as fiduciary, and by it and others as cofiduciaries; and the trust company and its cofiduciaries may invest funds held as trustee, guardian, or in any other fiduciary capacity in which it or they shall be authorized to invest funds, in any common trust fund, if the investment is not expressly forbidden by the instrument, decree, or order creating the fiduciary relationship."

Idaho. Specifies state or national bank.

Iowa. Section now reads: "Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds, or may utilize one or more common trust funds previously established by it, for the purpose of furnishing investments to itself as fiduciary, or to itself and others, as cofiduciaries, or to another bank or trust company as fiduciary or cofiduciary; and

may, as a fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in common trust funds maintained by it or by another bank or trust company at least eighty percent of the voting stock of which is owned or controlled by a bank holding company which owns or controls at least eighty percent of the common stock of the bank or trust company investing such funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries to such investment. If the instrument creating the fiduciary relationship gives to the bank or trust company the exclusive right to select investments, the consent of the cofiduciary shall not be required."

Kansas. Inserts "state or national" preceding "bank or trust company" where first appearing, and adds "The state banking board is hereby authorized to adopt rules and regulations for a plan of operation for the management of said funds for state banks and trust companies" at end of section.

Maine. Section reads: "Any bank or trust company qualified to act as fiduciary in this State may establish and operate common trust funds for the purpose of furnishing investments to itself as fiduciary or to itself and others, as cofiduciaries; and for the purpose of furnishing investments to affiliated banks, within the meaning of section 1504 of the Internal Revenue Code, acting for themselves or for themselves and others as cofiduciaries; and may, as such fiduciary or cofiduciary or acting for affiliated banks alone or with their cofiduciaries; invest funds which are lawfully held for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company or affiliate procures the consent of its cofiduciaries to such investment. Any person acting as a cofiduciary with any such bank or trust company or affiliate is authorized to consent to the investment in such interests."

Massachusetts. Section reads: "Any individual, corporation or association qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary or to itself and others, as cofiduciaries;

and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship. Each such common trust fund shall be administered in accordance with a written declaration of trust which shall have been filed in the registry of probate in the county in which such individual, corporation or association resides or has his or its principal place of business, and such written declaration may provide that premiums paid on the purchase of interest bearing securities need not be amortized."

Adds a separate section relating to consent of co-fiduciaries which reads:

"§ 2. Fiduciary consent

"If the individual, corporation or association maintaining a common trust fund holds property as a fiduciary together with a co-fiduciary or co-fiduciaries, investment of such property in participations in a common trust fund may be made only with the written consent of such co-fiduciary or co-fiduciaries and shall be withdrawn upon the written request of any such co-fiduciary."

Missouri. Section reads: "Any state or national bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and others as co-fiduciaries, or to other banks and trust companies acting as fiduciaries or co-fiduciaries. Funds may be invested in such common trust fund only if the investment is not prohibited by the instrument, judgment, decree, or order creating the fiduciary relationships, and if, in the case of co-fiduciaries, the banks or trust companies procure the consent of their co-fiduciaries to the investment."

Montana. Section reads:

"(1) Any bank or trust company qualified to act as fiduciary in this state may establish and administer common trust funds composed of property permitted by law for the investment of trust funds for the purpose of furnishing investments to:

"(a) itself as fiduciary;

"(b) itself and others as co-fiduciaries;

"(c) any affiliated bank or trust company, including any foreign affiliated bank or trust company, as fiduciary;

"(d) any affiliated bank or trust company, including any foreign affiliated bank or trust company, and others as co-fiduciaries; or

"(e) any combination of the entities listed in subsections (1)(a) through (1)(d).

"(2) Any bank or trust company may, as that fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in the common trust funds administered by itself or by any affiliated bank or trust company if the investment is not prohibited by the instrument, judgment, decree, order, or statute creating and governing such fiduciary relationship and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to the investment."

New Hampshire. Adds a sentence at end of section which reads: "Any person acting as a co-fiduciary with any such bank or trust company is hereby authorized to consent to the investment in such interests."

New Mexico. Section reads:

"Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself and its affiliated bank or trust company as fiduciary or to itself and its affiliated bank or trust company and others as co-fiduciaries and may, as fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in the common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating the fiduciary relationship and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to the investment.

"As used in this section, 'affiliated' means two or more banks or trust companies in which eighty percent or more of the voting shares of each bank or trust company, excluding shares owned by the United States or by any company wholly owned by the United States, are directly or indirectly owned or controlled by a holding company."

Oklahoma. The substance of sections 1 and 2 of the Official Text is contained in the following section of the Oklahoma act:

"§ 162. Common trust funds

"Any state or national bank or trust company acting in a fiduciary capacity, may create and maintain a common trust fund with the approval of the State Bank Com-

missioner or State Banking Board for the purpose of furnishing investments to itself as fiduciary and to other fiduciaries, and may as such fiduciary invest funds which it lawfully holds for investment in interests in such common trust fund if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship, and if in case of co-fiduciaries the bank or trust company procures the consent of its co-fiduciaries to such investment; provided that no such common trust fund shall be created until the plan thereof shall be submitted to the Bank Commissioner and the same be approved. If the State Bank Commissioner disapproves said plan, any interested party may appeal to the State Banking Board, and its decision in the matter shall be final. Any such plan may be amended from time to time by the company, bank or trust company upon obtaining the approval of the State Bank Commissioner.

"A bank or trust company maintaining a common trust fund may at any time file in the District Court of the County in which it maintains its principal office an account of the administration of such trust fund, provided that every such company must file in said District Court an account of the administration of the trust fund within three (3) years from the date of the establishment of such fund, and thereafter an account shall be filed at intervals of not less than three (3) years from the date of the last preceding accounting. Upon the filing of such account, the court shall fix a day for hearing not less than forty-five (45) days from said filing date, and appoint a guardian ad litem to represent the interests of all infant, incompetent, unborn, unascertained and absent beneficiaries. At the same time the court shall order the bank or trust company to give notice of such hearing to all beneficiaries of the trusts participating in the common trust fund, whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, in the following manner: (1) by personal service or by sending such notice by registered mail to such beneficiaries or their guardians or attorneys of record directed to them at the addresses shown by the records above mentioned, in either case at least fourteen (14) days prior to the date of the hearing; and (2) by one publication of such notice in a newspaper published therein, in some newspaper having a general circulation in said county, such publication

to be at least twenty (20) days prior to the date of the hearing; and (3) by such further notice, if any, as the court may order. Such notice shall require all parties to show cause on the date fixed by the court why such account should not be judicially settled and the order made by the court at the conclusion of the hearing shall, subject to the right of appeal to the Supreme Court, be a final judgment and binding on the bank or trust company and on every person interested in said common trust fund.

"No expression of intent by the creator of a trust shall excuse the trustee of a common trust fund from the duty to account as herein provided.

"The provisions of this Act shall apply to fiduciary relationships in existence at the time this Act takes effect or thereafter established."

Oregon. The substance of sections 1 and 2 of the Official Text is contained in the following section of the Oregon act:

"709.170 Establishment of and investment in common trust funds; accounting.

"(1) 'Common trust fund' as used in this section means any fund maintained by a trust company exclusively for the collective investment and reinvestment of moneys contributed thereto by the trust company or an affiliated trust company as a fiduciary. For the purposes of this section, two or more trust companies are affiliated if they are members of the same affiliated group, within the meaning of section 1504 of the Internal Revenue Code.

"(2) A trust company may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, to an affiliated trust company as fiduciary, or to itself or an affiliated trust company and others as cofiduciaries. A trust company may, as a fiduciary or cofiduciary, invest funds which it lawfully holds for investment, in interests in the common trust fund or a common trust fund of an affiliated trust company, if the investment is not prohibited by the instrument, judgment, decree or order creating the fiduciary relationship, and if, in the case of cofiduciaries, the trust company procures the consent of its cofiduciary or cofiduciaries to the investment.

"(3) The division may, pursuant to ORS 183.310, 183.315, 183.330, 183.335 and 183.341 to 183.410, promulgate rules necessary to control the establishment and operation of common trust funds and to protect the

investors. A trust company except national banks which are qualified to act as fiduciaries pursuant to the laws of the United States shall, in the operation of the common trust fund, comply with the rules.

"(4) Unless ordered by a court a trust company operating common trust funds is not required to render a court accounting with respect to the funds, but it may, upon application to the circuit court of the county in which it has its principal office, obtain a settlement of its common trust fund accounts on conditions specified by the court. When application for the settlement is presented to a circuit court for approval, the circuit court shall assign a time and place for hearing and order notice thereof by:

"(a) Publication once a week for three successive publications, the first publication to be not less than 20 days prior to the date of hearing, of a notice in a newspaper having a general circulation in the county in which the trust company operating the common trust fund has its principal office;

"(b) Mailing, not less than 14 days prior to the date of the hearing, a copy of the notice to all beneficiaries of the trusts participating in the common trust fund whose names are known to the trust company from the records kept by it in the regular course of business in the administration of the trust, directed to them at the addresses shown by the records; and

"(c) Such further notice, if any, as the court may order."

Tennessee. Substitutes ", or to another bank or trust company, which may," for "and may".

Texas. Section reads:

"(a) A bank or trust company qualified to act as a fiduciary in this state may establish common trust funds to provide investments to itself as a fiduciary, including as a custodian under the Texas Uniform Gifts to Minors Act (Chapter 141) or a uniform gifts to minors act of another state or to itself and others as cofiduciaries.

"(b) The fiduciary or cofiduciary may place investment funds in interests in common trust funds if:

"(1) the investment is not prohibited by the instrument or order creating the fiduciary relationship; and

"(2) if there are cofiduciaries, the cofiduciaries consent to the investment.

"(c) A common trust fund includes a fund:

"(1) qualified for exemption from federal income taxation as a common trust fund and maintained exclusively for eligible fiduciary accounts; and

"(2) consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other employees' trusts that are exempt from federal income taxation."

Utah. The Utah provision corresponding to section 1 of the Uniform Act [U.C.A. 1953, 7-5-13(1)] reads as follows: "Any trust company chartered by this state or by a federal agency, qualified to engage in the trust business in this state, may establish common trust funds. Funds held by a trust company may be invested collectively in a common trust fund in accordance with the rules prescribed by the appropriate governmental regulatory agency or agencies, if such investment is not specifically prohibited under the instrument, judgment, decree or order creating the regulatory relationship."

West Virginia. Section reads:

"(a) Any bank or trust company qualified to act as fiduciary in this State may establish common trust funds for the purpose of furnishing, or making available, investments to itself as fiduciary, or to itself and others, as cofiduciaries, and may, as such fiduciary or cofiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating its fiduciary status or relationship, and if, in the case of cofiduciaries, the bank or trust company procures the consent of its cofiduciaries to such investment: Provided, that unless such fiduciary acquiring or holding any interest in any common trust fund is specifically permitted by the instrument, judgment, decree or order creating the fiduciary status or relationship to invest in securities other than those described in section two [§ 44-6-2] of this article, or any amendments or reenactments thereof, such common trust funds shall be invested only in those securities described in said section two and subject to the limitations and conditions of said section, and any amendments or reenactments thereof, except that a common trust fund or funds may be established for the purchase of securities of the type described in said section two without regard to the percentage limitation specified in sub-

paragraph (1), subdivision (h) of said section two [§ 44-6-2(h)(1)], in which event the funds invested by a fiduciary in interests in such last mentioned common trust fund or funds shall not exceed the percentage limitation specified in said subparagraph (1) of subdivision (h) unless a larger investment is permitted by the instrument, judgment, decree or order creating the fiduciary status or relationship.

"(b) Any bank or trust company qualified to act as a fiduciary in this State may establish and maintain common trust funds for the collective investment of funds held in any fiduciary capacity by it or by any

bank or trust company qualified to act as fiduciary in this State which is owned or controlled by a bank holding company which owns or controls such establishing bank or trust company. Any such commonly owned or controlled bank or trust company may, as fiduciary or co-fiduciary with others, invest funds which it holds in common trust funds so established and maintained. The restrictions contained in subsection (a) of this section shall apply to the establishment, maintenance and investment of common trust funds under this subsection."

Law Review Commentaries

Commingle investment by corporate fiduciaries in Pennsylvania. 87 U.Pa.L.Rev. 577 (March 1939).

Common trust fund legislation. Robert W. Bogue. 5 Law and Contem.Prob. 430 (Summer 1938).

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Common trust funds. Ernest L. Averill. 13 Conn.Bar J. 14 (1939).

Common trust funds. James J. Saxon and Dean E. Miller. 53 Geo.L.J. 994 (Summer 1965).

Library References

Banks and Banking ⇐86, 315(1).
Trusts ⇐217.3(3).

C.J.S. Banks and Banking §§ 157 et seq.,
1054 et seq.
C.J.S. Trusts § 326.

Notes of Decisions

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Purpose 1

Leith v. Mercantile Trust Co. Nat. Ass'n. Mo.App.1967, 423 S.W.2d 75.

3. Permissible investments

Notwithstanding provisions of RSA 564:18, detailing investment for trustees generally and limiting them to four general categories, all or any part of testamentary charitable trust fund could be invested in a common trust fund by virtue of RSA 391:1 et seq., where there was nothing in will explicitly or impliedly prohibiting investment in common trust funds. *Mechanicks National Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

1. Purpose

This act has for its purpose the establishment of a new class of investments, interests in common trust fund, in which bank qualified to act as fiduciary, acting prudently, may properly invest funds of particular underlying trust. *Mechanicks Nat. Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

2. Parties eligible to invest

Only a bank acting as fiduciary or co-fiduciary is eligible to invest trust funds in common trust fund maintained by bank.

Investments of assets of testamentary charitable trust in common trust fund in accordance with trustee's plan did not, under the circumstances preclude continued investments of testamentary charitable trust assets in such fund. *Mechanicks National Bank of Concord v. D'Amours*, 1957,

129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

4. Amount of investment

RSA 564:18, providing that 50 per cent of a trust estate may be invested in stocks, bonds and other securities in which a prudent man would invest if other 50 per cent is invested as provided therein does not limit to 50 per cent the assets of a trust which may be invested in a common trust fund. *Mechanicks National Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

5. Plan of common trust fund

Common trust fund plan, under which trusts were to be administered in conformity with laws of state and nation and federal reserve regulations, trust investment committee was to review investments, trustee was to act in good faith and to be governed by rule of prudence, and was to refrain from investing assets of testamentary trust contrary to provisions of will and investment in securities of any one corporation was not to exceed ten per cent of total value of common fund, was in accordance with RSA 391:1 et seq., and federal reserve regulations. *Mechanicks Nat. Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

Any trust which does not expressly or impliedly prohibit investment in common trust funds may be invested by a bank qualified to act as fiduciary in its common trust fund when that fund is operated under a plan subject to 26 U.S.C.A. (I.R.C.

1954) § 584 and RSA 391:1 et seq., governing common trust funds and investments made by trustees. *Mechanicks Nat. Bank of Concord v. D'Amours*, 1957, 129 A.2d 859, 100 N.H. 461, 64 A.L.R.2d 260.

6. Ownership of assets

Party who was sole distributee or appointee of trust estate could not claim virtual ownership over trust assets which consisted of units in trustee bank's common trust fund on or prior to date of withdrawal of units from common trust fund where she could not own units of common trust fund and bank was unaware of provisions of life beneficiary's will. *Leith v. Mercantile Trust Co. Nat. Ass'n.*, Mo.App.1967, 423 S.W.2d 75.

7. Assignment of transfer of fund

Units of bank's common trust fund could not be assigned or transferred to party who claimed to be sole distributee or appointee of trust estate holding such units. *Leith v. Mercantile Trust Co. Nat. Ass'n.*, Mo.App. 1967, 423 S.W.2d 75.

Where assets of trust consisted of units of trustee bank's common trust fund which had many types of investments and numerous units, trustee did not abuse its discretion in failing to make distribution in kind to plaintiff who claimed to be sole distributee or appointee of trust estate notwithstanding provision of common trust fund which allowed distribution in kind. *Leith v. Mercantile Trust Co. Nat. Ass'n.*, Mo.App. 1967, 423 S.W.2d 75.

§ 2. Court Accountings

Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the [] court, secure approval of such an accounting on such conditions as the court may establish.

When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing and order notice thereof by: (1) publication once a week for [three] weeks, the first publication to be not less than [twenty] days prior to the date of hearing, of a notice in a newspaper having a circulation in the [county] in which the bank or trust company or branch thereof operating the common trust fund is located, and (2) mailing not less than [fourteen] days prior to the date of the hearing a copy of the notice to all

beneficiaries of the trusts participating in the common trust fund whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records, and (3) such further notice if any as the court may order.

As Amended Sept. 1952.

Amendments

The amendment of 1952 added the second paragraph.

In approximately twenty states there are common trust fund provisions containing the substance of the Uniform Act but in a

different form. This amendment is recommended to the corresponding sections of those Acts, and in the states where there is no provision for court accountings, it is recommended that the whole of this section, as amended, be used.

Action in Adopting Jurisdictions

Variations from Official Text:

Alaska. In second paragraph, substitutes "judicial district" for "[county]" in clause (1), and "participating trusts" for "said trusts" in clause (2).

Arizona. In the second paragraph, clause (1), substitutes "home office of the bank or trust company" for "bank or trust company or branch thereof".

Arkansas. Section reads: "Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it may, by application to the Chancery court of the county in which it has its place of business, secure approval of such an accounting on such conditions as the court may establish."

California. Omits this section.

District of Columbia. Omits second paragraph.

Hawaii. Section reads:

"A trust company maintaining any common trust fund shall be required to render only such accounts with respect thereto as may be required for the participating accounts."

Idaho. Omits this section.

Iowa. Second paragraph reads: "When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing, and order notice thereof by: (1) publication once each week for three consecutive weeks

in a newspaper of general circulation, published in the county in which the bank or trust company operating the common trust fund is located, the first publication to be not less than twenty days prior to the date of hearing, and (2) sending by ordinary mail not less than fourteen days prior to the date of hearing, a copy of the notice prescribed to all beneficiaries of the trust participating in the common trust fund whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records, and (3) such further notice, if any, as the court may order.

Kansas. Section reads: "Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds."

Maine. Section reads: "Unless ordered by decree of the Superior Court, the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it, as accountant, may by petition to the Superior Court or the probate court, in the county where the accountant has its principal place of business, secure approval of such accounting on such conditions as the court may establish. Whenever a petition for the allowance of such an account is presented, the court having jurisdiction thereof shall assign a time and place for hearing and shall cause public notice thereof to be given, meaning thereby notice pub-